Constitution and Constitutionalism in West Africa

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Introduction

In Africa, as in many parts of the world, the constitution of legitimate, juridically acceptable, and inclusive governance that functions in the overall interest of citizens remains a millenarian question. A robust discourse has centred on constitution and constitutionalism and efforts of administrations to formulate acceptable basic laws for their countries through series of national dialogues and constitution review processes. Some have argued the issue is not so much with the constitution, but with constitutionalism.

According to Robert Dahl, constitutions are nothing but the autobiographies of nations. Whilst they speak to settled governance systems by designing the constitutive rules, a foundational question remains as to why people acquire power, and what purpose constitutions serve or are meant to serve—that is to say, the rhetorical claims of constitutions do not often coincide with their real effects and impacts on citizens. Since the turn of the century, discourses on constitution and constitutionalism have been proliferating. In 2012, the Department of Political Affairs (DPA) of the African Union Commission (AUC) inaugurated an annual High-Level Dialogue on Governance and Democracy and, in its 2013 session of the dialogue, focused on “Enhancing Constitutional Order and Rule of Law in Africa.” The AUC expressed its commitment to building "developmental states based on strong institutions, framed by an inclusive constitutional order."

The clamour for constitution making and constitutional redesign has remained on the increase with the agitation for an end to authoritarian one-party rule and military rule since the late 1980s and the consequent convocation of national conferences in most African countries such as Benin, Chad, Congo, Niger, Togo and Zaire. In 2004, the need to amend the 1990 Benin constitution, a product of a well-publicised constitution-making process, remained on the agenda. In 2005, Nigeria, whose 1999 constitution was contentious, organised a national political conference that ended in a stalemate. Currently, the country is in the throes of yet another national conference saddled with the responsibility of addressing some of the issues agitating the minds of many citizens; these include the mode of control of extractive natural resources, as well as fiscal federalism and how powers should be decentralised amongst federating units. In Senegal, President Abdoulaye Wade initiated a constitutional reform process, and, more recently, his successor Macky Sall scrapped the upper house of the Senegalese Parliament to free financial resources for national development. In postwar Sierra Leone, an eighty-person committee has been formed under the leadership of President Ernest Bai Koroma to review the country’s 1991 constitution. Its purpose is to enable the country to fit into “the new contemporary political paradigm” with such liberal values as

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2 See AGI Newsletter, No. 44, November 2013, 1
3 Ibid.
supremacy of the constitution, the rule of law, respect for human rights, separation of powers, checks and balances, independence of the judiciary, judicial review, equality before the law, civilian oversight/subordination of the military to civilian authority, and free and fair elections.4

State-led efforts combined with civil society processes in ways that further accentuated the importance of constitution making on the continent and in the region. In Nigeria, both the United Action for Democracy (UAD) and Pro-National Conference (PRONACO) produced model constitutions for the country;5 so did the Citizens Forum for Constitutional Reforms (CFCR). Indeed, at least four different model constitutions were designed by various civil society and popular groups in Nigeria. In Sierra Leone, Citizens for Constitutional Change (CCC), a coalition of civil society organisations, was in the forefront of pushing for that country’s constitution review process, and in Zaire, “street parliamentarians” led the clamour for a national conference under President Mobutu Sese Seko.

In short, the desire for inclusive and people-centred constitutional review in Africa was driven by popular forces. But the ancien régime and pro-statist forces often found ways to scuttle genuine attempts at making a pro-citizen constitution that was inclusive, less technical and more easily comprehensible, and containing justiciable clauses in defence of second-generation economic and social rights. The point is that generalised disaffection with authoritarian rule led to open agitation for the involvement of more people in politics, for rights and freedoms, and for economic empowerment. In this respect, the clamour was both for second independence and the political rights that first independence from colonial rule denied the people. It is precisely for this reason that the struggle for second independence in Africa should not be seen in purely economic or material terms, as scholars like Nzongola-Ntalaja are wont to see it, because at the dawn of independence the people were denied basic rights and freedoms in the myth of classlessness in Africa, the self-serving ideology of nation building and the so-called consensual nature of African culture.

Amidst these developments, state-led militarism and coups d’état have remained a recurring decimal in Africa. Between 2000 and 2012, the military seized state power in Guinea Conakry, Mali, Guinea Bissau, Sao Tome and Principe, and Niger Republic. To be sure, both the Economic Community of West African States (ECOWAS) and the African Union (AU) have criminalised military coups and unconstitutional changes of government. The ECOWAS Supplementary Protocol on Democracy and Good Governance (2001) is quite explicit about this, and it is contained in various AU instruments euphemistically referred to as the African Governance Architecture (AGA).

In this paper, we examine the crisis of constitution and constitutionalism in West Africa. In so doing, we highlight recent dynamics in constitution making and constitutional rule and their

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5 See, for example, Draft Constitution for Federal Republic of Nigeria Proposed by the Peoples’ National Conference (PRONACO), August 2006.
implications for constitutionalism and democratic development in the region. We begin by conceptualizing constitution and constitutionalism and examining their concrete manifestations—both positive and negative—in the West African region. We next discuss the character of the post-colonial state and its impact on the crisis of governance and constitutionalism and examine the ripple effects and demagogical backlash in terms of popular resistance and struggle for democracy. We then look at constitution and political behaviour with regard to group rights and popular participation and exclusion and the complex and intriguing intervention of the military on the side of so-called “constitution legality.” We conclude by reflecting on the future of constitutionalism in the region.

**Constitution and Constitutionalism**

We commence our discussion of constitution and constitutionalism by treating the former as an inevitable platform for testing the latter. Even as we seek to conceptualise rather than define the constitution, we need to acknowledge that, quite understandably, the term is steeped in conceptual diversity. Beyond viewing the constitution as a set of rules governing any entity, we approach it as a major tool of the state—part of what Louis Althusser refers to as the ideological state apparatuses (ISAs). As Mahmood Mamdani has rightly noted, legal identities often juridically define our status as citizens, and this has implications for defining political identities. K. C. Wheare sees constitution as “the whole system of government of a country, the collection of rules which establish and regulate or govern the government.” Similarly, Nkem Onyekpe conceptualizes it as “the embodiment of the basic or fundamental laws that operate in the political administration and government of a state.” This viewpoint is reinforced by P. H. Merkl, who sees it as the organic law of the state, transcendent in its reach. However, to Thomas Paine, the famous author of The Rights of Man,

> a constitution is not the act of a government but of a people constituting a government and a government without a constitution is power without right . . .
> A constitution is a thing antecedent to a government, and a government is only the creature of a constitution.

The foregoing conceptualisations may look unproblematic, as they assume constitutions are without vested interests, or that they seek to serve the interest of “all citizens” and presuppose all are truly equal. At the outset, however, the United States Constitution did not recognise the rights of black slaves, and many constitutions, including those of the United States and the United Kingdom until the second quarter of the twentieth century, did not recognise the right of women to vote.

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9 Cited in ibid. 2.
10 Quoted in Barnett, Constitutional and Administrative Law, 8
Two points to take away here are that a constitution guarantees formal rights and equity, and not functioning rights and equality. People all over the world have often waged struggles to obtain the latter. Thus, we invoke V. I. Lenin’s conception of the constitution as the expression of the actual relation of force in the class struggle.”¹¹ This informs the view of a constitution as “a social construct in a socio-historical context in which there is organic unity between the letter and spirit.”¹² Such a definition envisages the triumph of the views and aspirations of the toiling people, the subalterns, and the de-classed. The key point here is that a difference often exists between the letter and spirit of a constitution, and hence the crisis of constitutionalism.

Constitutionalism also has been variously conceptualised by scholars in the legal profession and academia. For a legalistic viewpoint, we turn to Louis Henkin, who sees constitutionalism as the rule of the constitution in conformity with its letters; it is the rule of law, he writes,

> recognised as dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish social, economic, cultural and educational conditions under which his legitimate aspirations and dignity may be realised.¹³

Onyekpe falls into the legalistic loop by conceiving constitutionalism merely through the prism of the principles of government, deviation from which becomes arbitrary or ultra vires.¹⁴ Hilaire Barnett, however, goes beyond the legal parameters to elucidate on constitutionalism as

> the doctrine which governs the legitimacy of government actions. By constitutionalism is meant—in relation to constitutions written and unwritten—conformity with the broad philosophical values within a state. Constitutionalism implies something far more important than the idea of “legality” which requires official conduct to be in accordance with pre-fixed legal rules. A power may be exercised on legal authority; however, the fact is not necessarily determinative of whether or not the action was “constitutional.”¹⁵

He goes further to suggest four elements of constitutionalism, thus:

a) The exercise of power [must] be within the legal limits conferred by Parliament on those with power—the concept of *intra vires*—and . . . those who exercise power [must be] accountable to law;

b) the exercise of power—irrespective of legal authority—must conform to the notion of respect for individual and individual citizen's rights;

c) the powers conferred on institutions within a state—whether legislative, executive or judicial—[must] be sufficiently dispersed between the various institutions so as to avoid the abuse of power; and

d) . . . the government, in formulating policy, and the legislature, in legitimating that policy, [must be] accountable to the electorate on whose trust power is held.¹⁶

The merit in Barnett's typology is his emphasis on accountability to the electorate, the repository of the sovereign will, which affirms the Painean conception of the constitution not as an "act of a government but of a people constituting a government."¹⁷ An overstretch of this view, as implied in the Painean conception, is that constitutionalism is a process and a lived experience; it is contextual and historical. The procedural nature of constitution-making is best captured by Julius Ihonvbere and Issa G. Shivji, who are both advocates of the "process-led" and "democratic perspective to constitution-making."

In his search for a global framework for legitimate public power systems, Larry Cata Backer provides illuminating insight into the notion of constitutionalism by making a distinction between what he calls conventional and transnational constitutionalism. The former "situates the source of its value in the transcendent genius of the people of the nation itself,"¹⁸ while the latter "situates those legitimating substantive values in their expression by consensus of the community of nations."¹⁹ Backer does this by acknowledging constitutionalism's provenance in "a system of taxonomy and legitimation that is grounded in a set of normative assumptions about the meaning and purpose of government"²⁰ A discourse of constitutionalism in the context in which the debate is conducted today is inadvertently rooted in the transnational values emanating from different cultures, especially the Western liberal tradition mainstreamed by promoters of liberal individualism and universalism.

It is important to acknowledge still, as does Backer, that "the normative presumptions on which the state is organized—nationalist, transnational, natural law, theocratic or Marxist-Leninist presumptions—the last element of the definition of constitutionalism, tend to sharply divide governance systems."²¹ It is in this sense that constitutionalism becomes a legitimating, evaluative, and affective scaffold for visualising constitutions and for answering to dynamics of constitutional expression rather than an approximation of governmental form.²²

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¹⁶ Ibid. 6.
¹⁷ Cited in Ibid. 8.
¹⁹ Ibid.
²⁰ Ibid.
²¹ Ibid., 111.
²² Ibid., 112.
Therefore, whatever its eventual outcome, whether as a caricature of liberal constitutionalism or something innovative, constitutionalism in the West African region was and is still a response to the dynamics of constitutional expression; hence, the relevance in its being a process-led exercise.

Thus, for Ihonvbere, constitutionalism is a process for developing, presenting and utilizing a political compact that defines not only the power relations between political communities and constituencies, but also defines the rights, duties, and obligations of citizens in any society. Essentially, the focus of what we mean by constitutionalism is on two issues: first, the process of constitution-making and the extent to which it is popular and democratic; and second, the available openings, institutions, and processes of making the constitution a living document by taking it to the people so that they are in a position to not just have access to it, but that they understand it, claim ownership and deploy it in the defense of their individual and collective rights and the democratic enterprise.23

This democratic perspective/new concept of constitutionalism finds anchor in an accountable/responsive state and collective rights/freedom. The proposed concept is structured around four major foundations which, using the discourse of rights, may be described as “right of peoples and nations to self-determination”; “right to democratic self-governance”; “right to organize” and “right to the integrity of the person.” All these four rights, as a matter of fact, composite names of several other traditionally recognizable rights, whether in liberal democratic or “socialist” constitutions. What is new in our proposition therefore is not so much an invention of new rights as such but rather [1] attributing a broader and deeper meaning to them based specifically on the historical experience of Africa, [2] seeing them as integral rather than hierarchical, and [3] recognizing both their programmatic [or ideological] as well as normative [or regulatory] value.24

The above perspectives, namely, process-led and democratic perspective, underpin our analysis in this study.

**Background to Constitutionalism in West Africa**

The colonial political economy constitutes a veritable context for understanding the travails of constitutionalism in Africa and, in particular, West Africa. The colonial state on the continent

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served the colonizing powers' goal of accumulation by exploiting and expropriating resources to the metropole. The continent was colonised in the main by some of the actors in the Berlin Conference of 1884–85, namely, France, Britain, Belgium, Portugal, and Germany. These powers developed the bureaucratic apparatuses ramified in the colonial state, which was meant to serve colonial interests.

Inevitably, the colonial state was violent, repressive, and totalising in terms of controlling human and material resources. Neither devolution of power nor elements of liberal constitutionalism were in place. But there was decentralisation of power in the form of “decentralised despotism,” which created a bifurcated state governed by civil and customary law. At decolonisation, the colonial powers sought to bequeath to the colonies the full paraphernalia of liberal constitutionalism that had been elusive under the colonial dispensation. As Okoth-Ogendo has rightly noted in the case of English-speaking Africa, the power map was based on a severely modified version of the Westminster model; complete, nonetheless with bicameral legislatures, separation of powers, judicial review of legislative and executive actions and a bill of rights distilled from Magna Carta of June 15, 1215. In the case of French-speaking Africa, that map was based on the principle of constitutional tripartism as developed in the 18th century by Montesquieu, and accompanied as usual, with a declaration affirming or incorporating the provisions of the French Declaration of the Rights of Man and the Citizen of 1789.

The new liberal constitutions were at variance with the structure and relations of the colonial state and the prevalent objective conditions. This is what Claude Ake means when he notes that, although political independence brought some changes to the composition of the state managers, the character of the state remained much as it was in the colonial era, it continued to be totalistic in scope, constituting a statist economy. It presented itself as an apparatus of violence, had a narrow social base, and relied for compliance on coercion rather than authority.

The coercive character of the colonial state, with its denial of the rights of the subjects or natives, marked colonial constitution-making exercises as highly dominating, racist, elitist, alienating, and discriminatory. The colonial state had absolute powers, maintained and legitimated by force. Beyond its totalistic scope, Ihonvbere adds, “The post-colonial state was privatized and used only as an instrument for rapid primitive accumulation and its instruments

25 Mahmood Mamdani, “Citizen and Subject: Contemporary Africa and the Legacy of late Colonialism”.
of coercion deployed to settle private disagreements and control of power by political despots.”

The reduction of politics to warfare by the post-colonial state elite, of course made inevitable, partly explains the incursion of the military into politics.

Meanwhile, liberal constitutionalism had inherent divisive elements and multipartyism was its institutional expression. Apart from running counter to the perceived goal of unity and the development of the new nations, this produced factionalism and accentuated identity politics by the neo-colonial elite. The consequence was the emergence of those whom Ihonvbere has referred to as “self-styled ‘Teachers’, ‘Lions’, ‘Rainmakers’, ‘Fathers’ and ‘Killers of Elephant, ‘Warriors’ and ‘visionaries’.”

Indeed, power came to be centred on the chief executive, who exhibited what Okoth-Ogendo calls the four pathologies: the supremacy of the office of the president; immunity from the legal process; indefinite tenure; and paranoia, underlined by the frequent turnover of public officials. These more or less characterised the nature of arbitrary rule in Africa for over three decades.

The consequence was the alienation of the people, who came to perceive the state as a foe, a might to be shunned, loathed, assailed, and sabotaged as opportunity allowed. In the main, the constitution became instrumentalist—that is, to be used for maximizing power. The rule of law was undermined; so was the Grundnorm, which ought to guide the exercise of state power. This fact of the post-colonial political situation was a general political pathology in the West African region, and Guinea Conakry under Sekou Toure typified it. Lansine Kaba aptly describes it.

The party’s supremacy over the government, the judicial system, the bureaucracy, National Assembly, and all other aspects of the life of the country was beyond question. Its sovereignty implied the supremacy of its general secretary, who was jointly the head of the government and of the state. Toure thus became the embodiment of the nation, the ultimate law-giver and interpreter, who symbolized the people and the state. All national and regional officials were his appointees, and no one, including the judges, could make a major decision without consulting him. Private law practice was abolished in the name of people’s justice. In practice, Toure’s opinion prevailed over the constitution and the rule of law.

The subordination of the basic law and the process of constitution making inflicted an atrophy, if not an amnesia, on academia; issues of constitutionalism were not discussed, even in the vortex of conversation around power politics that came to dominate the political environment. Meanwhile, poor governance produced and reproduced poverty and denial of rights and basic freedoms of the people. This amnesia or atrophy was only

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29 Ibid., 5.
partly corrected by the application of the Organization of African Unity’s “African Charter on Human and Peoples Rights.”

The Military and Constitutionalism

As Ake notes quite incisively, “It was not the military that caused military rule in Africa by intervening in politics, rather, it was the character of politics that engendered military rule by degenerating into warfare, inevitably propelling the specialists of warfare to the lead role.”

This was anticlimactic for many an African for whom independence had held great promise, which General Jimmi Wangome aptly captures:

With the advent of independence in the late 50’s and early 60’s euphoria and new hopes swept through Africa as nation after nation attained self-government. There were new dreams and expectations as the colonial masters packed their bags and handed over the instruments of power to the indigenous peoples. To most Africans this was the end of a long freedom struggle in which so many had suffered. It was the end of slavery, human degradation and exploitation. However, these dreams were soon shattered as government after government fell victim to the coup d’état across the continent. The new military rulers accused the civilian government of everything from corruption and incompetence to mismanagement of the national economy.

To be sure, the privatisation of the state, accentuation of identity politics, and, above all, the abnegation of the normative foundation of the state led to an efflorescence of coups d’état in the region and elsewhere on the continent. In Congo-Kinshasa, in 1960, General Mobutu seized power; in Togo, January 1963, Colonel Gnassingbe Eyadema deposed President Sylvanus Olympio; in Congo-Brazzaville, August 1963, the government of Abbe Youlou was overthrown; in Dahomey (now Republic of Benin), December 1963, Colonel Sogho overthrew President Maga; in Algeria, June 1965, Colonel Boumedienne overthrew President Ahmed Ben Bella; in Burundi, October 1965, the monarchy was overthrown by army officers. In Central Africa Republic, January 1966, President David Dacko was ousted by Colonel Jean-Bedel Bokassa; in Upper Volta, January 1966, Colonel Lamizana deposed President Yamego; and in Nigeria, January 1966, the government of Prime Minister Tafawa Balewa was overthrown by young officers. Similarly, in Ghana, February 1966, President Kwame Nkrumah was overthrown by the military, led by General Ankrah. In Sierra Leone, March 1967, President Milton Margai was deposed by Lieutenant Colonel Juxon-Smith; in Mali, November 1968, Lieutenant Moussa Traore overthrew the government of President Modibo Keita. In Libya, September 1969, the monarchy was deposed by Colonel Muammar Gaddafi; and Somalia, too, had a coup in October 1969.

The military has http://leadership.ng/news/391518/inec-promises-deploy-air-force-navy-2015-election accounted for its adventure in politics in various ways. The putschists in Nigeria stated amongst others that they intervened in politics to put down enemies of the country who were

the political profiteers, the swindlers, the men in high and low places that seek bribes and demand ten percent; those that seek to keep the country divided permanently so that they can remain in office as ministers or VIPs at least, the tribalists, the nepotists, those that make the country look big for nothing before international circles; those that have corrupted society and put the Nigerian political calendar back by their words and deeds.35

Once the military took over the reins of power on the continent and, in particular, the region, it somewhat reified succession by means of force and consequently opened the floodgate of coups and countercoups—a relay the Afro-beat king, Fela Anikulapo-Kuti, has aptly dubbed, “soldier go, soldier come.” But the pertinent question is, how did the military rule? What were the normative foundations for its rule?

Some analysts36 have sought to differentiate between constitutionalism and constitutionality. The former refers to the rule of law and the latter being rule by edicts and decrees, usually employed by the military. Once the military takes over power, the first casualty is usually the constitution. Upon usurpation of state powers, constitutionalism is dealt a mortal blow by the suspension and modification of the constitution, which completely undermines the parliament and, to a large extent, the judiciary by the means of ouster clauses engrossed in decrees and edicts. So, in Africa, military “intervention” in politics has often meant the invalidation of the legitimate constitution of the state and its replacement by a new legal order far from the legitimizing principles embodied in constitutionalism.37 For example, in Nigeria, the clauses of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13 of 1984 were deeply deleterious to the notion of constitutionalism. It states, amongst other things the following:

WHEREAS by section 5 of the said Constitution (Suspension and Modification) Decree 1984 no question as to the validity of any Decree or an edict (state Governments) . . . shall be entertained by any Court of Law in Nigeria . . . And


36 See, for example, Abiola Ojo, Constitutional Law and Military Rule in Nigeria (Ibadan, Nigeria: Evans Brothers Limited, 1987).

37 Ibid., 65
WHEREAS . . . a Decree shall prevail over those of the unsuspected provisions of the said Constitution (preamble).

i) no civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if any such proceedings are instituted before, on or after commencement of this Decree the proceedings shall abate, be discharged and made void;

ii) the question whether any provision of chapter IV of the Constitution has been, is being, or would be contravened by anything done or proposed to be done in pursuance of any Decree or an edict shall not be inquired into in any court of law and, accordingly, no provision of the Constitution shall apply in respect of any such question.  

In Guinea Conakry, the rule of Lasana Conte was characterised by the absence of parliament, constitution, or administrative safeguard against authoritarian exertion of the military junta. In the main, the junta ruled by ordinances and decrees that were anathema to the principles of constitutionalism.

In Benin, against a background of several years of instability exemplified by by coups and countercoups, President Mathieu Kerekou seized power in 1972 and ran an authoritarian government on the basis of the African brand of Marxism-Leninism known as African socialism in the context of the Cold War. His administration established the Benin People’s Revolutionary Party (PRPB), which was the only recognized or legal political party of the state. The administration was underlined by a National Revolutionary Assembly that was elected by citizens and, in turn, chose the president, who was the head of state.

As the Nigerian and the Guinean experiences quite illustrate, power under military rule resides in the supreme military council and nowhere else. Ojo was quite right to conclude in the discourse on “splitting the Grundnorm” that, under a military rule, “the Supreme Military Council is the source of its own legal order. Any search for a Grundnorm away from the Supreme Military Council or the expression of its powers as declared in decrees is a futile judicial and academic exercise.”

By contrast, the Beninois experience indicates the paradox of constitutionalism under military rule. The military stages a coup against the state and its ethical foundation and yet requires elements of that ethical order to run the state. There is a resort to some quasi-constitutional order is dictated by the quest for legitimacy central to the regime’s continuity in power. In Nigeria,

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39 Kaba, “Constitutionalism in Guinea under the Military,” 214
40 Ibid., 110.
Despite the absolutist and dictatorial essence of its rule, the military did not completely jettison the constitution it overthrew, which it came to rely on for the maintenance of law and order in the state. When General J. T. U Aguiyi Ironsi took over the reins of power in the aftermath of the January 15, 1966, coup, the regime deployed some sections of the republican constitution in place; for instance, chapter 4, which covered fundamental human rights as well as the independence of the judiciary, was not suspended.41

Despite an obvious desire to hold tenaciously onto power, the military, upon seizure of apparatuses of the state, has always perceived the takeover of government as an interregnum, for two reasons. First is that dabbling in state governance undermines its professionalism in the science of warfare and its oath to defend the territorial integrity of the state. Second, the praetorian basis of intervention does not envisage a long durée of restoring law and order, but sees it as a stopgap measure. This sometimes explains the brevity of tenure and inclination towards a raft of transition programmes aimed at restoring a liberal constitutional order. Adverting to the Ghanaian 1969 constitution promulgated by the military, Eboe Hutchful notes that the military “sought to entrench civil rights and political freedoms, a multi-party system, the separation of powers, and a strong judiciary, primarily with the intention of hobbling the executive power.”42

Even amidst such self-transmutation projects by military rulers in the region, however, getting the military out of the political arena in some cases took the form of popular struggles and resistance. In the next section, we examine the return to constitutionalism mainly in the context of what Samuel Huntington and Crawford Young have identified as Africa’s “third wave of democratization,”43 a trend that began in the late 1980s in the Republic of Benin and has yet to witness any major reversal.

Popular Struggles and Democratisation

Scholars44 have variously accounted for several factors that drove the so-called re-democratisation project in Africa and elsewhere in the developing world under Huntington’s third wave,45 ranging from the economic, political, and social to external dynamics. Various

45 See Samuel Huntington, The Third Wave of Democratisation in the Late Twentieth Century (Norman, OK: University of Oklahoma Press, 1991). In this work, Huntington locates the beginning of third wave in 1974 when
hues of dictatorship proliferated on the continent and the capture of the state by African rulers through the primitive accumulation of resources undermined the economic base of society and depreciated the resources for clientelism, the surviving logic of despots. Indeed, most of Africa languished under debt overhang and economic adjustment policies. Rather than turn around the economic fortune of African countries, the policies aggravated the accumulation appetite of the local bourgeoisie and their foreign partners. This, of course, triggered agitations and protests on the continent. To be sure, these internal realities, in conjunction with global events typified by the collapse of Berlin Wall in November 1989 created new objectives conditions. Liberal triumphalism spawned liberal conditionalities—economic and political.

In June 1990, in his speech at the La Baule Franco-African summit, President François Mitterrand of France served the guests a democracy menu:

Of course we must speak of democracy... You should not consider freedom to be a hidden enemy. It will be, believe me, your best friend... France will link its entire contribution effort to efforts made to move in the direction of greater freedom.... Aid will be more lukewarm toward regimes which conduct themselves in an authoritarian manner without accepting evolution toward democracy; it will be enthusiastic for those which take the step with courage.\(^46\)

Mitterand's declaration that support for France's African allies would be tied to political liberalisation had a dual effect on his audience: the repressed population in the former French colonies saw it as unqualified support for regime change, and the sitting administration read it as a window for stabilisation and re-legitimation, the ulterior motive of the French president. As Dieter Sepp has observed,

It is by now agreed that the famous Sovereign National Conference of Benin was not at all intended by the French government, which merely tried to manage the political and economic crisis of Benin in a way that would allow the Beninois president Kérékou to stay in power.\(^47\)

As a consequence, however, the lid on political agitation which had been broken in the Republic of Benin and set in motion a national conference- a process for redrawing the social contract could not be revised. It led to the institution of a transitional government and the conduct of democratic multiparty elections in which Necephore Soglo, a former World Bank technocrat, came to power.\(^48\)
The Benin example had a domino effect across francophone and anglophone Africa. In Togo, Benin’s western neighbour, protest largely spearheaded by students amidst massive repression by President Eyadema’s administration helped bring about the inauguration of a national conference, which, as in Benin, produced a transitional government headed by a prime minister. The ensuing presidential election was won by Eyadema amidst claims of vote rigging and was followed by parliamentary elections in February 1994.

In Niger, protests by students and deleterious economic policy forced the authorities to democratise by means of a national conference, which stripped political power from the Seibu regime. The constitutional outcome was the institution of a semi-presidential system. In Mali, societal pressures engendered a military coup in March 1991, with the consequent removal of the government of Moussa Traore and the establishment of a Transitional Committee for the Salvation of the People (CTSP), which commenced dialogue process that led to general elections.

In much of this period, the francophone countries of Senegal and Côte D’Ivoire were unaffected by the national conference virus; in the former, a dominant-party system flourished, and in the latter, one-party dictatorship thrived under Félix Houphouet Boigny, who admitted “the train of democracy had stopped somewhere” due to the subversion of the country’s constitution under his leadership. Interestingly, President Léopold Sédar Senghor of Senegal had instituted multiparty democracy in 1974 after the repression and cooptation of opposition forces in the immediate post-independence period.

In Nigeria, the prodemocracy forces organized under the Campaign for Democracy (CD) had begun a series of protests and acts of resistance against military dictatorship and sought the convocation of a sovereign national conference (SNC) to resolve the issues of democratic politics and resource control and the volatile national question, especially the end to military rule and the question of the federal structure. The CD’s attempt to convene the SNC in Lagos 1992 was stopped by the military administration of General Babangida, but its continued pressure led to the imposition of two-partyism and parliamentary and presidential elections in 1991 and 1993, respectively. The presidential election was presumed to have been won by Chief M. K. O. Abiola, although it was annulled by the military. This led to renewed authoritarian rule in the country and the abolition of democratic institutions, but as protests persisted, the new military rulers sought to begin afresh a transition to a democracy programme. It convened a national constitutional conference (NCC), heavily teleguided by the Abacha administration, and drew up a new constitution for the country while simultaneously working for a self-transmutation agenda. In May 1999, sustained agitation by the prodemocracy forces again led to the exit of the military and the consequent institution of a multiparty system under civil rule.

In Ghana, the Jerry Rawlings administration ran a “revolutionary” government under the toga of the Provisional National Defence Council and imposed on the civil society what the regime admitted was a “culture of silence.” Serious economic crisis and the consequent adoption of an economic reconstruction programme as the exit option by the Rawlings regime drove the regime into the democratisation circuit. Economic assistance from the Bretton Woods Institutions (BWIs) came with the condition of political liberalisation. Consequently, the Rawlings administration, which was showcased and celebrated by the BWIs as a success story of Structural Adjustment Policies SAP, embraced democratisation under a multiparty transition process, and Rawlings emerged as a democratically elected president in 1992.\(^\text{51}\)

The process leading to national conferences that were meant to redraw the social contracts of the respective countries was, then, similarly goaded in them by internal and external forces. The consequential issues for the various polities were deepening economic misery and disempowerment, especially with political repression, the romanticisation of the informal sector as the catalyst of Africa's development, and the alienation of the populace from the process of governance. Whereas this commonly opened up the political process through liberal democratic institutions of governance, however—such as multiparty democracy, periodic elections, and a free press—dialogue mechanisms did not produce uniform outcomes across board.\(^\text{52}\) Some resulted in peaceful elections; others floundered. Truly, in practice, the “democratic governments” were largely choiceless\(^\text{53}\) and hemmed into Thomas Carothers’s grey zone of democratisation that is neither democratic nor wholly authoritarian.\(^\text{54}\)

**Constitution versus Political Behaviour**

Constitutionalism is a dynamic process that continues to absorb new objective realities in a society. Since the renewed march towards so-called democratisation of many polities in West Africa since the early 1990s, they have equally undergone turbulent political crisis, resulting in ruptures of the existing legal order. Unlike in the past, when coups d’etat had often led to prolonged military rule, more recently some coups have been staged to protect the constitutional order against ambitious state actors desirous of prolonging their tenure in power. Importantly, a broad international regime frowns on forceful seizure of power other than by constitutional means. The African Union (AU) and the Economic Community of West African States (ECOWAS) have acted in ways that have ensured prompt return to constitutional rule.

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This may appear as an affirmation of Finer’s dictum that a constitution can serve as a moderating force shaping the political process and the behaviour of actors within it. While unlawful takeover of government previously undermined constitutionalism with an explicit disdain for the constitution—as mentioned, coups are now ostensibly staged to restore constitutional order, while those without such intentions are made to toll the line by the threats of sanctions from the regional organisation and the broader international community. To illustrate this dynamic development in the region, we look now at the political reversals and the coups in Sao Tome and Principe, Nigeria, Guinea Conakry, Niger, Mali, and Guinea Bissau.

On July 16, 2003, in the West African island of Sao Tome and Principe, soldiers led by Major Fernando Pereira overthrew the democratic government of President Fradique de Menezes, who was visiting Nigeria at the time of the coup. The coup leaders said they seized power in frustration at the continued impoverishment of the population and corrupt enrichment by senior government officials of government. Constitutional order was immediately restored on account of international mediation, with guaranteed amnesty for the coup leaders and the formation of a new government.

In an ironic twist, Nigeria, which had played a significant role in the restoration of democracy in Sao Tome and Principe, was itself caught in an orchestrated constitutional crisis. The incumbent president Olusegun Obasanjo, whose tenure would constitutionally end in 2007, had in 2005 begun manoeuvres towards tenure elongation in contravention of the provisions of the 1999 constitution, whose section 137 (1) (b) states that “a person shall not be qualified for election into the office of president if he has been elected to such office at any two previous elections.” Enamored of the prospect of a third term in office, President Obasanjo brought all stratagems to bear on amending the constitution to accommodate it. On May 16, 2006, however, the National Assembly, with the support of civil society in a groundswell of hostile public opinion, defeated the amendment motion. President Obasanjo’s view of the defeat of his bid for tenure elongation is instructive for constitutionalism. In his words,

The National Assembly as the constitutional and legitimate body for making laws for this country including the supreme law of the land—the Constitution—has just concluded as it deemed fit, especially the Senate, the exercise on the amendment to the Constitution of the Federal Republic of Nigeria. The outcome is victory for democracy . . . At this juncture, I want to reiterate that as Leader of this great Party, I will continue to defend the Constitution and protect democracy. My track record speaks for itself in this regard and having been a victim of a ruthless undemocratic regime, I cannot be anything but a guardian of

57 See the 1999 constitution of the Federal Republic of Nigeria.
democracy. Under no excuse or guise should democracy and its practice be supplanted with any substitution whatsoever.58

A coup in Guinea Conakry compounded the regional dilemma. Following the death of President Lasana Conté on December 23, 2008, the military struck to prevent a constitutional succession, citing as the basis for the takeover poverty, hopelessness, and the inability of existing institutions of state to solve the problems. The junta organized under the National Council for Democracy and Development (CNDD) promised credible and transparent presidential elections. The coup was, however, condemned by the AU as “a flagrant violation of the constitution and African legality which outlaws unlawful takeover of government.”59 The constitutional course for Guinea allowed sixty days for elections to fill the power vacuum, with the president of the National Assembly assuming the presidency in the interim. Intriguingly, the new junta donned the label of democracy, indicating an uncertain inclination toward democracy. The regime did hand over power to a democratically elected president, Alpha Conde, a year later.

While an elected parliament defended the constitutional order in Nigeria, it was the soldiers who did so in Niger, where President Mamaodou Tandja sought also to prolong his tenure in 2009, citing unfinished projects and the wish of the people as the rationale for his bid. Tandja dissolved the National Assembly in May 2009 and subsequently appointed a new constitutional court and conducted a constitutional referendum in August 2009 that extended his mandate for an additional three years. The new constitution also increased his power by adopting a presidential system of government while jettisoning the semi-presidential system. In February 2010, Tandja was overthrown by a junta led by Salou Djibo; the complexity of the situation was captured by Ban Ki-moon, Secretary-General of the United Nations, who emphasized his “disapproval of unconstitutional changes of government as well as attempts to remain in power through unconstitutional means.”60 Djibo established the Supreme Council for the Restoration of Democracy (CSRD), appointed a committee to draw up a draft constitution, and returned the country to democracy in 2011.

In Mali in March 2012, the military deposed the government of President Amadou Toumani Touré, thereby truncating the democratic process of the country in ways that signified democratic reversal. The event drew the condemnation of the international community, including ECOWAS, which immediately urged the mutineers to revert to the status quo ante. International mediation led to the setting up of an interim government under Dioncounda Traore until democracy was restored in 2013.

In Guinea Bissau, the military struck on April 12, 2012, subverting the electoral process to prevent the succession to power of a candidate they did not prefer (questions about the fairness of the election, which had gone through the first round of voting, also may have

58 Speech delivered by President Olusegun Obasanjo at the National Executive Committee meeting of the People’s Democratic Party. May 19, 2006.
59 “AU holds crisis meeting over Guinea coup” Press TV, December 12, 2008.
motivated the coup. As usual, the coup was condemned, and the mediation of ECOWAS led to a transitional arrangement to restore democratic rule.

The situation in Guinea Bissau was complicated by the involvement of the African Party for the Independence of Guinea Bissau and Cape Verde (PAIGC), whose members included many veterans of the struggle for liberation from Portugal. Entrenched in the polity with a strong hold over the military, they refused to concede defeat at the ballot box and instead asked for support from Angola to remain in power. This parasitic and elitist club of PAIGC veterans was at the heart of the struggle in Guinea Bissau. They were determined to cling to power and decide how it would be exercised purely on account of their national liberation credentials, without taking into account the new political realities of a country with lean resources and a highly impoverished population.

Guinea Bissau had also become the new hub and route for a trans-Atlantic drug network, leading to the emergence of what we call a *narco-bourgeoisie*. Sustained by capital accumulation based on dirty or drug money and afraid that transparent governance would unveil its illicit trade and nefarious activities, this bourgeoisie was largely responsible for the subversion of democratic rule. Both the veterans and a faction of the politically active narco-bourgeoisie were emboldened by the failure of the AU and ECOWAS to agree on the right strategy to ensure free and credible elections, which resulted in the general elections having to be shifted twice and the prolonged lingering of the crisis.

**Conclusion: The Future of Constitutionalism in West Africa**

Incessant assaults on the constitutional order represent a threat to constitutionalism and democracy. Contestations over objective realities in society have continued to engender coups and illegal seizures of power and subversion of the constitutional order, yet the constitution remains, or ought to be, "an expression of the general will of a nation . . . a reflection of its history, fears, concerns, aspirations, vision, and indeed, the soul of that nation."^61^ How may this dilemma be resolved? The trends so far have been the application of international conventions, norms, and protocols against illegal seizures of power and their enforcement at various levels, as deemed appropriate. In the future, social provisioning through transparent and inclusive management of the scarce resources of states will mitigate societal discontent and popular uprisings. It should be coupled with an approach to governance that periodically addresses the challenges of society through constitutionalism in ways that will become part of the new consensus embodied in the constitution, thus treating constitutionalism as a work in progress. The starting point will be a strict focus on electoral service delivery based on the canons of best practices and principles of independence, nonpartisanship, and the neutrality of electoral management bodies (EMBs) in the region.

Electoralism has become a fairly stable feature of Africa, especially with the criminalisation of military coups and seizures of duly constituted and democratically elected governments (the reversals in Mauritania, Guinea Conakry, Guinea Bissau, and Niger notwithstanding). It has come with its challenges and import for constitutionalism, which we can summarise as follows:

- The creation of a political elite instead of a political class
- The elitist control of party membership, denying them mass-base
- The lack of professionalism of the media
- The weakness of a horizontal system of public accountability
- The shrinking of the political sphere and political self-censorship by critical stakeholders
- Weak party and political opposition
- The subversion of the electoral process through both statism and community rigging
- The use of the incumbency factor in the polity and at elections
- The over-militarisation of the electoral process
- Voter apathy, occasioned by weak methodology for political and voter education
- Weak notions of civic duty on the part of citizens due to lack of civic education.
- The engrossment constitutions of most West African countries in French, English and Portuguese only, without translation into local languages;
- Absence of effective voter education
- Ideological poverty of most political parties in West Africa and consequent choiceless choice for prospective voters at elections;
- And prevalent partisanship of some election management bodies (EMBs) which make election outcomes fairly fractious and rancorous.

All these have made the resort to law courts and contestation of electoral outcomes incessant and the interpretation of rights and duties of citizens and responsibilities and obligations of the state the key contentious issue for the new crisis of constitutionalism in West Africa. A result has been abuse of the court process and too much stress on the courts; increasingly, they are being politicized. This politicization, an emergent electoral jurisprudence, started with the Nigerian Supreme Court rulings on elections and has gone viral by affecting Ghana’s Supreme Court judgment in electoral matters.

Related is the citizenship question, which has also raised issues impinging on the constitution. Who is a citizen in West Africa? What implications does it have for ECOWAS citizenship and its future? What is the status of refugees and internally displaced people (IDPs)? These vexed legal issues have serious political implications, and differing responses of politicians to them have resulted in constitutional contestations. In some instances, ECOWAS as a regional economic (and political) player must intervene to put the region on the right footing, especially with the establishment of the West African Parliament and Court. The democratic political outlook of ECOWAS and other regional organisations, such as the West African Bar Association (WABA), the West African Civil Society Organisations Forum (WACSOF), the Centre for Democracy and Development (CDD), and the West African Network for Peacebuilding (WANEP), as well as intellectual organisations, such as the Council for the Development of Social Science Research
in Africa (CODESRIA) and the West African Journalist Association (WAJA), among others, all have prominent and critical roles to play in this regard.

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