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Post-Independence Constitutions in Africa: reflection on their roles in generating and promoting intra-state conflicts

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Accepted 22 November 2014

Africa has experienced three generations of constitutions since independence. These constitutions were mainly copied from former colonial powers. They were also detached from African cultures, values and traditional political institutions. In addition, ordinary citizens were not widely participated in the making processes. As a result, the constitutions lacked popular support and legitimacy; and became a centre of political contradictions and causes for intra-state conflicts by dividing and polarizing the society apart than consolidating peace and stability. This paper presents the roles of post-independence constitutions in generating and promoting intra-state conflicts in Africa from four border perspectives: 1) by looking at the kind of state structure and systems of government they introduced; 2) by looking at its nature and constitutional making processes; 3) by looking at how they distributed power and wealth among ethnic groups; and 4) by looking at the kind of state-society relationships they established. Therefore, it concludes that the imported post-independence constitutions should be amended or changed in a way reflecting the cultures, values and traditional political institutions of the African people to establish perpetual peace, security and social harmony in the continent. Finally, this paper relies on qualitative method of data analyses and the data are gathered from secondary sources.

Key Words: Constitution, constitutional design, generations of constitutions, conflict, Intra-state conflict

Cite This Article As: Memar AD (2014). Post-Independence Constitutions in Africa: reflection on their roles in generating and promoting Intra-State Conflicts. *Inter. J. Polit. Sci. Develop.* 2(10): 258-265

INTRODUCTION

Historical sources indicate that, since the creation of human beings, there had been some rules and practices, written or unwritten, which governed the behaviour of individuals within in their communities for the sole

purpose of promoting and maintaining peace and social harmony. In modern times, every "states", being democratic or authoritarian in nature, have adopted rules and principles expressed in the form of constitution to

guarantee the rights and impose the obligations of their citizens as well as to determine the organizational structure and roles of political institutions.

Africa has seen three generations of constitutions since independence (Shivji, 2009). These constitutions were mainly imposed by external powers at the time of independence. In addition, the African society was not actively participated in the various stages of constitutional making processes. Like colonial and post-colonial states, these constitutions were totally, if not partly detached from the historical realities of the African continent (Clapham, 2000); rather they imposed western liberal values on the body of African politics. More importantly, the adoption and execution of these constitutions by African leaders was not primarily to benefit the African society and to ensure sustainable economic development; but they were used as an instrument to consolidate power and legitimacy (Olowu, 1994). Besides, African leaders used them as a foreign currency to purchase international support to be labelled as democratic and progressive leaders.

Hence, it created a polarized state-society relationship; and opening rooms for the emergence and outbreak of civil wars across the continent. In fact, intra-state conflicts have been the defining feature of many African countries following the collapse of the Cold-War bipolar international system. More importantly, the imported post-independence generations of constitutions have deepened social fragmentation by instituting antagonistic power relations within the society. Therefore, this paper makes an attempt to demonstrate their role in generating and promoting intra-state conflicts in Africa.

WHAT IS CONSTITUTION?

There is no hard and fast definition for constitution. In other words, there is no universally agreed upon definition of what constitution is all about. However, different scholars from diverse disciplines have attempted to define constitution in various ways. Philosophers, political scientists and constitutional lawyers have attempted to engineer numerous definitions of constitution. In fact, there are factual differences in their definitions due to variation in context and time that they generated their definitions. Most often, their difference stems from the very nature of constitution itself. This is to say that constitution differs from one another in its content, purpose, scope and the way it constructs the power map of a state.

In the words of Aristotle (320 BC), constitution is “the way in which, citizens who are the component parts of the state are arranged in relation to one another.” He attempted to conceptualize constitution as a document consisting of different principles and standards of behaviours that govern the relationship of state members.

Aristotle also pointed out two major aspects of constitution; ethical and institutional aspects (Ross, 1995). The ethical aspect is the aim and goals to be pursued by community while the institutional aspect involves the determination of the sovereign power and the allocation of power among officials.

According to John Lock (1690:36), “constitution is a form of government.” He considered any form of government as a constitution. Thomas Hobbes (1640:87) on the other hand defines constitution as “a contract among citizens establishing the institution of government.” It is an instrument that fixes the structure of supreme government. Still others define constitution as the aggregate of laws and customs under which the life of state goes on. It is a complex totality of laws embodying the principles and rules whereby the community is organized, governed and held together. In addition, Herman Finer (1980:8) argues that “the state is a human grouping in which rules determine a certain power relationship between its individuals and associated constituents. This power relationship is embodied in political institutions. The system of fundamental political institutions is the constitution the autobiography of the power relationship.”

Constitution is a fundamental law that establishes the character of the government by defining the basic principles at which society must conform, by describing the organization of the government, power distribution and limitation on the function of the different government organs. As a fundamental law, constitution includes the basic principles, values, beliefs and traditions that direct the internal and external affairs of a country. It also elaborates the economic, social and political policies of a given country.

STAGES IN CONSTITUTIONAL DESIGN

Constitutional design is a process which brings people and their government together to shape their future political life; it is a meeting point between the past, the present, and the future. Depending on the character of the polity for which it is designed, and the model of the constitution we adopt for the purpose, the process of constitutional design might take different stages. Most often the process involves the structuring or restructuring of the political, socio-economic and cultural life of a nation. The stage in constitutional design can broadly be classified into four categories namely: drafting, deliberation, adoption and ratification.

THE DRAFTING STAGE

Owing to the central significance the question of who should be the maker of the constitution as well as who is

in and who is not in the polity, the drafting process must be inclusive of the choices of the dominant actors. Although the drafting body constitutes a technical body, it must be accommodative of all the concerns and able to capture the visions of all stakeholders (Brandt, 2012). As a technical work, it benefits from being non-political, although it is often difficult to be politically neutral at this juncture.

The existence of pre-existing principles on which the “founder” agree upon will support the drafters by serving as guiding sign posts to the progress of its work (Reynolds, 2012). Thus there needs to be an agreed upon terms of reference. Needless to say, drafting being primarily a technical work, technical professionals dominates the process at this stage though all stakeholders are also important in curving the initial document.

THE DELIBERATION STAGE

This is a stage where intensive discussion of the drafted document would be carried out by all political players and the society at large. The deliberation phase must be broad-based, all inclusive, participatory, free, and a two-way traffic. Thus, all the relevant political actors and other stakeholders would have the opportunity to reflect their own opinion. The society must have the basic freedom to express their opinion and to organize themselves in various political groups; and be able to participate in the constitutional making process. They should also be allowed to make an in-put.

The popular discussion can be done in the form of seminars, workshops and symposium (Memar and Endalkachew, 2012). After such a discussion, a representative group might also discuss the document as enriched by the popular discussion before it finally submits it to adoption by a constitutional assembly.

THE ADOPTION STAGE

This stage must be done by a body which is fairly representative of all the political actors and other stakeholders. Thus the election of members of the constitutional assembly, its mandate and the degree of openness, freedom are key principles in this stage to lay broad-based legitimacy for the ratification of constitution (Brand, 2012). The constitutional assembly adopts the drafted document as a final constitutional document.

It would be usual to have a rule that clearly elaborates the act of adoption. This means a certain percentage of the constitute assembly or parliament must pass the entire document. Adoption rules mostly needs “supermajorities,” rather than the usual majority of those legislators present and voting. In support of a number of

members equal to more than half of all the seats in the parliament may be required-or 65 percent, or 2/3, or 75 percent (Ibid:2012). Different majority may be required for approval of various changes depending on the political culture of the society or the rules agreed upon in the drafted constitutional document.

THE RATIFICATION STAGE

The process of ratification might takes place either through popular referenda or through the interposition of the legislative assemblies of the units that constitute the larger polity intended to be established through the new constitution (Reynolds, 2012). The later occurs if there are units that antedate the constitution or the polity that the constitution seeks to create.

In the processes of constitutional making, however, constitution needs to be careful in how it deals with traditional sources of legitimacy (such as religion, tradition, or even force), especially in polities where the legal system manifests layers of legal orders such as the rule of traditional law-alias customary law, the rule of political law, or the rule of professional law (Perry, 2009).

GENERATION OF CONSTITUTIONS IN AFRICA

Since independence, Africa has been serving as a laboratory to constitutional making processes both at rhetoric and practical terms. This is not an exaggeration; but real experience in the constitutional history of the continent. There had been an attempt to aggressively implement imported constitutions mainly from Britain and France in the political landscape of Africa which contravene with African values and cultures.

It is crystal clear that African has experienced different generation of constitutions following independence. In this regard, Issa G. Shivji (2009: 50-63) identified three generation of constitutions as he vividly classified into: first generation constitutions, second generation constitutions and third generation constitutions (Ibid). These generations of constitutions have been designed, in most cases, to advance and/or legalize different ideologies ranging from socialism to neo-liberalism as well as western cultural values in the African continent. Accordingly, the implementation of it in the body of African politics eventually produced national disintegration and civil unrest instead of establishing perpetual peace and social order. This was more prevalent and became a defining feature of Africa soon after the demise of the Soviet Union and its empire in Eastern Europe and in Africa in the early 1990s. Here it is worthy to briefly analyze the characteristics and nature these generations of constitutions so as to understand how they have been generating and promoting intra-state

conflicts in Africa.

THE FIRST GENERATION CONSTITUTIONS: LIBERAL CONSTITUTIONS

The first generation of constitutions was the product of national liberation struggle against colonial powers. It was the outcome of negotiated independence with the exception of Lusophone countries which got their independence through armed struggle (Nolutshungu, 1991). It has to be noted that the large segment of African society was neither consulted nor participated in the constitutional making processes. The constitutions were an imposition than something evolved from the customary and traditional practices of African society. This is to say that the colonial powers imposed the negotiated constitutions so as to advance their economic, political and strategic interests in the form of neo-colonialism. Francis M. Deng (2008) stipulated that African leaders accepted these constitutions as an imperative under circumstances not as their ideal preferences.

The result of the negotiated independence between the colonial powers and local contending forces was liberal constitutions based on Westminster or Gaullist models (Ibid). These constitutions were organized on the twin pillar of limited government and individual rights as well as multiparty electoral processes (Shivji, 1991a). They advocated the idea of private property and individual rights to protect the interests of immigrant settler communities. However, the notion of individual rights is less important than community rights in African context (Howard, 1986).

Generally, the first generation of constitution was marked by the absence of fundamental rights, an ethnic-based judicial system, the wide discretionary power of the executive and minority rule over the majority as it had been seen in some African countries like South Africa and Rwanda (Assefa, 2004). The constitution deeply divided and polarized the society on the basis of ethno-linguistic elements. Eventually, it destroyed the sense of national unity and social cohesion. Above all, the constitutions were perceived as documents emphasizing independence and constituting state sovereignty, rather than documents embodying national consensus and fundamental human rights. Thus they did not obtain popular legitimacy and mass based support; and consistently violated.

THE SECOND GENERATION CONSTITUTIONS: AUTHORITARIAN CONSTITUTIONS

The second generation of constitutions were introduced within the context of the Cold War where international

politics was divided mainly into two antagonistic ideological blocs as liberalism and free market economy propagated by U.S.A and Socialism advanced by USSR. Therefore, promulgating of these constitutions had certain rationales (Shivji, 1991a:183). Firstly, it had the objective to respond to the changing international balance of power and power configuration. Secondly, African leaders had the motivation to drag their society out of parochial tribalism to the universalism of modern nations. Lastly, there had been internal demands for change and economic development due to the failure of the first generation of leaders to create socio-economic opportunities. Thus, the second generation of leaders enacted this constitution because they merely believed that an authoritarian constitution which allows centralization of power and recognizes the state was the only agency of social change in an authoritarian one-party state is instrumental to met public demands.

In the words of Alex Thomson (2010), authoritarian constitutions introduced a *de jure* (Kenya since 1982, Malawi, Tanzania, Zambia) or *de facto* (Kenya until 1982, Senegal, Ivory Coast) one party state which extended the power of the executive to the extent of monopolizing the power of the legislative and the judicial organ. The consequences of authoritarian constitution were grave violation of human rights by military regimes, political anarchy, poverty, civil unrest, ethno-nationalist movements and civil wars (Sudan, Nigeria, Somalia, Angola, Seria Leone, Liberia to mention some) (Tordoff, 2002).

By and large, the shift from liberal independence constitutions to various forms of authoritarian constitutions had deepened the polarization of state society relationship. This opened the door for military coups and counter-coups (Kandeh, 2004). According to Hutchful (1994: 183) *"Between January 1956 and the end of 1985 there were 60 successful coups in Africa, that is, an average of two every year. In 1966 alone there were 8, military coups d'eta and by 1986 out of some 50 African states, only 18 were under civilian rule"*. Besides, the rigidity nature of authoritarian constitution for amendment (they require specified majority which was impossible for the minority group) contributed for the proliferation of insurgent movements. The outcome was eruption and escalation intra-state conflicts. It also destroyed the peace and security networks of the states.

THE THIRD GENERATION CONSTITUTIONS: NEO-LIBERAL RIGHT BASED CONSTITUTIONS

The third generation of constitutions appeared in the political map of Africa following the collapse of the Soviet Union and its empire in Eastern Europe in the 1990s (Shivji, 2009). The culmination of socialism left Africa only with one international ideology which was liberal

democracy and free market economy.

In other words, the changing international politics left military authoritarian regimes unprotected in the sense that were compelled to incorporate global ideas of multiparty democracy, human rights, liberalization, good governance and rule of law because they became preconditions of western powers aid package. In addition to external factors, military authoritarian regimes were compelled to introduce neo-liberal right based constitutions due to domestic demands and struggle for equality, freedom, human rights and justice.

It can be argued that, in comparatively perspective, the third generation of constitutions was participatory and tired to be inclusive of the society in its character. It also opened rooms for free media, democracy and liberalization of the economy. However, they failed to designate African traditional and cultural practices since, like the first generation of constitutions; they are impositions of western powers through World Bank (WB), and International Monetary Fund (IMF) as a precondition for their economic aid and financial assistance (Soludo, 2004).

HOW THEY HAVE BEEN GENERATING AND PROMOTING INTRA-STATE CONFLICTS IN AFRICA?

Following the end of the cold war era, Africa has witnessed intensification of intra-state conflicts driven by interwoven and complicated factors. These conflicts were fuelled by the existence of ill-demarcated boundaries, competition among internal political actors on the basis of ethnic identities to monopolize state resources. Besides, the withdrawal of the then super-powers, the United States and the former Soviet Union, from active involvement in conflict management in Africa further exacerbated internal civil war, abuse of human rights, economic degeneration and political disorder (Henderson, 1997).

Among other things, the imported and imposed generations of constitutions played a major role in generating and promoting intra-state conflicts in Africa. Their roles can be approached from four broad perspectives. These are:

BY LOOKING AT THE KIND STATE STRUCTURE AND SYSTEMS OF GOVERNMENT THEY INTRODUCED

It has been argued that African society is pluralistic or heterogeneous in nature which is composed of diverse ethnic, cultural, linguistic and religious groups. However, contrary to this, colonial powers introduced unitary state structure in most African states to create homogeneous society out of diversity. Later on, the constitutions legalized this state structure and incorporated into the

constitutions. In this regard, it is important to note the experiences of Sudan, Tanzania, Botswana, Uganda, Rwanda and Cameroun; to mention some. In Tanzania alone, there are approximately 200 ethnic groups, but forced to be "homogeneous". The failure to recognize existing diversity within the society generated inter-ethnic group tension and unhealthy rivalry to control state power and natural resources which would in most cases led to eruption of violent ethnic conflicts.

It has to be noted that the imported constitutions did not change even the colonial exploitative and imperialist state institutions for the benefit of African people; instead they maintained them as key components of post-independence state structure. According to Andrew (2012), Anglophone countries retained British state institutions where as Francophone countries maintained French state institutions, such as the presidency with two-round elections. For instance, "Nigeria looked to the USA in 1978, so, too, have any countries aimed to resemble Switzerland rather than Nigeria, even though their problem resemble Nigerian's more than Switzerland" (Ibid, 2012:31) This is to say that colonial state institutions have locked the opportunity to move from centralization of power to decentralization and pluralism. This was one of the factors that resulted in military coups and counter-coups in the early 1970s which destroyed the hope of establishing vibrant democracy in the continent.

Furthermore, most post-independence constitutions adopted presidential system of government which granted excessive and wider power to the president within the executive. Most African presidents as was the case in North Africa (Tunisia, Libya and Egypt,) and francophone African countries (Cameroun, Burkina Faso, Mali, CAR and Chad) have enjoyed enormous constitutional and extra-constitutional powers to the detriment of other members of government both individually and collectively (Moye, 2014). Individually, the Prime Minister, Vice President or ministers are at the discretion and mercy of the president. As Gonidec (1978: 379) emphasized, 'the importance of ministerial functions depend on the nature of political regime.' In most francophone black Africans, the 'autonomy of action of the minister is subjected to considerable restrictions' (Schwartzberg, 1977:36).

The constitutions also introduced various forms of regimes extending from 'democratic' to extremely authoritarian in their nature. In fact, the African systems of government are marked by excessive presidentialization and are qualified presidentialist (Moye, 2014). Most of them have been baptized presidentialist; borrowing of legal techniques from parliamentary and presidential system that help re-enforce the status of the president (Ibid, 2014:12). Apart from installing presidential system of government, the constitutions have also created powerful and strong presidents instead of

strong administrative and political institutions. In addition, the presidents' power and rights are emphasized where as obligations are neglected. He becomes omnipresent and omnipotent and has been qualified "presidential monarch".

The individual and regulatory powers of the minister are limited and residual. The ministerial councils preside by the president himself are usually customary with optional consultation and little effect on president's actions (Bayart, 1989:148-156). Furthermore, through legal and conventional means, the executive dominated by the president manipulates and controls the other governmental organs. The predominance of the president is proportionate to the 'vassalization' of other powers that lack the means of controlling the executive effectively (Abraham, 1980). The parliament has been rationalized and the judiciary marginalized. And usually, the president is empowered with the unreciprocal right to intervene in the legislature domain through ordinances. For instance, the first Lyttelton constitution (named after the British Colonial Secretary Oliver Lyttelton) and the 1964 amended constitutions of Kenya granted unlimited power to the president to become the head of the state and government (Mrangi and Nyambura Githaiga, 2012). Both constitutions failed to address corruption, accountability in governance, politicized ethnicity and inequitable resource distribution and marginalization.

Above all, the African presidentialist system of government has been hugely criticized for encouraging zero-sum game competition, easily promoting deadlock between the executive and legislature branches, and encouraged personality leadership (Ibid, 2012:6). In this connection, successive constitutions of Kenya promoted colonial divide and rule system and encouraged differences than national unity. This was one of the major causes which took the nation into unprecedented violent conflict in post-2007 election. The same was as true in Ghana, Tanzania, and Malawi (Tordoff, 2002). More importantly, the first generation of constitutions established the legal foundation not only for power to be centralized in a single party but also for it to be personalized in the hands of the party leader (Thomson, 2010). It also established one-party authoritarian state which favours one ethnic group against the other. There has been a widely accepted argument that constitutions had a paramount importance in fuelling the conflict conflicts in Sudan, Nigeria (1970s), Liberia (1989), Sierra Leon (1991), Burundi (1993) and Rwanda (1994) as being the centre of controversies.

BY LOOKING AT ITS NATURE AND CONSTITUTIONAL MAKING PROCESSES

The contents and the constitutional making processes of the first and second generation of constitutions did not

reflect the interests and aspirations of the African people; rather they were impositions either by former colonial powers or one-party authoritarian African leaders. Historical experiences indicated that imported post-independence constitutions have been serving as an instrument for former colonial powers to advance their selfish interests and neo-colonialism policy in Africa either by convincing or compelling African leaders to incorporate concepts of liberal democracy and free market economy into their respective countries' constitution which did not correspond with African cultures and traditions.

Western liberal ideas and cultural values were highly promoted in the constitutions where as African wisdom, values, cultures and traditional practices were undermined. Many of the constitutions even today are not primarily written by indigenous African languages; but by colonial languages which do not allow ordinary citizens to understand their fundamental rights and obligations. In this regard, Ali Mazuri (2010) in his article "*Should African Political Parties bear African Names? Should African Constitutions be Translated into African languages?*" strongly recommended the need to translate African constitutions into African languages.

Another important element that has been magnified in the contents of these imported constitutions was that the imposition of Western conception of individual rights on the African notion of communal human rights. Most often, the debate between individual human rights vis-a-vis communal human rights has been a centre of political friction and bone of contention among competing political forces. In Ethiopia, for example, it has been a controversial political agenda between the oppositions on the one hand and the ruling party on the other hand since 1991. According to some scholars such as Rhoda Howard (1986) argues that communal rights are more important than individual rights in Africa. He pointed out three reasons for this; 1) the group is more important than the individual; 2) decisions are made by consensus than by competition; 3) economic surplus are redistributed and not based on making profit.

As I have discussed above, African society did not widely participated and represented in the making of their constitutions. The first generation of constitutions only liberation political movements were participated since they were the outcomes of negotiation between liberation movement leaders and the departing colonial powers (Shivji, 2009). Similarly, ordinary people were not actively participated in the formulations process of the second generation of constitutions. They were imposed by authoritarian and military dictators as a justification to establish one-party state to cure the damages of the first generation of leaders. Thus, they did not receive broad based legitimacy. Obviously, the result was the formation of insurgent and secessionist movements due to the failure of the constitutions fact that to open up rooms for

political dialogue, compromise and win-win competition. Sadly, after 50 years of independence, the constitution African countries are still narrowing the political space for opposition political organizations to operate freely though they have been subjected for modification.

BY LOOKING AT HOW THEY DISTRIBUTED OF POWER AND WEALTH AMONG ETHNIC GROUPS

During colonial period, African societies were divided along ethno-linguistic and cultural lines. The intention of the colonial power was clear: to sustain their exploitative and discriminatory colonial administration. To this end, they favoured minority ethnic group against the majority. They also allowed the minority to access to and control state resources.

In Rwanda, for instance, the minority Tutsi ethnic group (15%) was promoted by the colonial powers to rule over the majority Hutu ethnic group (85%) by the colonial powers (Wolff, 2006). As a consequence of struggle for power and resources, the Hutus brutally slaughtered nearly one million Tutsis within 100 days in 1994 which is called the Rwandan genocide.

The white minorities in South Africa were also given superior political positions and wider economic opportunities where as the black majority were extremely marginalized from sharing the national cake. In fact, the apartheid system was culminated by the bitter struggle of the black population though the black population are still suffering from unemployment and poverty. We can also mention the cases in Sudan (ethno-cultural black population was historically marginalized, the civil war in Darfur), Burundi (rivalry and adversarial power relations between the Hutu and Tutsi), Nigeria (the first constitution divided the people of Nigeria into political hegemony north and socio-economic ascendancy of south) and DRC.

BY LOOKING AT THE KIND OF STATE-SOCIETY RELATIONSHIPS THEY ESTABLISHED

In Africa, the imported post-colonial constitutions established a fragile state and society relationship. Africans were left out of any representative relationship between government and people. Consequently, trust and shared political values never developed between the rulers and ruled. State institutions are not fully gained legitimacy and the respect of the people (Thomson, 2010). Civil society organizations and professional associations which are the backbone of democracy were constitutionally banned in some countries. The educated people were either forced to leave the continent or persecuted arbitrary due to political reasons. Thus, the imported post colonial constitutions, sooner or later,

promoted weak and sometimes antagonistic the state-society relationships by destroying the social fabric of the African people.

CONCLUSION

Africa has been serving as testing ground for various constitutional making processes. According to Issa Shivji, the continent has experienced three generation of constitutions (liberal independent constitution, authoritarian constitution and neo-liberal constitution) since independence in the 1960s. These constitutions were imposed either by former colonial powers or African authoritarian and dictatorial regimes. Besides, they were totally, if not partially disconnected from the past and present socio-cultural and traditional history of the continent. In other words, they failed to reflect African values and traditional practices; rather they maintained colonial state institutions and western liberal cultural values.

The three generation of post-independence imported constitutions have failed to capture the major priorities and challenges of the African people; instead they perpetuated the divide and rule policy of the western powers and neo-colonialism. By doing so, they polarized state and society relationships to the extent that some of the African people even disassociate themselves from the state. Needless to say, the ordinary citizens were not neither consulted nor actively participated in the various stages of constitutional making processes. Thus, the constitutions did not receive broad based legitimacy and as a consequence they became the centre of controversies.

Here is one question to ask: Can the imported post-independence constitutions be reversed? The answer is yes! The recent constitutional reform measures in Kenya and some other African countries clearly demonstrate that there is a need to inject modification into our constitutions in a way reflecting our values, norms, cultural and traditional political institutions that promote tolerance and mutual coexistence. However, this will not be easily realized without the political will and commitment of African leaders. As Julius K. Nyerere (1974) argued "we refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by our institution. We refuse to put ourselves in a straitjacket of constitutional devices even of our own making. The constitution of Tanzania must serve the people of Tanzania."

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