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ROOTING DEMOCRACY ON AFRICAN SOIL

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1. AFRICAN EXPERIENCE

1.1 INTRODUCTION

A tide of democratic change is sweeping through Africa. Despite persistent ethnic tensions, continued economic stagnation and nagging fears of possible military intervention, the transition to democracy is proceeding at a relatively fast pace. Remarkably, this move towards democracy comes not as an aftermath of destructive wars but in an unprecedented half century of global peace. Indeed it comes at a time when the cold war has ended, regional conflicts from Cape to Cairo have abated and Europe the very keg of global wars from the late eighteenth to mid-tenieth century, has moved into a historic process of economic and political unification. An era of democratic reawakening is apparently engulfing the whole of the African continent. There is all the hope that it will be an era of rooting democratic values in the fabric of body politic of the African society and of encouragement of the development of a human rights culture throughout the continent. This suggests that there is a better chance for legal and constitutional renewal in Africa today than ever before.

The burden of the history of law making in Africa, from the colonial to the post- independence era, weighs heavily against an easy transition from authoritarianism to the rule of law on

the whole of African continent.

It might be painful to look back and examine the role and function of law in the colonial era and the post independence period, but if we ignore history we will by so doing not only be condemned by it to become its victims, but we will also fail to realistically to assess the available resources from which to create a new future. Our failure to understand the history of law under colonialism in Africa as an instrument of oppression and exploitation is to fail to understand the very essence and character of the whole process of colonialism.

1.2   THE POST-COLONIAL STATE AND ITS CRISIS OF LEGITIMACY

The paradigm of law under colonialism was not that of equality and freedom, but of discrimination, coercion and repression (Seidman 1969) The Africans had very little understanding of this law of which they regarded themselves as merely victims. Its concepts and procedures sat uncomfortably with their customs and ways, which alone had legitimacy in their eyes, and the very subordination to the law to which these customs and ways were subjected, further undermined its acceptability (Diamond 1979). Indeed it was the defiance of this law, writes Yash Ghai, which made heroes of men and women. In short the law was seen as repressive alien and an instrument of colonial rule.

The crisis which the African state has faced since independence in the early 1960's can easily be traced from the constitutions that were imposed on them at independence.

African states were created in the image of the west with national constitutions, bureaucracies, legal systems and western ideologies of law that were imposed on them at independence. But the very aliennees of these institutions posed problems of their legitimacy, as did competing ethnicities, traditional cultures and fragile economies. What compounded the problem was their inheritance of the colonial state, which lacked all forms of legitimacy, with its raison d'etre, the economic exploitation of the indigenous society.

1.3 THE CRISIS OF EXPECTATIONS AND AFRICAN INDEPENDENCE

It was only with independence that the state regained some of its legitimacy. Through the state the ruling elite got access to public resources and to its repressive apparatus. The law far from reflecting modified and legitimising independent economic relations, became a central instrument in creating political and economic power for the ruling elite. On the part of the indigenous people this led to a crisis of expectations. The African people had expected that independence would be a vehicle through which their sufferings would be alleviated.

This however did not happen at independence due, inter- alia, to the under developed economies and the concomitant ramified state apparatus inherited by the post colonial states.

Using the emotional slogans of the primacy of " nation building" and "economic development", the ruling elite has

been able to justify its centralization of power, the

appropriation of surplus from the rural and other communities, the repression of all dissent and the outlawing of all opposition political parties[3].

1.4   THE PROCESS OF DEMOCRATISATION AND LEGACY OF COLONIALISM

In the post colonial era the problem of democracy and state formation and consolidation, had to be confronted simultaneously. The inherited colonial state lacked the underpinnings of the imperial power and prestige. Its colonial character and its lack of secure popular base limited its legitimacy. As Nolutshungu rightly points out, the central problem of statehood is authority : the capacity of the state and those who control it, to secure compliance and obedience without constant recourse to threats and physical coercion. The central problem of democracy is consent: the extension of submission to authority, to a relationship between the state and individuals, which bases authority upon the will of the people in some observable way such as free and fair electoral procedures. That involves the reciprocal recognition of rights and obligations (between rulers and the ruled, and among the ruled) which are embodied in institutions and procedures broadly regarded as upholding those principles[4] Although some of these rights might have been entrenched in the

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[3] Yash Ghai ibis P.204

[4] S.C. Nolutshungu ; Fragments of democracy reflection on class and politics in Nigeria P.86

constitutions and Bills of Rights at independence, experience
demonstrates that it was not long before these fundamental
freedoms and rights of citizens were eroded by the ruling elites
in almost all the African countries.

2.   *SOUTH AFRICAN* EXPERIENCE

African experience demonstrates that in the period immediately preceding independence, the constitution becomes a centre of controversy. Parties and groups look up to it for the solution of political and economic problems. The constitution as finally negotiated, is therefore safeguarded by a high degree of entrenchment of its provisions and the vesting of powers of review in the courts to enable them to rectify its infractions. It becomes a fundamental law of the country, the real bases of the organisation of state power and establishes the real basis for political competition. (Ghai: 1986:187)

It seems that era has arrived in South Africa. The present political era is characterised by an intense constitutional debate where each party sings praises of its constitutional proposals and those of others are virulently attacked and their merits are searchingly examined.

To the majority of South Africans, a constitution for a democratic non-racial, non-sexist South Africa, promises to be the cementation of their nationhood. Its role as a symbol of our unity is no less important than its role as the charter of a democratic non-racial, non -sexist government. We hope it would be the tie that would bind all our people and personify the South African nationhood. Inherent in these hopes and aspirations is

the desire to start again; a time to reconceive and restructure the basis of our society. It would be the only opportunity we have ever had of assertion of our freedom and rooting once and for all the hard-won affirmation of our individual rights.

To the majority, especially the Blacks a democratic constitution promises fairness and justice to all, the rule of law and restraint on those who govern. It is our shared long term interest, an interest greater than any immediate party political victory or gains. However, Africa and the third world in general have taught us that in as much as constitutions may enshrine all the fundamental human rights and be epitomes of democracy, the structuring of the government may be such that it gives room to the violation of those rights and erosion of democracy.

It is for this reason that the structure of government must be amenable to function as instruments to achieve the ideals of democracy.

2.1 LEGITIMACY AND THE STRUCTURE OF GOVERNMENT

To be publicly acceptable and therefore effective and functional the state apparatus and institutions of government must enjoy legitimacy among the governed. legitimacy has been defined as the popular positive response to the moral basis of the government and its structures. This moral basis is predicated upon ability of the government to deliver democracy. Basically the underpinning of legitimacy of the government is its ability to serve as vehicle for democracy to the people.

The exercise of governmental authority is to a large extent determined by the nature of its structures and the extent of their legitimacy.

The notion of legitimacy is conceptualised by Mitchel in the folowing terms:-

> " The legitimacy of authority is ultimately a matter of belief in the rightfulness of the institutional system through which power is allocated and authority exercised as well as perceptions regarding rightfulness in authoritative positions and of the commands themselves. (Mitchell : 1979 : 13-14)

It is basically in this area that the South African government suffers a chronic crisis of legitimacy.

In the eyes of the black majority in South Africa the present structure together with the socio-political and socio-economic order it serves to preserve lack every semblance credibility.

The constitutional transformation of the South African society will therefore have to bring about far-reaching structural changes in the state apparatus in order to restore credibility and legitimacy to government structures.

The post-colonial African states were characterised by their inheritance of the colonial structures of government and institutions. Because of the exploitative and oppressive

purposes for which these structures were designed in the colonial era, the post-colonial governments found themselves trapped within these authoritarian structures and therefore incapable of employing them to extend democracy to the people. The crisis of legitimacy which bedeviled the colonial governments was carried over to the post colonial states. This was further exacerbated by the crisis of expectation which flowed from the failure of the independence to deliver socio-political democracy. Belief in the rightfulness of the government structures through which authority was exercised was eroded. This ultimately led to the questioning of the incumbency of those who occupied positions of authority.

Authoritarianism became the answer on the part of those in authority. Constitutions failed to protect the ordinary citizens from the high-handed authority of the state organs. Opposition parties were proscribed.

The society from which we are presently emerging is the one that has been characterised by social and economic inequalities for the creation and sustenance of which the government has been very instrumental. The administration, judiciary, bureaucracy, security forces, the legal system etc were designed to maintain and enforce an illegitimate socio-political and economic order, apartheid.

The South African executive was characterised by the enhancement of its authority at the expense of the legislature.

This was among other things done, by the manipulation of the white voters perceptions which created a belief in impending security onslaught against the country. It was this perception that gave a blank cheque to the government to rule in a particular way which did not call for an account to the legislature. This justified the secretive nature and unaccountability of the government structures to the electorate.

The lack of accountability of government to the parliament was illustrated by the uniteral withdrawal of South Africa from the commonwealth by the government and the declaration of the state of emergency in 1985 and 1986 without consulting parliament. The executive did not only assume autonomy in decision making, but within the cabinet structure, a further concentration of power occurred (Heymans: 1988:38) The ascension of the State security system within the cabinet eroded the very power of the cabinet itself. The manner in which the executive was organised and functioned led to concentration of power in centralised bodies like SCC and the concomitant shift of powerfrom parliament and other lower-tier decision making bodies. The 1984 constitution further weakened the link between parliament and executive.

The judiciary has unashamedly been the instrument of repression more than being a vehicle for the distribution of justice. It is exactly this employment of judiciary for oppressional purposes that has given birth to the operation of

a plethora of alternative means of dispute settlement by the oppressed majority of this country.

In order for the South African government inter-alia to maintain the labour supply and the spacial racial divisions effectively, it needed the oppressive state apparatus in the form of police and the army, and an efficient bureaucracy. The South African bureaucracy grew and developed in response to the need to efficiently enforce apartheid.

In a non-racial democratic South Africa the political system should provide for an effective participation by those who live under it. It will only be the materialisation of such democratic participation in government structures that value predispositions essential for the peaceful and harmonious development will be deeply ingrained in the fabric of our society.

The present demon of violence engulfing our society which is the legacy of apartheid can be exorcised by the fulfilment of legitimate political and economic aspirations of our people. It therefore becomes imperative upon us to restructure the government in such a way that meaningful participation is afforded to our people.

2.2 DEMOCRACY AND DEVELOPMENT

Although many Blacks in South Africa are proud to be associated with the victories that Africa has achieved especially in defence

of herand the independence especially in the last three decades, many of us feel uneasy at the criticism that is being heaped on the African continent because of its violation of basic human rights and its

inability " to register progress " in economic development. Although we might be inclined to ignore this criticism, the mounting pressure for change on the African continent, especially from Africa's citizenry, is becoming increasingly difficult to ignore. (Lowe Morna:1990: 133).

Within academia, there is an approach developing which attributes most of these developmental and human rights disappointments to failures of state, governments and law. The thrust of such criticism has been directed on the role of state and law in developmental policies, the top-down approach where the state is perceived as the panacea to all socio-economic ills. On the other hand, there is a growing, highly influential trend which favours a bottom- up approach, which is lauded as the only way to empower the poor and powerless.

Meanwhile within the non-governmental organisations' developmental network, there is a growing realisation that the state can both be a problem and a solution in roughly equal measure. There is thus, a need for a top-down and a bottom -up balance among law and state devices to maximise the contributions individuals, voluntary organisations and the state make to development and human rights. (Brietz : 1988: 28)

Perhaps it is the role the African " state" has played in

developmental issues, especially in the economy, which has tempted many an analyst, to compare events in Africa with recent events in Eastern Europe. It is true that there are differences between African political parties, which were
formed originally to struggle against colonialism and the vanguard parties that sprouted in Eastern Europe after the second world war. Despite these historical, cultural and political differences, there was a similarity and sometimes even an affinity, between the governments that evolved in Africa to those in Eastern Europe. Opposition has been brutally suppressed, leaving military coups as the only avenue for change in most African countries. Whether to the left or to the right of the political spectrum, the one party state with its attendant corruption and lack of accountability became the norm.

Recently there has been a growing realisation of the need to " *move towards more accountable and participatory form of government*". This is clearly discernable in the OAU 1990 head of state summit declaration and the warning contained in the World Bank ground-breaking report "*Sub- Saharan Africa: from crisis to sustainable growth.*" Whilst the OAU communique calls for the " *consolidation of democratic institutions* " The world Bank report links democracy to economic development. Regional and International events have demonstrated this linkage. The mounting pressure sustained by the democratic
forces against apartheid has to some extent opened the eyes of many to political restriction in their own countries.
Perhaps the events in Eastern Europe might provide some lessons for Africa and for South Africa in particular.

2.3   CONSTITUTIONAL TRANSITION AND DEMOCRACY

In South Africa, like in Europe in the late 1980's we are faced with a series of unprecedented and momentous events.
Although there were clear signs of impending change we found difficulties in recognising the advent of these events. We played down their significance and counselled prudence. Almost all our forecasts had been clouded by pessimism and events turned out differently and generally better than we had forecast. Although the events in Eastern Europe might be completely different from what is happening in South Africa, and the situation in South Africa might prove to be more difficult and complex, we must be heartened by the fact that despite all difficulties, Eastern Europe is succeeding in democratisation and redness will soon also be registered in economic development.

It might be worthy of note that the prescriptions that are being offered to Eastern Europe, " *free market economy and privatisation*" are the same being offered to South Africa, especially by the De Klerk Administration.

The source of this generalisation can be traced in certain classic themes derived from an established literature about democratisation.

The first theme is that attempts at rapid changes of regime are invariably traumatic and prone to backfire. Even if democracy eventually emerges the trauma surrounding its
birth can distort its form, hamper its legitimacy and performance. This distortion can find its manifestation in the

deformed government structures whose handicap militates against the extention of democracy to the people. The social, economic and political factors constituting the milieu and the matrix from which a new constitution emerges will to a large extent have a telling impact on the resultant government structures and their capability to be vehicles of democracy.

According to Di Palma, democracy is a matter of rules for mediating plural and conflicting interests; when it is introduced abruptly and against the will of some of the players, the losers will resist it and the " *winners*" lacking tested democratic organisations and personal experience, will be less than fully at ease with its methods. Thus consolidation is placed in doubt, while backsliding is an ever-present possibility. (Di Palma: 1991: 25)

Does that not sound familiar with the theoretical justification by academic apologists of de Klerk's government's implementation of agreements meant to accelerate the negotiations process and initiate democratisation?

Even the second approach of linking democratisation to the emergence of favourable social, economic and cultural conditions, is being echoed by apologists of the apartheid system.

These include economic prosperity and equality and an independent middle class and national culture which, by virtue of a penchant for tolerance and accommodation, is already well disposed towards democratic ways. Di Palma cautions against accelerated transitions. This he pins on the assertion that democratisation

" violates the double prescription : they are fast and they occur in response to political constigencies which have little to do with self propelled, slow motion rise of auspicious conditions" (Di Palma: 1991 :25)

A related theme is the need to develop a civil society. This is closely associated with the growth of a bourgeois class of citizens commonly linked to the reconstruction of the market. We shall turn to the significance of this phenomenon in the democratisation process in the following section.

2.4   CIVIL SOCIETY AND DEMOCRATISATION PROCESS

The example of Eastern Europe has shown that the opening up of the market inevitably leads to the opening up of the political system and promotes democratic development. In South Africa this should include the encouragement of the development of an African middle class. One method of achieving this will be the adoption of legal mechanisms that would encourage the breaking up of the apartheid created domination and monopoly of top executive jobs in industry and commerce, contracts and production in all spheres of the economy. Although primarily in South Africa, such reform measures have been advantageous to those sectors of the black community which closely collaborated with the apartheid system in implementing the Bantustan system, there is hope that it would lead towards the burgeoning of a black middle class.

There is hardly any need to argue for the view that such measures

in South Africa are no gift from the apartheid authorities but the product of struggle, which had for the most part a recognisable class content. Even the democratic changes are a residue of previous struggles. To a lesser extent it is also an attempt by the African middle class to make political space for itself. Despite the fact that presently in the midst of the struggle class boundaries among blacks tend to be blurred, as the democratic process develops, and the market opens, class identities and interest will emerge clearly. By the same token, the criteria of accession to class positions, or to the economic means that guarantee access to class membership will be eased.

Resistance against apartheid has demonstrated the positive role that plural civil society, one based not only on community but also on an individual role can play in democratisation. It has demonstrated clearly that democracy cannot function properly where some specific dogma is held with fanatical zeal, where the spirit of tolerance is regarded as an expression of moral weaknesses and compromise as an act of opportunism. That is why a healthy democracy has no official ideology but is tolerant of all streams of thought.

The constitution should guarantee the free articulation of differences within the framework of equal rights and tolerance. An open society requires guarantees for the free functioning of non-governmental organisations, such as religious bodies, trade unions, sporting and cultural associations, subject only to respect for fundamental human

rights as set out in the Constitution. Non-governmental organisation should be encouraged to collaborate with the Government in furthering the aims of the Constitution, without thereby compromising their identity or independence.

All men and women shall be entitled to all necessary information to enable them to make effective use of their rights as citizens, workers and consumers and to impart such information. There should be freedom of the press, and the media should be open, accessible and respond to all the views, opinions and interests of the community. Government structures should by their very shape and nature respond to these ideals and give effect to same.

2.5 <u>SOME PROSPECTS OF A POST-APARTHEID CONSTITUTION</u>

A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed.

In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all. It presupposes a South Africa in which every individual has equal chance, irrespective of his or her birth or colour. It recognises the worth of each individual.

A non-racial Constitution can be adopted rapidly but a non-racial South Africa would take many years to evolve. Yet, although the massive discrepancies in education, health and living conditions imposed by decades of racial discrimination

cannot be eliminated by constitutional declaration, the Constitution must provide the positive means to reduce progressively the imbalances and inequalities and to ensure that everybody has an equal chance in life.

The new Constitution must reflect a commitment to full, free and equal participation in the new South Africa. Law and practice keep South African women out of their rightful place in helping to build democracy and enable a new nation to evolve, and deprive them of their human rights as individuals. The new Constitution must therefore:

Guarantee equal rights for women and men in all spheres of public and private life;

Create mechanisms whereby the discrimination, disabilities and disadvantages to which women have been subjected are rapidly removed;

Give appropriate recognition to reproductive and birth rights;

Guarantee constitutional protection against sexual violence, abuse, harassment or defamation; ensure that women are heard in all issues and participate actively in all levels of society.

Finally, government and its structures should reflect the will of the majority, be effective but not all-powerful. It should operate within the framework of the Constitution, acknowledging a separation of powers and the existence of fundamental rights and freedoms as guaranteed in a Bill of Rights.

Our faith in democracy in South Africa should not rest in the belief in the natural goodness of man, but in the belief that most human beings can learn by experience. In a world in which science can command unlimited, natural power, it can be said that its basic values, shared knowledge, mutual discussion and the institutionalisation of consent can solve more problems with less friction than is possible by entrusting power to minorities who claim to be better judges of the true interests of citizens themselves.

Our aim should be to let the ideals of democracy leave their mark on the whole order of society and the mutual relationships of its members, so as to give each individual the opportunity of a full meaning to life. The result of ideals of freedom flourishing in such a democratic culture inevitably contributes to the solution of problems of poverty.

In time, if peace is preserved, and democratic culture does not yield to despots, the masses do bring about democratic changes by their own efforts Freedom is infectious. The appetite for freedom grows on what it feeds. And once the process of liberalisation begins, there is no telling where it will end.

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