

African constitutionalism

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Abstract

Constitutionalism appeared in the eighteenth century, in North America and in Europe. It was based on the idea of supremacy of the written Constitution, which is considered to guarantee sovereign power as well as fundamental rights, against arbitrary practices and despotism, coming from ruling persons. This political movement and colonialism, which took place particularly in African territories, such as the territory of the current Republic of Zambia, after the abolition of slavery, have been two parallel phenomena of France and other powerful European countries, which have been duplicated (neocolonialism and neo-constitutionalism), in Africa and elsewhere, whilst the twenty-first century has been marked by the very serious development of the Arab Spring, mainly in North Africa.

Keywords: Africa, Arab Spring, Colonialism, Constitutionalism, Constitutional History, Northern Rhodesia, Slavery, Zambia

I. Introduction: The movement of constitutionalism in Africa

Africa historically has been the continent with the mainstreaming phenomenon of colonialism of European countries. It had the advantage to be relatively near the powerful States of Western and Central Europe and so the challenge of the political penetration was big. Even one of the oldest States worldwide, Egypt, was not exempted from this form of foreign “protection”, given that the UK granted independence to it in 1922.

Some decades before the beginning of this phenomenon, another one emerged, constitutionalism. It is about a current which appeared in the eighteenth century, in North America and in Europe (Senou, 2019). This legal theory was based on the idea of supremacy of the written Constitution that is considered to guarantee sovereign power as well as fundamental rights against arbitrary practices and despotism, coming from ruling persons. In other words, the code adopted by the State, in the form of Constitution, is not merely a set of legal rules of superior rank but also a means to limit down political power. The Constitution has become the symbol of the fights for the consecration of elementary rights of the people, against States, whilst many of these countries were involved in the movement of colonialism.

It would be interesting to take an approach to the adoption and application of formal Constitutions in Africa in the post-independence era. This process has particularly concentrated the interest of the doctrine (Amadou, 2018).

First of all, this analysis examines aspects of the colonial era and of neocolonialism, especially in Northern Rhodesia, being a typical protectorate of the UK (Lazos, 1979). It is about a case study for the territory which nowadays is the Republic of Zambia.

Afterwards, it focuses on independent States, with emphasis on empirical data having to do particularly with the case of countries related to French colonialism. This comparative approach from the point of view of Constitutional Law aims at highlighting the question of consecration and application of one of the typical constitutional principles, consisting in the separation of powers in the interior structure of a State.

Besides, it refers to the Arab Spring and the current crisis of the Republic, particularly in the Sub-Saharan Africa.

Finally, it ends up to a general conclusion, which is based particularly on the findings of constitutional history through the use of comparative method.

II. Colonialism and neocolonialism in Zambia

It is now common learning that pre-colonial Africa had a coherent system of human rights, although the philosophy underlying that system differed from that which inspired the pattern of human rights in Europe and North America (Sakala, 2013). Despite the great variety in which traditional societies functioned, customary laws shared certain fundamental principles and features of universal truths, values of morality and reasonableness. Before colonization, the various tribes comprised in what is today known as Zambia had their own justice systems for dispute resolution and for maintaining peace and order among themselves. (Sakala, 2013). Although these justice systems varied from one indigenous group to another, they shared certain fundamental features in their organization. All indigenous groups had village 'headmen', chiefs and Paramount Chiefs. It was through this hierarchical set-up that the indigenous judicial system operated. That traditional mechanism of delivery of justice was not subject to the principle of separation of powers, namely in Dicey's sense of the term. The Chief-in-Council was also the judge.

As for colonialism in Africa, it is notable that it did produce some beneficial effects in the matter of the status of protection of human rights. For instance, it out-lawed slavery child marriages and forced marriages (Sakala, 2013).

Besides, the contact of Europeans with what is now Zambia dates from the 15th century, having to do with the arrival of some Portuguese traders, whilst the Portuguese by that century established themselves on the east coast of Africa and carried on a gold trade (Ndulo et al, 1996).

As far as slavery is concerned, British had been the world's largest slave dealers. The first country to abolish slavery was France, given that a part of the Revolutionaries in 1793 decided to recognize human rights to the slaves of Haiti, due to the massacre of French colonialists in that colony. It is about the episode of August 1791, in which the enslaved Africans descended to Le Cap, where they destroyed the plantations and executed all the whites living in the region. The first general abolition of slavery in France took place through the decree of 4th February 1794, having to do with slavery in French colonies. In 1807, British Parliament passed the Slave Trade Act, outlawing the slave trade but it did not abolish slavery itself. The step forward was made in

1833, when the UK adopted the Slavery Abolition Act, which banned slavery throughout the British Empire.

However, colonialism implicated forced labor as well as taxation of the local people, as it was the case of Northern Rhodesia. In a similar way, the British administration in Tanganyika initiated a head tax, less to gain revenue than to force Africans to work on plantations, in order to pay the tax, an African had to leave subsistence farming and enter the money economy. African families were forbidden to live with a worker in plantation housing, and if they did, they might be arrested for trespass. As a worker having left a plantation was guilty of a criminal offense, for plantation workers the law meant virtual servitude (Quigley, 1992).

In constitutional terms, the first significant development of the penetration of the UK in the territory which nowadays is Zambia was the Royal Charter of Incorporation of the British South Africa Company, of 29 October 1889 (Ndulo et al, 1996). This text originally covered the area south of the Zambezi River but on 5 March 1891 was amended to include the area north of this river. It incorporated the British South Africa Company, which was established following the amalgamation of Cecil John Rhodes' Central Search Association and the London-based Exploring Company Ltd. Rhodes (1853-1902) became the builder of a gold and diamond empire of Southern Africa, who pushed British influence in this region by obtaining mineral rights. Indeed, through the conclusion of questionable African treaties and the obtention of concessions from African chiefs, this Company extended its sway over most of what is now Zambia.

By 1900, British rule was made official by two "orders-in-council", namely a legislation made in the name of the monarch in some Commonwealth countries: the North-Western Rhodesia Barotseland Order-in-Council of 1899 and the North-Eastern Rhodesia Order-in-Council of 1900 (Kasonde, 2008). The name "Rhodesia", which was derived from the above-mentioned entrepreneur Rhodes, had been affixed by 1897. The territories were joined in 1911 whilst the Company rule lasted till 1 February 1924, as the Northern Rhodesia Order in Council, of that year, introduced a colonial office rule under a Governor (Ndulo et al, 1996). During the colonial rule, the country did not have its own Constitution, only that provided by Westminster (Kasonde, 2008). However, a series of structural arrangements decreed by the British government, loosely termed "Constitutions", were designed to promote governance with the active cooperation of the white settlers and acceptance by the Africans (Ndulo et al, 1996). The Northern Rhodesia Order in Council, of 24th February 1924, set up Legislative and Executive Councils whilst in 1959 a ministerial system was introduced.

So, an odd form of constitutionalism emerged, as the UK wanted to acquire political legitimization through conventional legal tools, such as Constitutions, although normally a Constitution is designed to cover the needs of a sovereign State. Colonialists tried to establish a form of governance subject to the rule of law, by imitating the structure of norms in the interior of an independent State. Furthermore, these "Constitutions" were endowed with flexibility, which consisted in the ease in which they could be amended in response to pressures and crises (Ndulo et al, 1996).

In 1953, a serious institutional development occurred, as the Central African Federation, including Northern Rhodesia, Southern Rhodesia and Nyasaland, was

created. Federalism only led to increased African nationalism and by 1963 the Federation had collapsed (Kasonde, 2008).

More precisely, the 1953 Federal Constitution was amended in 1962, after the retirement of Nyasaland from the Federation. This Constitution was designed by the colonial administration to accommodate the participation of both the white settlers and the Africans in the Legislative Council whilst ensuring that the former had electoral advantage over the latter (Chungu). Full suffrage emerged on 1 January 1964 whilst the elections of the same year brought an overwhelming victory for the United National Independence Party (UNIP) (Ndulo et al, 1996). This democratic process resulted in the nomination of the leader of this party, Kenneth David Kaunda, as the prime minister of the last government of Northern Rhodesia.

Besides, the new Constitution came into being through the Zambia Independence Order-in-Council of 1964 and it granted Zambia her independence (Chungu). Basically, like previous Constitutions, this Constitution was not a creation of the people of Zambia. Instead, it was based on a Westminster model, designed for the emerging nations of former British Colonies and Protectorates. More precisely, the Zambian state apparatus and its constitutional foundations are a direct legacy of British imperialism (Gould, 2015). The 1964 Constitution appeared, in its principles and orientations, identical to the Constitution of Northern Rhodesia at the end of the colonial period whilst Zambia became a member of the Commonwealth. Neocolonialism has been noticed by the doctrine not only in the case of Zambia but also of other African former colonies. Coined by the famous philosopher Jean-Paul Sartre in 1956, the term ‘neocolonialism’ was first used by Kwame Nkrumah in the context of African territories undergoing decolonization in the 1960s. Anyway, as a representative case of European neocolonialism is considered the phenomenon described as ‘Françafrique’ (namely ‘France - Africa’). This term, introduced in 1955, was related to the continued close relations between the metropolitan country of France and its former colonies in Africa.

The irony of the story is that the first Zambian Constitution, which was not a ‘granted Constitution’ (through negotiations between the UK and local social groups, like the 1964 text) but a Constitution coming from uniquely the Zambian people, was antidemocratic. Indeed, the 1973 Constitution previewed a socialist, one party-regime whilst the neighboring country of Tanzania had already chosen that form of governance. In the 1960s, the leader of Tanzania, Julius Nyerere, was the most articulate proponent of one-party rule on the continent (Quigley, 1992). Nyerere shepherded the legislation that brought one-party rule to his country, making eloquent arguments in its support.

III. A general overview of the separation of State powers in Africa

One of the constitutional topics that have traditionally attracted the academic interest consists in the principle of separation of powers (Senou, 2019). It is about the principle promoted by some scholars of eighteenth century, such as Charles de Secondat and Montesquieu. Montesquieu is famous for the articulation of this theory, which has inspired the regimes in Europe to such a pitch that article 16 of the Declaration of human rights, of 26th August 1789, previews that any society in which the separation of powers is not determined has no Constitution.

This principle inspired also North America before being adopted by various countries all over the world. Africa, which was not acquainted with it in the pre-

colonial era, did not make full use of it, as a general rule, in the post-independence era. However, this situation, being quite unfamiliar on the basis of the Western standards, changed through the political developments of 1990s. New constitutions emerged in the continent, which were based on this principle, let alone in reaction to the mistakes of the post-independence regimes.

In Africa, this norm has not been always apprehended with the required scientific precision, by political factors and the society in its whole. It is just overused from time to time without real control of its meaning, to condemn real or supposed interference of the executive in the functioning of justice. In the best case, it is transgressed by the members of the executive power unintentionally (ignorance of limits) or unconsciously (they believe that they may do anything, being the executive power), simply being guided by political concerns (Senou, 2019).

Some have questioned the suitability of Western models for use in sub-Saharan Africa, but the impact of history seems clear; one may interpret or reinterpret history, but one cannot repeal it (Ndulo et al, 1996).

Just like the first regimes of the free life of African countries, the regimes emerging from the democratic renewal, which were theoretically based on the principle of separation of powers, could not easily comply with it (Senou, 2019). The unique significant difference between the two phases of governance (the post-independence and the post-cold war) consists in the practical development of an area more conducive to the exercise of citizens' rights and freedoms. This practice of liberalism is widely linked to the international context of 1990s, with the fall of the Berlin wall, which occurred in November 1989, and the change of paradigms as far as the French-African cooperation is concerned since the speech of La Baule.

African States adopted the principle of separation of powers in the phase of neo-constitutionalism but the political actors have seen only an enumeration of the three powers in the interior of the State. It is notable that African Constitutions dedicate a title for each of the three powers but, almost all of them, they contain nowhere the explicit mention of the separation of powers.

The doctrine remarks that the separation on the matter, as it is applicable in the African States, constitutes in some aspects one of the reasons of corruption whilst this reason is insufficiently studied. The dominance of the executive power over other organs is also reflected in influence trafficking, insider trading, bribery, conflicts of interest and other corrupt practices.

It is also to mention the tendency which has emerged in Africa, to institutionalize the right of the President of the Republic to appoint one-third of the members of the Senate, as it is the case of the Constitution of Cameroun. This privilege enhances the prestige and the influence of the President, mainly in the legal orders endowed with a Senate with competences equivalent to those of the assembly of deputies.

The African constituent of democratic renewal has attempted or succeeded in breaking with the old political order, inspired by the authoritarian culture of dictatorship. This neo-constitutionalism is also relevant to the extension of constitutionalism, as constitutionalism appeared in the 18th century, particularly in France and in North America (through the Declaration of Independence of the 13 colonies involved against the UK, adopted on 4th July 1776). As already signalized, constitutionalism includes the technique of the application of the separation of powers. However, the above-mentioned developments have proved that this theory is “a petition of principle”, if not a lure (Senou, 2019).

IV. The Arab Spring and the current crisis of African Republic

As for some African States, such as Tunisia and Egypt, they have drastically changed due to the events in the Middle East and North Africa in late 2010 and early 2011, which have been given the label ‘the Arab spring’. The involved countries seemed to be moving from authoritarian systems toward more democratic and constitutionalist ones (Tushnet et al, 2015). The events seemed to resemble those that took place in the other regions – in Latin America in the 1970s as authoritarian regimes were replaced by democratic ones, in central and eastern Europe after 1989. In retrospect, of course, the hopes for rapid and widespread constitutional transformation were unrealistically optimistic. A more realistic view would have understood that substantial changes in governing systems occur not in tightly confined time periods, but extend for many years, even for decades.

Especially as far as Egypt is concerned, it is notable that the armed forces played a role of major importance, after the Arab Spring. For instance, they took on governance in the interim period, just after the collapse of the Hosni Mubarak’s regime whilst in the everyday life of Egyptian citizens almost nothing changed. Of course, the army became the protagonist of political developments, through the coup against the legitimate regime of the President of the Republic Mohamed Morsi. The coup took place on 3 July 2013 with the leadership of the army chief General Abdel Fattah el-Sisi. This officer, coming from the party of Morsi, led a coalition to remove him from power and suspended the Constitution of 2012, which had implicated a democratic renewal. Not only did the army enact an unconstitutional role but for the first time it caused bloodshed instead of ensuring a peaceful settlement.

Besides, although the term of constitutional science ‘presidentialism’ has been adopted by the doctrine to highlight mainly the political regimes in Latin America, it is also applicable in Africa. The emergence of a presidential Republic in Zambia in virtue of 1964 Constitution exemplifies the model of presidential Republic in new States, such as former colonies, which were not ruled by a local Monarch. Just the opposite, the model of parliamentary (non-presidential) Republic is attributed to the historical process of fight of the people against the monarch. Monarchy was replaced by a democratic Kingdom (principle of democracy combined with a Monarch as the head of State) and then by the similar form of parliamentary Republic (with the President of the Republic as the head of State).

In Africa, the current problematic context of democracy, which is not real but electoral, favors the deviation of constitutionalism (Senou, 2019). It is to put the stress on the fact that bad economic condition of the people is conducive to dissatisfaction of the electoral body and potentially to political instability. This instability is likely to lead to the extreme phenomenon called ‘democratic suicide’, in the sense that a Republic essentially collapses in a way that at least initially seems to be legitimate, as it was the case of the first Republic in the history of the German State, known as the Weimar Republic.

V. Conclusion: Duplication of colonialism and constitutionalism

The current research ends up to the following remarks:

1. *Slavery, succeeded by colonialism, survived in form of forced labor*

Slavery was abolished, initially due to the violent revolt of the black people in the French colony of Haiti against the white owners. The gradual abolition of slavery, by the two mainstreaming imperialist powers, France and the UK, led indirectly to the

emergence of colonialism in Africa, in the nineteenth century, as European powers wanted to exploit the resources, particularly the mineral ones, of this continent. It is notable that not only slavery was a thing of the past during colonialism in Africa but also of the present, given that it was transformed into forced labor. Essentially, slavery survived, not to speak to the fact that the USA abolished it 71 years after France did. It is to pay special attention to the fact that it never disappeared fully. Indeed, slavery nowadays is a hidden crime that persists, in various forms, like human trafficking, in various regions (Skinner, 2008). According to a 2008 research, not only the abolition of slavery remain an unfulfilled promise but there were more slaves then than at any point in human history (Skinner, 2008).

2. Private and public methodology of colonialism

Zambia was transformed into colony with the successive use of both available methods:

-Initially the economic penetration was made by a British enterprise (private method).

-Some decades afterwards, the country became an official protectorate of the UK (public method).

So, there is a gradual development from the private power to the State one, and, as a matter of fact, from questionable treaties and concessions of the first phase to colony-type unilateral acts (orders-in-Council), let alone to ‘‘Constitutions’’, although the UK itself has been deprived of a written Constitution.

More precisely, the political occupation of the area that was to be called Northern Rhodesia was spearheaded by Cecil Rhodes with his chartered company and by the British government in the east (Chungu).

In general, the novelty of the 19th century consisted in the use of companies run by private investors and given defined political and administrative powers, which would thus shoulder the cost of colonization without burdening the taxpayers (Chungu). This improvisation is just the opposite to another novelty, a century later: the emergence of the PFI program, in 1992, in the UK is due to the concern of John Major’s government to acquire public infrastructures through taxation, without burdening the end users. Indeed, the current model of Public-Private Partnership (PPP) emerged in that context and is, as a general rule, used worldwide mainly for non-reciprocal scopes, such as the ones of the PFI program (schools, hospitals and jails).

3. Existence of neocolonialism mainly at the beginning of the independence era

Colonialism to a great extent survived, in the post-independence era, with the same European country as colonialist. However, this cultural and economic influence between the metropolis and its former colonies did not implicate necessarily an identical constitutional model. For instance, the UK has no written Constitution, as already signaled, and has a parliamentary model of governance whilst Zambia, in its 1964 Constitution, acquired a presidential (non-parliamentary) form of independent State (according to the will of the metropolis), let alone in the version of a Republic instead of a State endowed with a governor representing the Crown of the UK (upon the will of the former protectorate). It is to pay special attention to the facts that, with the unique, sui generis exception of Cyprus, all the territories of the UK had hitherto gone into independence with a monarchical form of government, and with the Queen represented by a Governor-General (HL, 1964).

4. *The authoritarian post-independence prolonged parenthesis*

The regimes coming from the advent of decolonization era did not last a longtime. In most of Africa, for instance in Zambia and in Tanganyika, the political movement that led the anticolonial effort assumed power (Quigley, 1992). The model of Western-type Republic was accompanied by the growth of factionalism in Tanganyika (Quigley, 1992) and the appearance of sectionalism in Zambia (Ndulo et al,1996).

The Zambian ruling party was led to the establishment of a one-party regime, essentially in favor of itself, by getting rid of the British-adopted Constitution and therefore of the operation of a multiparty Parliament. Besides, in various countries there was an extreme fragility of democratic governance, with repeated use of violence by the armed forces. For instance, the State of the Niger, from the emergence of the independence in 1960 to date, has experienced 7 cases of Republic, 1 exceptional regime lasting 13 years (1974-1987), 4 transitions (1 democratic transition and 3 military ones) and 3 military coups (between 1990 and 2014) (Senou, 2019). In this adventured period, it experienced 8 Constitutions, the 1959 Constitution included.

5. *The current period of post-cold war: neo-constitutionalism*

The post-cold period, from 1990 and on, has been called ‘neo-constitutionalism’ because of its dynamic to limit down political power and to democratize the State. Modernization and constitutional normativity are obvious but, as already signaled, unconstitutional developments, violent or not, still happen in various countries, whilst many States keep coping with serious economic problems, such as Zambia (Maniatis, 2018). If formally democracy is consecrated and promoted, its exercise is mostly at odds with the rules and principles that underlie it (Senou, 2019).

6. *The Arab spring and its adventurous aftermath*

The Arab spring has enacted a very important role for the democratic renewal of the constitutional and political life of some Mediterranean countries. This is mainly the case of Tunisia and Egypt whilst in some other African countries, such as Morocco and Libya, the revolutionary movements failed. Anyway, the problem of unconstitutional developments and violent conflicts proves to be vertical, exemplified by Egypt and Libya. The collapse of some prolonged and powerful regimes proved to be difficult, so does the constitutional and political normality of a democratic Republic.

7. *Duplication of both colonialism and constitutionalism*

Last but not least, constitutionalism and colonialism have been two parallel phenomena of France and other powerful European countries, which have been duplicated (neocolonialism and neo-constitutionalism), in Africa and elsewhere, whilst the twenty-first century has been marked by the very serious development of the Arab Spring, mainly in Africa.

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Ο αφρικανικός συνταγματισμός

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Περίληψη

Ο συνταγματισμός εμφανίστηκε το δέκατο όγδοο αιώνα, στη Βόρειο Αμερική και στην Ευρώπη. Βασίστηκε στην ιδέα της υπεροχής του γραπτού Συντάγματος το οποίο θεωρείται ότι εγγυάται την κυρίαρχη εξουσία και τα θεμελιώδη δικαιώματα έναντι αυθαίρετων πρακτικών και του δεσποτισμού από τους κυβερνώντες. Αυτό το πολιτικό κίνημα και η αποικιοκρατία, η οποία έλαβε χώρα ιδιαίτερα στα αφρικανικά εδάφη, όπως στο έδαφος της τρέχουσας Δημοκρατίας της Ζάμπιας, κατόπιν της καταργήσεως της δουλείας, έχουν αποτελέσει δύο παράλληλα φαινόμενα της Γαλλίας και άλλων ισχυρών ευρωπαϊκών χωρών, τα οποία έχουν αναδιπλασιαστεί (νεοαποικιοκρατία και νεο-συνταγματισμός) στην Αφρική και αλλού, ενώ ο εικοστός πρώτος αιώνας έχει σηματορευθεί από την πολύ σοβαρή εξέλιξη της αραβικής άνοιξης, κυρίως στη Βόρειο Αφρική.

Λέξεις-κλειδιά: Αφρική, Αραβική άνοιξη, Αποικιοκρατία, Συνταγματισμός, Συνταγματική Ιστορία, Βόρεια Ροδεσία, Δουλεία, Ζάμπια