

**LANGUAGE AND THE RULE OF LAW:
CONVERGENCE AND DIVERGENCE**

by

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The official language of almost every Constitution south of the Sahara is European. Sub-Saharan constitutional law is almost entirely Eurocentric in that sense. Every right, every civil liberty, has to be interpreted in terms of its meaning in the relevant Euro-colonial language. In addition to the substance of the law being itself culturally derived from the West, there is the additional embarrassment of the official language in which the law is expressed - a special case of double-jeopardy!

There are gains and losses in this interplay between language, law and constitutionalism. On the Pan-African side, it has enabled lawyers from one part of Africa, or even one part of the Black world, to serve in another part. One of the highest ranking justices in Tanzania was at one time from the West Indies.

In Uganda, on the other hand, a Nigerian judge was indeed Chief Justice in critical years after independence - Sir Udo Udoma. The fact that English was the language of law and constitutionalism in the Commonwealth sometimes facilitated the interchange of lawyers and judges across huge distances. There were occasions when Pan-African solidarity was among the beneficiaries of this lingo-legal convergence.

The Rule of Law in African countries has sometimes gained from this lingo-legal convergence. The shared legal traditions and shared legal language have sometimes enabled lawyers from one part of Africa or the Commonwealth to help defend dissidents in another part. The convergence of linguistic and legal traditions

have also enabled African lawyers to construct networks of solidarity with other "jurists" internationally. In Nigeria and Kenya lawyers have often been in the vanguard of defending human rights and democratic processes, and have been partially protected from excessive governmental revenge by the international networking of jurists and constitutionalists abroad.

We define "the Rule of Law" as the legal dimension of the democratic process - the dimension which seeks to ensure that governmental decisions are impersonal and subject to legal restraint, and the dimension which guarantees to the individual freedom from arbitrary government and entitles the individual to "due process of law." The convergence between European languages and legal traditions has often aided the Rule of Law in this sense.

On the negative side, such lingo-legal convergence has sometimes encouraged excessive dependence by a former colony upon the metropole (the former colonial power) even for the recruitment of judges for African courts. Kenya is one African country which has been too slow in replacing expatriate judges with indigenous ones. The problem of expatriate judges poses intricate problems for this whole issue of the Rule of Law.

Is one truly being "judged by one's peers" if the judiciary is still dominated by foreigners? Of the three branches of government (executive, legislative and judiciary), the judicial branch has often been the least Africanized. It is also the one

which is the least susceptible to indigenous languages. While politicians have to use African languages in some context or another, judges and lawyers in most of Black Africa need not know a single word of an indigenous language. What this means is that the judiciary is not only the least Africanized branch of government in personnel in many African countries; it is the least Africanized branch culturally in almost all African countries.

And yet the great majority of the accused who came before the courts have little knowledge of European languages. The whole system is basically a massive exercise in translation - often extremely bad translation. The concept of "due process" is diluted as a result. Not many of the accused understand either their rights, or what is going on in court. If Justice must only be done, it must also be heard to be done, then it is seldom heard in the right language in most African countries.

Then there is the vexing question of whether expatriate judges are more likely to be independent of the Executive Branch than local judges. This used to be a popular belief at one time.

It was assumed that a judge in Uganda, who was a British citizen, was more likely to stand up to the dictatorial government of the day than was a local Ugandan judge. The language policy which enabled British citizens to serve in African judiciaries was therefore regarded as an asset for the Rule of Law.

Empirically, on the other hand, the record of expatriate

judges is mixed. It is true that one brave expatriate judge in Uganda under Idi Amin gave a ruling against the regime and then fled the country - rather than compromise. On the other hand, expatriate judges in countries like Kenya and Malawi have routinely acted as if they were an extension of the executive branch - leading to rumours of massive government manipulation of the judiciary.

Nor must it be forgotten that some local African justices have been known to stand up to their own governments even at great personal risk. One of the more tragic cases was that of Chief Justice Benedicto Kiwanuka of Uganda, who in 1972 gave a ruling contrary to President Idi Amin's preference - and paid the supreme price. The Chief Justice was picked up from his own chambers in Kampala by military thugs, and was never seen again. He was a martyr to the Rule of Law - and he was a native son.

The lingo-legal convergence (the shared language and the shared legal traditions) may still be important in safeguarding the Rule of Law in Africa, but the distinction between expatriate and local judges may be far less relevant than was once assumed.

What about the persistent anomaly that virtually all constitutions south of the Sahara are in European languages - languages spoken by very few of the citizens governed by those constitutions?

The linguistic gap between the constitution and the citizenry deepens the remoteness of the constitution, and may be a

contributory factor to the perceived irrelevance of the constitutional order in most African countries. It is extremely rare that African constitutions are translated into African languages (even if the official version of the constitution remained the original European one). Most indigenous languages are therefore poor in constitutional vocabulary - even such basic terms as "fundamental law," "Bill of Rights," "the right to privacy," "civil liberties," or "secular state."

U.S. citizens are constantly bombarded on their television with terms like "separation of church and state" and "the First Amendment." How many African indigenous languages can even translate such concepts? Here we have acute lingo-legal divergence, rather than convergence.

Africa is paying a higher price for Euro-constitutionalism than Africa realizes. The fact that African constitutions are almost exclusively in European languages has slowed down the development of a new constitutionalist culture in Africa. African citizens are not learning to think in constitutional terms, partly because they live in political systems which stifle the development of indigenous constitutional vocabulary. How many indigenous languages have words for "freedom of conscience" or "collective responsibility?" Do African citizens have the remotest idea of what their constitutional rights are supposed to be? This lingo-legal divergence has created a conceptual void in the intellectual universe of the average citizen.

There is a conspiracy of silence afoot among enemies of constitutionalism in Africa. The silence has taken the form of not translating the fundamental laws which are supposed to govern the lives of Africa's millions of citizens. The silence is politically and morally deadly.