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CONFICTING CONCEPTIONS OF HUMAN RIGHTS: RETHINKING THE POST-COLONIAL STATE

By Dr. Makau wa Mutua*

I believe that we have come to a crossroads in history. We must now look with a fresh eye at the conceptual and structural arrangements under which we have hitherto lived. I believe this is particularly pertinent where Africa is concerned. I say this because I believe as most of you do, at least in your subconscious even if you have not come to accept it, that all of Africa is threatened with extinction.

There is little doubt today that Africa’s survival is seriously threatened by corrupt and inept political elites, unbridled militaries, ethnic rivalries and economic misery. The protracted problems of the post-colonial African state have raised anew the meaning of state legitimacy and brought forward disturbing questions about the concepts of sovereignty and statehood. The problems of the post-colonial state indicate that the juridical statehood attained with the decolonization of the colonial state has in the past four decades proven inadequate. It is becoming increasingly apparent that sovereignty and statehood are concepts that may have trapped Africa in a detrimental time capsule; they now seem to be straitjackets with time bombs ready to explode.

The imposition of the nation-state through colonization balkanized Africa into ahistorical units and forcibly yanked it into the Age of Europe, permanently disfiguring it. Unlike their European counterparts, African states and borders are distinctly artificial and are not the visible expression of historical struggles by local peoples to achieve political adjustment and balance. Colonization interrupted this historical and evolutionary process. Since then Africa has attempted, unsuccessfully, to live within the structural and conceptual confines of the post-colonial state; all too frequently the consequences have been disastrous.

The problems of the modern African state have been well rehearsed, with some analyses bordering on the apocalyptic. These have become chronic crises from which deliverance seems unlikely. As if to bear out the prophets of doom, the post-colonial state has collapsed in Liberia, Rwanda and Somalia. Others, such as Zaire, Nigeria, Sudan, Mozambique, Angola, Ethiopia and Kenya maintain a precarious balance on the political precipice. I argue that the post-colonial state, the uncritical successor of the colonial state, is doomed because it lacks basic moral and legal legitimacy. Its normative and territorial construction on the African colonial state, itself a legal and moral nullity, is the fundamental basis for its failure. I argue that at independence, the West decolonized the colonial state, not the African peoples subject to it. In other words, the right to self-determination was exercised not by victims of colonization, but by their victimizers, the elites and institutions that control the international state system. As such, dependence continued under the post-colonial state, the instrument of narrow elites and their international backers. I concede that, although other reasons such as external economic factors and cultural disorientation, have contributed to the crisis of the African state, they cannot be divorced from the crisis of internal legitimacy. I contend that foreign imposition of artificial states and their continued entrapment within the concepts of statehood and sovereignty are sure to occasion the extinction of Africa unless those sacred cows are set aside for now to disassemble African states and reconfigure them. I propose that pre-colonial entities within the post-colonial be allowed to exercise their right to self-determination. Only this radical but necessary step can legitimize the African state and avoid its demise.

Needless to say, my surgical suggestion, that of a new cartography, will doubtless be

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viewed without sympathy by a host of interested parties: elites who control the international state and financial systems; scholars stuck in traditional notions of international law; and states elsewhere—but nowhere is opposition bound to be steeper than within African states themselves and the ruling cliques who benefit from those states. Until Eritrea recently prosecuted a secessionist war against Ethiopia, prevailing state ideology in Africa treated as treasonable any discussion about border changes, separatists movements or ethnic self-determination within an independent African state. Ironically, it was African elites who sacralized the colonial state by ratifying its borders and forbidding even so much as idle speculation about the reconsideration of the issue. Even where European map-makers split one nation into two states, such as the Masai in Kenya and Tanzania, their fate was discussed as two separate and alien entities, although reality on the ground defied such fictitious separation. Even today, with overwhelming empirical evidence of the failure of the post-colonial state, African elites insist on clinging to this fictitious entity of European creation to the bitter end. Cases in point are the regimes of Siad Barre of Somalia, Samuel Doe of Liberia and Juvenal Habyarimana of Rwanda who, rather than permit independent political activity, defied popular demands, leading to the collapse of their states. A similar fate most likely awaits others: Daniel Arap Moi of Kenya, Mobutu Sese Seko of Zaire, Meles Zenawi of Ethiopia and many more.

There are several reasons for this resistance to an imagination of political life without the post-colonial state. The simple explanation is that alienated elites—who have more in common with and harbor aspirations of elites in industrialized countries than with their teeming masses of rural and urban poor—are loathe to give up their privileges, which come from the control of the state. Since the state as currently organized makes possible their privilege, it would be suicidal for them to participate in changing it, especially if thereafter their privileged positions were not secured. Even when the state is not effective—or on the brink of collapse—elites will still defend it. Arguments against dismantling the colonial state range from the chaos that would result from removing central authority to the balkanization of Africa into a million ethnic entities. While anticolonial fervor had a lot to do with pride in the post-colonial state, unless the sobering reality of its failure is appreciated and steps are taken to make a voluntary, consensual map, the partition of Africa into small inviable states is going to occur at great cost as pre-colonial entities free themselves from the wreckage of the failed state. That eventuality will come at a great cost to Africa; and it is not in the interest of the Continent. This is why I argue for an orderly re-creation of the state.

The views of those who imposed the colonial state on Africa are not dead. Some have even suggested that Europe should recolonize Africa—this reasoning assumes that it was a mistake to decolonize Africa. Such views do not recognize that Europe’s involvement in Africa has brought nothing but misery. Perhaps the withdrawal of the West from Africa, though detrimental to the colonial state, may provide an opportunity for Africans to squarely face their problems for the first time in several centuries. In that re-examination of the Continent, Africa would do well to abandon the principle of uti possidetis juris, the device that falsely linked the decolonization of the colonial state to the liberation of African peoples. It is a straight-jacket that continues to deny freedom to millions of Africans. While its rejection plunges Africa into an uncertain future, it ensures that creative thinking at least begins to boldly explore solutions to the crisis.

It would be irresponsible to assume that the direction proposed here could not lead Africa down a more treacherous path in which power mongers and cynical ethnic chauvinists would senselessly tear society apart in pursuit of self-aggrandizement. That possibility, which would be a real setback, does exist. However, it is far more damning to sit and wait for disaster to strike, precipitating the crises that have been witnessed in Somalia, Liberia and Rwanda. Thus, an orderly formulae for re-making the Continent’s political
map must be worked out soon, otherwise the post-colonial state, itself already a terrorist organization masquerading as the repository of popular will, will fragment into pieces and provide devious outsiders with more opportunities to literally pick Africa apart. Among the problems that will have to be addressed by Africans as they ponder this proposal are the criteria for determining the “self” who would possess the right to self-determination, and how the will of that “self” would be determined. This will be especially difficult because the colonial state substantially changed social relations and created new alliances and interests not in existence in the pre-colonial era. All these variables will have to be taken into account as new fora for expressing popular will, such as plebiscites and referenda, are explored as possible avenues for determining a new African political map.

It will not suffice to simply redraw Africa’s map. A human rights jurisprudence that resonates with the heart and soul of cultural Africa will have to be simultaneously attempted. The argument by current reformers that Africa needs only a liberal, democratic rule of law state to be freed from despotism is mistaken. The transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa. The sacralization of the individual and the supremacy of the jurisprudence of individual rights in organized political and social society is not a natural, trans-historical or universal phenomenon, applicable to all societies without regard to time and place. The ascendancy of the language of individual rights has a specific historical context in the Western world. The rise of the modern nation-state in Europe, its monopoly of violence and the instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive state.

The development of the state in Africa is so radically different from its European equivalent that the traditional liberal conception of the relationship between it and the individual is of limited utility in imagining a viable regime of human rights. The failure of the post-colonial state points to the continued inability of the “unnatural” and forced state to inspire loyalty and distinct national identities. This disconnection between the people and the modern African state is not merely a function of the loss of independence or self-governance over pre-colonial political and social structures and the radical imposition of new territorial boundaries with unfamiliar citizenry. It is above all a crisis of cultural and philosophical identity: the delegitimation of values, notions and philosophies about the individual, society, politics and nature developed over centuries. Severe as these problems are, I do not think that the crisis of the African state is insoluble. My purpose here is to imagine and reconfigure a rights regime that could achieve legitimacy in Africa, especially among the majority rural populace, and become the basis for social and political reconstruction. I regard the imposed colonial state, and its successor, the post-colonial state, as moral and legal nullities, entities whose salvation partially lies in new map-making in the context of self-determination for Africa’s many nationalities, democratization, and, critically, a historical reconnection with certain pre-colonization ideals.

I understand the current human rights movement to be only a piece of the whole. Its roots in the Western liberal tradition necessarily deny its completeness, although not the universality of many of its ideal and norms. To paraphrase a famous metaphor: the gourd is only partially full; it falls on other traditions to fill it. On this premise, I want to stress the existence of African notions of human rights prior to colonization, and how those notions differed from the contemporary Eurocentric articulation of human rights. I regard the Eurocentric approach to human rights as that of the insider, the ethnocentric universalist who rejects the existence of human rights norms in other cultures. However, African notions saw man, the social being, as the bearer of both rights and duties. This formulation should be the basis for the construction of a regime of rights that hopes to achieve legitimacy in Africa. I suggest a vision that strikes a balance between duties and rights, and that restraints the runaway individualism of the West, should be attempted, because it has
roots in the African Continent and may be Africa's last hope for reversing societal collapse. I do not deny the validity of the Western liberal tradition to the human rights movement. I only inform it with an African perspective, that of the twinning of duties and rights in a society consumed by the socialization of the individual, a concept articulated by the 1981 African Charter on Human and Peoples Rights.

This view is not relativist—it does not advance or advocate the concept of apartheid in human rights or the notion that each cultural tradition has generated its own distinctive and irreconcilable concept of human rights. This is the approach of the outsider who rejects universality. I proceed from the position that although cultural relativism in human rights as an anti-imperialist device is admirable, it is a misunderstanding inspired by cultural nationalism. What its proponents see as radically distinctive, irreconcilable traditions also possess ideals that are universal.

Most critiques of cultural relativism, on the other hand, are ethnocentric and symptomatic of the moral imperialism of the West. Both extremes serve only to detain the development of universal jurisprudence of human rights. In reality, the construction and definition of human rights ideals and norms are dynamic and continuous processes. Human rights are not the monopoly or the sole prerogative of any one culture or people, although claims to that end are not in short supply. In one culture, the individual may be venerated as the primary bearer of rights, while in another individual rights may be more harmonized with the corporate body. Rather than assert the primacy of one over the other, or argue that only one cultural expression and historical experience constitutes human rights, I prefer to see each experience as a contributor to the whole. The process of the construction of universal human rights is analogous to the proverbial description of the elephant by blind men: each, on the basis of his sense of feeling, offers a differing account. Put together, all the accounts paint a complete picture. As a dynamic process, the creation of a valid conception of human rights must be universal; that is, the cultures and traditions of the world must, in effect, compare notes, negotiate positions and come to agreement over what constitutes the corpus of rights characterized as human rights. This is the basket approach.

There is a clear and urgent need to confront the nature of the post-colonial state, demystify it and address the crisis of legitimacy pressing it. It is important to realize, as this process gets under way, that the alienation of the African state is not merely a function of the loss of sovereignty over pre-colonial structures and institutions; it is also a crisis of cultural and philosophical legitimacy. The two phenomena are inextricably linked. I believe the crisis in Africa can only be addressed through a dual but simultaneous process of norm re-examination and reformulation—to reconnect the Continent to many of the pre-colonial ideals of community and social organization as well as democratization—and new map-making. A human rights corpus that is rooted in the Continent's cultural and philosophical identity is indispensable to this exercise.

**African Women's Rights in the Context of Systemic Conflict**

*By Gwendolyn Mikell*

There is a new militancy and an urgency in African women's call for human rights and citizens' rights in the 1990s. The decade of 1985–1995 has ushered in a period of systemic conflict in African societies, which is evident in the economic crises and structural adjust-

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