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African Constitutionalism: Between Power, Persuasion, and Irrelevance?

Heinz Klug

JEREMY GOULD, *Postcolonial Legality: Law, Power and Politics in Zambia*. New York: Routledge, 2023.

INTRODUCTION

While focused on the history, politics, and law of one African country, Jeremy Gould's extraordinary exploration of postcolonial legality in Zambia provides insights into many of the core questions confronting constitutionalism across the African continent. If written constitutions are, as Linda Colley (2021, 9) has argued, "protean and volatile pieces of political technology" that spread across the world from the eighteenth century, what might the history of their making and remaking teach us about law and society in postcolonial Africa? Why, despite the quick overthrow of most independence constitutions across Africa, did constitution making become and remain a central focus of political engagements across the continent since the end of the Cold War? Even as political conflict has led to a new wave of coup d'états across the Sahel and constitutional orders have been challenged or violated to ensure particular leaders or groups maintain power, the assertion that "constitutions matter" is acknowledged by even the most skeptical African legal theorists, despite their critiques of the existing social orders (Sibanda 2011; Shivji 2020). Gould's ethnographically rich description of constitution making in Zambia gives us a specific, yet broadly applicable, understanding of why this is the case.

The question of constitutionalism in Africa was for a long time subsumed by debates over the nature of the postcolonial state and the legacies of colonialism (Ghai 1991). While the history and practice of constitutionalism across Africa and much of the postcolonial world cannot be separated from these legacies, constitution making and remaking in Africa has its own dynamics that have been increasingly addressed in the literature, providing perspectives and experiences that are informing constitutional debates beyond the continent. Whether it was Kenyan academic H.W.O. Okoth-Ogendo's (1991) questioning of "Constitutions without Constitutionalism"; Yash Ghai's

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insistence on popular participation in constitution making (Ghai and Galli 2006, 13–18); the inclusion of justiciable social and economic rights (Liebenberg 2010; K. Young 2012); debates over gender equality and customary law (Andrews 2012; Mnisi Weeks 2017); or concerns over the relationship between legal culture and transformative constitutionalism (Klare 1998), African constitutionalism is providing a dynamic landscape for intellectual engagement. Gould's method, both locally grounded and historically contextualized, highlights and gives us insights into the existing debates over the impact of colonial legacies as well as raising new questions about local agency and the tensions between inclusion and exclusion in constitutional engagements.

Based on his over forty years of working and doing academic research in Zambia, *Postcolonial Legality* provides a four-dimensional view of constitution making that together offers significant insights into constitutionalism, law, and power in the "postcolony." In one dimension, the book describes the constitutional history of this former British colony in the drama of its movement from its independence and First Republic, through the Second Republic of the one-party state, and on to the repeated constitutional struggles that have marked the making and remaking of the Third Republic. The second dimension is the book's focus on the roles of particular lawyers, social movements, and political leaders and their impacts on constitutional struggles and options that have characterized the emergence of constitutionalism in the Third Republic. A third dimension is the book's focus on "prerogativism," a label that Gould gives to the legacy of executive authority that characterized colonial rule in the British Empire and that is in inherent tension with notions of liberal constitutionalism. Finally, Gould explores the institutional structure of the most recent constitutional reforms, as well as the jurisprudence of the new constitutional court, in both questioning the limits of liberal legality and pointing to the possibility of a progressive post-liberalism, or transformative constitutionalism, that might go some way toward resolving the inherent contradictions of the existing constitutional order in Zambia and the postcolony more generally.

CONSTITUTION MAKING FROM THE COLONY TO THE POSTCOLONY

The impetus for constitution making in Africa in the late twentieth century was generated by the need for "good governance." The multilateral institutions, including the World Bank, argued that it was the failure of governance that explained Africa's lack of economic development (Ndulo 2001, 102). While the global political culture in the post-Cold War era stressed the need for constitutions to protect property and political rights (Klug 2000), Muna Ndulo (2001) stressed the need to recognize the legacies of colonialism and the need to build democratic cultures and institutions as part of constitution making in Africa. However, as Gould's study demonstrates, the simple adoption of liberal constitutions—which provided for multi-party democracies and formally protected individual rights to property and freedom—remained largely detached from most segments of Zambian society. This recalls Martin Chanock's (2010, 127) observation that constitution making in Africa has been top-down, resulting in "the writing of increasingly complex constitutions, with increasingly sophisticated

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institutions and rights guarantees, which have, as has been shown time and again, floated meaninglessly above the societies for which they have been designated, until the bubbles burst in outbreaks of violence." The ethnographic detail that Gould provides in *Postcolonial Legality* enables us to see how the combination of a very small community of elite lawyers and politicians, based in the capital city and a few other urban centers, have engaged in constitutional struggles rooted within the competition of power and control of the state, leaving the majority of Zambians on the sidelines.

Focusing predominantly on the debates and struggles over the constitutional form of Zambia's Third Republic, which was launched with the demise of the one-party state in 1991, Gould offers a "genealogy of postcolonial power" to contextualize the processes he observes. Considering the first, independence constitution, Gould notes that "the powers of the presidency that Zambia's first president Kenneth Kaunda assumed in 1964 were virtually identical to those of the colonial governor of Northern Rhodesia" (104). While the struggle for independence saw the mobilizing of popular protest to demand universal suffrage to defeat attempts to "inflate the electoral mandate of the settler constituency" (107–8), the nationalist movement negotiated the independence constitution with little participation of the *demos*.

Constitutional negotiations and drafting among the elite are, of course, not unique to Zambia or Africa. The US Constitution was drafted by slave owners and members of the small urban elite, but, while the US Constitution was ratified by state conventions with greater popular participation (Elkins, Ginsburg, and Blount 2008, 361–62), the republican constitutions adopted shortly after independence in Africa were drafted and ratified by legislatures dominated by the nationalist political parties that led the struggle for independence. It was only with the advent of a constituent assembly in South Africa and in the Kenyan constitutional review process that public participation was formally integrated into the constitution-making process.

Decolonization, Constitution Making, and the "People"

Even as constitution making in Africa evolved through different modes—from imposed colonial constitutions to negotiated independence constitutions, to post-coup constitutions overseen by the military and one-party state constitutions designed and adopted by the political parties in power, and even to the later post-Cold War multi-party constitutions—the common thread has been the dominance of political elites and exclusion of "the people." While some of the liberation parties have enduring popular support, most analysts of constitutionalism in postcolonial Africa see the continuing influence of an authoritarian colonial legacy and the common history of decolonization. It is what Crawford Young (2012) describes as "the code of decolonization," which has produced a focus on territoriality, representative institutions, universal suffrage, the centrality of political parties, and sovereignty. Sam Nolutshungu (1991, 92–93) describes a limited notion of constitutionalism that dominated the process of decolonization as focused on the transfer of power and the constitutional moment, while the idea of "constitutional function"—what the Constitution was supposed to do—was fragmentary and undeveloped. Extending his analysis of the bifurcated nature of the colonial state, Mahmood Mamdani (1996, 301) argues that the postcolonial state in

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Africa rests on a specific mode of rule based on a continued division between state and traditional authority and the interaction of a rural-urban division that is both geographic and institutional, producing a decentralized despotism in the colonial era and requiring for the project of democratization a transcendence of the "dualism of power around which the bifurcated state is organized." It is in this broader context that the mobilization of constitutional demands by civil society in Zambia can be understood.

Civil Society's Limits

As Gould demonstrates, even when civil society mobilized during the Third Republic in Zambia, the political elite retained control of the process of constitutional reform. While the 1991 Constitution was a "hastily assembled . . . [and] unsatisfactory compromise patched up under pressure to facilitate multiparty elections" (116), the new governments that followed resisted demands for a constituent assembly and, instead, appointed a series of constitutional review commissions to make proposals for constitutional change. Despite efforts by these commissions to increase public participation—whether in the case of the Mwanakatwe Constitutional Review Commission in Zambia (116–19) or the Constitution of Kenya Review Commission (2002), which was led by Yash Ghai—the politicians inevitably resisted attempts to limit their authority and, instead, either rejected the proposals or passed versions of the drafts that included provisions that protected those in power and ultimately lacked popular legitimacy.

Significantly, even when civil society managed to mobilize and block attempts by President Frederick Chiluba to change the Constitution to allow for a third presidential term, the social movement was still unable to have its preferred options adopted, especially provisions that would have limited executive authority or prerogativism more generally. Thus, while Gould shows how the Oasis Forum, an extraordinary coalition of civil society organizations comprising churches, the women's movement, and lawyers—in the form of the Lawyers Association of Zambia—came together to frustrate the political and constitutional goals of a series of elected presidents, they failed "to achieve a fundamentally new constitution in 1996, and again in 2016" (139). In part, Gould suggests that the Oasis Forum came to be dominated by lawyers and church leadership, while the women's movement, which had a popular constituency that it could mobilize, was only effective at demonstrating against political authority as opposed to being able to successfully entrench the needs and demands of its constituency in the Constitution.

CONSTITUTIONAL MOBILIZATION AND THE LIMITS OF LIBERAL CONSTITUTIONALISM

Despite this legacy of colonial prerogativism and the limits on popular participation in constitution making, political mobilization around constitutional claims has become a regular feature of African politics. Even as "the constituent power of the Zambian *demos* has remained a muted force" (260), the history of constitutional

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challenges in the Third Republic over several presidencies, which Gould describes, reveals the emergence of a vibrant culture of constitutional contestation. At the same time, Gould notes that the country has experienced "protracted political stability," which he believes can best be explained by the deep entrenchment "in Zambian politico-legal culture [of] the imperial form of power inherited at independence," such that its "radical overthrow falls outside the Zambian political imaginary" (267). While Gould points out that "there is no unitary or universally accepted consensus on what constitutionalism entails," he notes that his "findings suggest that Zambian elites believe that the constitution is a dike holding back a tsunami of chaos and confusion" (267). It is this tension—between a seemingly increasingly stable constitutional environment, on the one hand, and the concern that there is "something out there"—that reveals the limits of liberal constitutionalism (Gordimer 1984, 117–203).

Gould concludes that "a more just Zambia requires the radical remaking of the ways that political power is constituted" (275) and that a "fairer future demands the pursuit of popularly endorsed *ends*, rather than campaigns for more liberal *means*—not merely abstract demands for transparency and accountability, but concrete designs for redressing real and urgent grievances concerning livelihoods, health, education, poverty and the environment" (275; emphasis in the original). While he argues that such designs can only come from below, Gould seems to have chosen to forego any real focus on why the people from below remain excluded. While there is a sophisticated discussion of the relationship "between formal (state) law and informal (customary) law" (70) and an acknowledgment that the "fragmentation of empirical legality has immense consequences" (71), Gould does not pursue his conclusion that "[p]ostcolonial Zambia thus appears to be a land of two distinct and to some degree adversarial jurisdictions vying for the loyalty of overlapping sets of subjects" (73). Instead, Gould notes that the "Zambian constitution does not recognize any distinction between the legal entitlements of different groups of citizens" (73) while acknowledging that, although both constitutional review commissions that his study spans "visited all 150 electoral constituencies and received … untold thousands of submissions on the substance of constitutional law, … [t]hese efforts of the peoples on the margins of the state to contribute to constitution-making are … of little consequence" (74). It seems that the reason for not pursuing this important question is Gould's own methodological modesty, in that his ethnography was focused on the urban middle class and he was reluctant to make broader claims even as he acknowledged the inherent limits of both the formal law and his own focus.

While Gould prefers not to explore this bifurcation of postcolonial legality and its consequences for constitutionalism, he relies more for his analysis on the persistence of "prerogativism" to explain the limits of liberal constitutionalism. Finally, he turns to a discussion of the 2016 constitutional reforms and the potentially "transformative" jurisprudence that might emerge from the new Constitutional Court. Here, Gould focuses in part on a dissent by Justice Margaret Munalula in a case in which the Law Association of Zambia and a civic organization led by a former chairperson of the Oasis Forum challenged the government's pursuit of further constitutional reform in 2019 that would have reversed the few gains against "prerogativism" achieved in the 2016 constitutional reform—specifically, the requirement that the president be elected by fifty plus one members rather than a mere plurality of the vote. While Gould offers an

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excellent discussion of the debate over transformative constitutionalism and postliberal constitutionalism in South Africa, he nevertheless seems to lay his hopes for overcoming Zambia's constitutional stasis on the "[o]ngoing struggles within the Constitutional Court over the substance of constitutionalism," which he recognizes hinges "upon opposing views of the court's mandate" (259).

RECALIBRATING THE AFRICAN CONSTITUTIONAL IMAGINATION

While it is difficult to do justice to Gould's extraordinary ethnographic study of Zambian constitutionalism, it is a book that, in its scope and detailed exploration and understanding of constitutional developments in Zambia, makes a very important contribution to our broader understanding of constitutionalism in Africa. Despite my eagerness to see Gould engage more deeply with the implications of the urban-rural divide for constitutionalism in Zambia and beyond, the richness of his ethnography sets a high bar for those of us exploring struggles for a constitutionalism that will be responsive to the *demos* across Africa. Even as we embrace the "new hope" of a postliberal constitutionalism that Gould seems to sense in the willingness of "the Zambian peoples to hold their leaders accountable" (275), we must also recognize the need to bridge the gap between the promise of any form of constitutionalism and the majority of people in African societies who live under forms of governance that are in many cases barely incorporated within the nation's constitutional institutions. To achieve the "recalibration of the political imagination" that Gould recognizes is needed, the people and institutions that constitute political power and authority in Africa must be incorporated into what Berihun Gebeye (2021, 243) describes as a "legal syncretic paradigm" that might build on, and respond to, the different elements of the African constitutional matrix.

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