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ARTICLES

THREATS TO THE RULE OF LAW IN AFRICA

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I. INTRODUCTION

Throughout history, scholars and practitioners have struggled to define the political concept generally referred to as democracy. That exasperation in seeking a definition for democracy is evidenced in Schweinitz's statement that "[d]emocracy is one of those troublesome words which means all things to all people."[1] He continues and states that "[l]ike motherhood and patriotism, [democracy] is thought to be a noble condition and so is evoked by politicians, publicists, preachers, and demagogues to prove their unsullied intentions and just claim to popular support."[2] Part of the reason for the confusion in what democracy really is, is derived, at least partly, from the way the word is used, particularly by politicians who seek to convince their citizens, as well as the global society that their countries are bastions of democracy. For example, during the existence of East Germany (1949–1990), which was part of the Soviet-dominated Warsaw Pact, the country was often referred to as the German Democratic Republic. Then, there are today's Democratic People's Republic of Korea (DPRK) and the Democratic Republic of Congo. It is difficult to find any institution or organization that studies democracy and democratic governments that would consider any of these countries as democratic or as possessing fully functioning democratic institutions.[3]

Certain values and characteristics have the power to make, break or define a democracy. Adherence or fidelity to the rule of law is one of them and it is an important foundation on which democracy is built; it is not only the heart and soul of a democratic society, but without it, members of society would find it very difficult to live together peacefully. For example, in Africa, in order to effectively manage the conflicting interests of the diverse subcultures that inhabit each country, "all citizens, regardless of their political, economic, and ethnocultural affiliation, must be subject to the law."[4] Regardless of what an African country calls itself, it cannot be said to be democratic or practicing democratic governance if the majority of its citizens consider themselves above the law or do not voluntarily adhere to the rule of law. A governing process characterized or undergirded by the rule of law is the key to peaceful coexistence and development in Africa. Such a governing process is also the foundation on which a democracy is built.

During the last several decades, many African countries have suffered from a variety of political and economic problems. Some of these problems

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[1] KARL DE SCHWEINITZ, JR., INDUSTRIALIZATION AND DEMOCRACY: ECONOMIC NECESSITIES AND POLITICAL POSSIBILITIES 12 (1964).

[2] *Id.*

[3] *See* John Mukum Mbaku, *Corruption and Democratic Institutions in Africa*, 27 TRANSNAT'L L. & CONTEMP. PROBS. 310, 331 (2018).

[4] John Mukum Mbaku, *Kenyan Democracy and the Rule of Law,* GEO. J. INT'L AFF. (March 28, 2018), https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/3/28/kenyan-democracy-and-the-rule-of-law.

include, but are not limited to, government impunity; military intervention in politics; extreme poverty, especially among historically vulnerable groups (e.g., women, infants and children; ethnic and religious minorities); ethnic-induced violence, some of which has deteriorated into civil wars; massive abuse of human rights, including genocide and ethnic cleansing; abuse and exploitation of children, including their use (i) in the production of pornography, (ii) as "child soldiers" in various conflicts, (iii) "slaves" in fetish shrines or beggars on the streets of various cities, (iv) as sources of organs for the international organ transplantation market, (v) sexual slaves in the sex-tourism industry; and many more.[5]

True, African countries have a lot of political and economic problems. Nevertheless, they also have the potential to deal fully and effectively with all of them. Take extreme poverty, for example. Available data show that in 2018, as many as 91.16 million people in Nigeria were living in extreme poverty.[6] In June 2018, researchers at the Washington, D.C.-based think tank, The Brookings Institution, determined that Nigeria had overtaken India as the country with the largest number of people living in extreme poverty in the world.[7] By 2030, the number of Nigerians living in extreme poverty is expected to rise to 120 million, representing 45.5% of the national population.[8]

Even though Nigeria is one of the countries with the highest population of people living in extreme poverty, Nigeria is also endowed with significant amounts of natural resources, including large reserves of oil and gas.[9] Since the 1970s, the country has received significant amounts of revenues from the export of its natural resources.[10] These revenues could have been invested by the government in public programs that are pro-poor and capable of providing

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[5] *See, e.g.*, John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT'L & COMP. L. REV. 287, 287 (2019) (examining conditions leading to the abuse and exploitation of children in Africa); *see generally* John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT'L & COMP. L. REV. 73 (2019) (examining the persistence of government impunity in Africa and how to eradicate it) [hereinafter Mbaku, *Struggle Against Impunity*].

[6] *See* Emmanuel Okogba, *91 Million Nigerians Now Live in Extreme Poverty—World Poverty Clock*, VANGUARD (Feb. 16, 2019), https://www.vanguardngr.com/2019/02/91-million-nigerians-now-live-in-extreme-poverty-world-poverty-clock/.

[7] Homi Kharas, Kristofer Hamel & Martin Hofer, *The Start of a New Narrative*, BROOKINGS INST. (June 19, 2018), https://www.brookings.edu/blog/future-development/2018/06/19/the-start-of-a-new-poverty-narrative/; *see also* Yomi Kazeem, *Nigeria Has Become the Poverty Capital of the World*, QUARTZ AFRICA (June 25, 2018), https://qz.com/africa/1313380/nigerias-has-the-highest-rate-of-extreme-poverty-globally/.

[8] *The Percentage of Nigerians Living in Extreme Poverty Could Increase by 2030*, WORLD POVERTY CLOCK (2018), https://worldpoverty.io/blog/index.php?r=12.

[9] Ruth Maclean, *Violence in Cameroon's Anglophone Regions 'Spiraling Out of Control,'* GUARDIAN (Sept. 18, 2018), https://www.theguardian.com/world/2018/sep/18/cameroon-amnesty-election-violence-anglophone-regions.

[10] *Id.*

those living in extreme poverty with the opportunity for self-actualization. So, why did Nigerian authorities not devote these enormous revenues to poverty-alleviation efforts? In an interview in 2012, former World Bank Vice President Dr. Oby Ezekwesili, herself a Nigerian and co-founder of Transparency International (the Berlin-based anti-corruption non-governmental organization), indicated that Nigeria had "lost more than $400 billion to oil thieves since she attained independence in 1960."[11] Dr. Ezekwesili went on to say that "as much as 20 percent of the entire budget for capital expenditure in Nigeria ended in private pockets annually" and noted that "whereas oil accounts for about 90 percent of the value of Nigeria's exports, over 80 percent of the fund ends up in the hands of one percent of the country's population."[12] In other words, extreme poverty in Nigeria is not due to the fact that the country does not have the resources to deal with it. The problem lies in the fact that, over the years, the country's civil servants and political elites have squandered and mismanaged the resources that could have been used to invest in human development. As stated by Antony Goldman:

> Nigeria has earned around $400bn from oil since 1970. A Nigerian friend returning home after 15 years abroad asked where the war had been—so run down and dilapidated had the country become. And yet Nigerians own some of the finest properties in the world's best cities, and swell some of the world's biggest bank accounts.[13]

Nigeria, of course, is not the only African country that has squandered its development potential through bureaucratic and other forms of corruption. During the last several decades, countries such as Angola, Cameroon, Equatorial Guinea, Gabon, and, of course, Nigeria, have received significant revenues from the sale of oil but virtually all of these revenues have "been squandered and fritted away in conspicuous consumption" by a few privileged civil servants and political elites, leaving significant numbers of citizens sweltering in extreme poverty.[14]

Many studies have been devoted to determining why several African countries, including even those with significant endowments of natural and human resources, have failed to improve the quality of life for their citizens. Some of the reasons advanced to explain the continued existence of a major

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[11] *See* Ikechukwu Nnochiri, *Nigeria Loses $400 Bn to Oil Thieves—Ezekwesili*, VANGUARD (Aug. 28, 2012), https://www.vanguardngr.com/2012/08/nigeria-loses-400bn-to-oil-thieves-ezekwesili/.

[12] *Id.*

[13] Antony Goldman, *Who Benefits from Africa's Oil?* BBC NEWS (Mar. 9, 2004), http://news.bbc.co.uk/2/hi/africa/3542901.stm.

[14] *See* GEORGE B. N. AYITTEY, AFRICA UNCHAINED: THE BLUEPRINT FOR AFRICA'S FUTURE 34 (2005).

underdevelopment trap in many African countries characterized by huge pockets of extreme poverty, include: (1) the pervasive nature of bureaucratic and political corruption; (2) the failure of many of these countries to effectively manage diversity, which has allowed a majority faction[15] to tyrannize minority ethnic and religious groups; (3) violent and destructive mobilization by subcultures that have been marginalized or perceive themselves to be marginalized by public policies—in some countries, this mobilization has deteriorated into civil wars;[16] (4) unmanageable external debts; (5) continued dependence of African countries on their former colonizers for trade, development, and food aid; (6) intervention by the military in national politics; (7) a global market that discriminates against African business interests;

[15] Such a faction is usually made up of one or more ethnocultural groups that monopolize and control the political system, as well as major sectors of the economy. In doing so, such a majority faction marginalizes the minority and forces the latter to live in extreme poverty on the economic margins. For example, since unification between the English-speaking and French-speaking regions of the erstwhile German colony of Kamerun in 1961, the country's government has been dominated by the Francophones. The latter have controlled the political and economic systems of the Republic of Cameroon, to the exclusion of the country's Anglophone Regions. In late-2016, teachers and lawyers in the Anglophone Regions took to the streets to peacefully protest the continued marginalization of the Anglophones. The central government responded to the peaceful protests with extreme brutality, killing thousands of people and burning down more than 300 Anglophone villages. As a consequence, radical Anglophone groups responded to the central government's violence with violence of their own. As of this writing (2020), the country is embroiled in a bloody and "genocidal" conflict that is being compared to the Rwanda Genocide of 1994. *See, e.g.*, Kwasi Gyamfi Asiedu & Commentary, *Cameroon's "Quiet" Anglophone Crisis Keeps Escalating with Killings, Detentions Mounting*, QUARTZ AFRICA (May 29, 2018), https://qz.com/africa/1291273/cameroons-anglophone-activists-say-unreported-killings-like-rwanda-genocide/ (arguing that activists in the Anglophone Regions of Cameroon are now comparing the massacre of thousands of Anglophones and the burning of their villages by government security forces to the Rwanda Genocide of 1994); *see also* John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?*, 42 SUFFOLK TRANSNT'L L. REV. 1 (2019) (examining the violent struggle between the Anglophones and the Francophone-dominated central government in Cameroon).

[16] Recent examples include civil wars or ethnic-induced violence in Cameroon, the Central African Republic, and South Sudan. *See generally* Maclean, *supra* note 9 (examining the violence between Anglophone separatists and the central government that has degenerated into the slaughter of thousands of civilians and the burning of many villages); Morgan Winsor, *South Sudan Marks 5 Years of Vicious Civil War*, ABC NEWS (Dec. 15, 2018), https://abcnews.go.com/International/south-sudan-marks-years-vicious-civil-war/story?id=59797433 (noting that the civil war that started in South Sudan in 2013 remains quite active); Ewelina U. Ochab, *The Religious War in the Central African Republic Continues*, FORBES (May 9, 2018), https://www.forbes.com/sites/ewelinaochab/2018/05/09/the-religious-war-in-central-african-republic-continues/#19746c2f3c0d (noting the fighting between religious militias—mainly Muslim and Christian—in the Central African Republic).

(8) excessive and unmanageable population growth; and (9) a chronic shortage of physical and human capital.[17]

In addition, it has been argued that "pervasive poverty in the continent is due either to mistakes made by well-intentioned policymakers or to the ineptitude and incompetence of poorly educated and unskilled civil servants and politicians."[18] It has been argued, then, by some development economists, that emphasis should be placed "on the recruitment into the public services of African countries, new leaders who are better trained and educated, have higher skills, and are more honest and disciplined, and have higher levels of integrity."[19]

Research conducted during the last several decades, however, has shown that many of the "so-called policy mistakes committed in the African countries during the last several years were actually deliberate programs designed and advanced by opportunistic—but not necessarily poorly informed or unskilled—politicians and civil servants seeking ways to enrich themselves at the expense of the rest of society."[20] In fact, research has determined that in many African countries, "civil servants actually intentionally and deliberately impose various bottlenecks where none existed before with the expectation that entrepreneurs, afraid that these bottlenecks would increase their transaction costs, would be willing to bribe the regulators to have them removed."[21] In a study of corruption in Africa, B. Osei-Hwedei and K. Osei-Hwedei determined that "when bottlenecks are created in the administration [i.e., government] within the sectors dealing with the public, they become a source of corruption"[22] used by civil servants to extort money for themselves. In doing so, civil servants stunt economic growth and create an environment for the perpetuation of poverty, especially among historically vulnerable groups, such as women, youth, and religious and ethnic minorities.

But, how were these state custodians (i.e., civil servants and political elites) able to undertake these perverse public policies without any pushback from civil society and its organizations? First, since independence, many African countries have not been able to provide themselves with governing processes that adequately constrain the state and guard the government against

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[17] *See, e.g.*, JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA 236–40 (2004).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See* John Mukum Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, 33 ARIZ. J. INT'L & COMP. L. 661, 680 n. 94 (2016).

[22] *See* Bertha Z. Osei-Hwedie & Kwaku Osei-Hwedie, *The Political, Economic, and Cultural Bases of Corruption in Africa*, *in* CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 40, 44 (Kempe R. Hope, Sr. & Bornwell C. Chikulo eds., 2000).

such behaviors as corruption and rent seeking.[23] In fact, the laws and institutions that many African countries adopted at independence actually created imperial presidencies and empowered many politicians and civil servants with significant levels of discretion, which they used to plunder national resources for their own benefit and that of their supporters, the majority of whom are usually members of the subculture to whom the politician or civil servant belongs.[24]

Second, in several countries, military elites intervened in politics, claiming that they intended to save their countries from incompetent and opportunistic civilian governors.[25] For example, when the military overthrew the government of Nigeria's First Republic in 1966, one of the coup leaders, Major C. Kaduna Nzeogwu, claimed that they had done so in order to save Nigerians and their hard-fought independence from the "tribalists" and "nepotists" who had squandered the country's development potential through their corrupt activities.[26] He went on to state that the military wanted to assure "every law abiding citizen [of Nigeria] . . . freedom from fear and all forms of oppression, freedom from general inefficiency and freedom to live and strive in every field of human endeavor, both nationally and internationally."[27]

Nigeria's coup leaders, as was the case with their counterparts in other African countries, did not keep their promises. Instead, they plundered their economies for their personal benefit, abused the rights of their fellow citizens, and promoted policies that stunted economic growth and development, as well any efforts to institutionalize the rule of law and constitutional government.[28] The Nigerian military, which ruled the country during the periods 1966–1979 and 1993–1999, committed many atrocities against their fellow citizens.[29]

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[23] John Mukum Mbaku, *Bureaucratic Corruption in Africa: The Futility of Cleanups*, 16 CATO J. 99, 100 (Spring/Summer 1996).

[24] For example, since Paul Biya became President of the Republic of Cameroon in 1982, his Beti/Bulu ethnic group from the South Region of the country has held most of the key senior positions in government and dominate "state-owned businesses, and security forces." *See* U.S. DEP'T OF STATE, 2018 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CAMEROON (Mar. 13, 2019), https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/cameroon.

[25] *See, e.g.*, Victor T. Le Vine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFRI. STUD. 181 (1997) (examining the impact of military coups on constitutionalism in several countries in West Africa).

[26] *See* Major Chukwuma Kaduna Nzeogwu, *Announcing Nigeria's First Military Coup on Radio Niger* (Jan. 15, 1966), *reprinted in* VANGUARD (Sept. 30, 2010), https://www.vanguardngr.com/2010/09/radio-broadcast-by-major-chukwuma-kaduna-nzeogwu-%E2%80%93-announcing-nigeria%E2%80%99s-first-military-coup-on-radio-nigeria-kaduna-on-january-15-1966/.

[27] *Id.*

[28] *See, e.g.*, Claire Felter, *Africa's 'Leaders for Life'*, COUNCIL ON FOREIGN REL. (Apr. 29, 2019), https://www.cfr.org/backgrounder/africas-leaders-life.

[29] *How First Coup Still Haunts Nigeria 50 Years On*, BBC NEWS (Jan. 15, 2016), https://

Despite the claim that their more disciplined training would make them more effective governors, their reign was marked by extremely high levels of self-dealing, public financial malpractices, abuse of fundamental rights, and a significant level of tyranny directed at civilians.[30]

Of course, Nigeria was not the only country in Africa whose military had taken over control of the government. On July 23, 1952, the government of King Farouk of Egypt was overthrown by members of the Free Officers Movement.[31] Since the 1952 military intervention in the country's political system, Africa has encountered "at least 200 successful and failed coups."[32] However, by the mid-1990s

> especially after South Africa's successful transition from the racially-based apartheid system to a multi-racial and democratic political dispensation, many Africans came to see multiparty democracy and constitutionalism as the only legitimate way to change government, as well as to enhance and ensure peaceful coexistence and minimize sectarian conflict.[33]

However, the continent has continued to suffer from military intervention in politics.[34]

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www.bbc.com/news/world-africa-35312370.

[30] No event illustrates the cruelty and the recklessness of military rule in Nigeria more than the brutal execution of Ken Saro Wiwa, a human rights activist and leader of the Movement for the Survival of the Ogoni Peoples (MOSOP) and eight other Ogoni activists. *See, e.g*., Ifeanyi O. Onwuazombe, *Human Rights Abuse and Violations in Nigeria: A Case Study of the Oil-Producing Communities in the Niger Delta Region*, 22 ANNUAL SURVEY OF INT'L & COMP. L. 115, 123 (2017) (examining the execution, by the military, of the human rights activist, Ken Saro Wiwa).

[31] *See* JOEL GORDON, NASSER'S BLESSED MOVEMENT: EGYPT'S FREE OFFICERS AND THE JULY REVOLUTION 4 (1992) (examining the Egyptian military coup of 1952 and its aftermath).

[32] *See* Yomi Kazeem, *What is a Coup? These 40 African Countries Could Help Explain*, QUARTZ AFRICA (Nov. 16, 2017), https://qz.com/africa/1130009/what-is-coup-zimbabwe-joins-40-african-countries-that-have-had-coups/.

[33] John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT'L COMP., POL'Y & ETHICS L. REV. 77, 90 (2018). It was this belief in multiparty democracy as a method for change of government that provided the impetus for the adoption of the adoption of the *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government* (hereinafter "Lomé Declaration"). The Lomé Declaration specifically rejected the military coup as a way to change the government. *See* Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, Lomé, Togo, July 10–12, 2000, O.A.U. Doc. AHG/Decl.5 (XXXVI).

[34] Recent coups in Africa include: Burkina Faso (2014), Egypt (2013), Sudan (2019), and Zimbabwe (2018). *See generally What Was Behind the Coup in Burkina Faso?*, BBC NEWS (Sept. 25, 2015), https://www.bbc.com/news/world-africa-34277045; Eliza Mackintosh, *Zimbabwe's Military Takeover was the World's Strangest Coup*, CNN (Nov. 21, 2017), https://www.cnn.com/2017/11/20/africa/zimbabwe-military-takeover-strangest-co

Le Vine has argued that of all the efforts to thwart or stunt the practice of constitutional government and the rule of law in Africa, the military coup d'état has been the most effective. He argued that military intervention in African politics and the subsequent establishment of military regimes "epitomized the low estate to which constitutionalism had fallen during the 1963–89" period in Africa.[35] He argued further that:

> [n]ot only did they [i.e., the military regimes] commit acts which in themselves amply spoke to their disdain of the rule of law, but after taking power, they frequently suspended or discarded existing constitutions, to be removed from sight as offensive remnants of previous régimes, and then (more often than not in order to help legitimize their own rule) proceeded to write new ones to suit themselves.[36]

Third, even in countries where there have not been successful military coups, peace and security have still been threatened.[37] For example, South Sudan, one of the world's and Africa's youngest country, has been pervaded by ethnic-induced violence during most of its existence as an independent country.[38] Violent mobilization by ethnic-based militias plunged the country into civil war in 2013 and as of this writing, the country has still not been able to extricate itself from this bloody confrontation.[39] Not only has the continued violence in South Sudan crippled the economy but it has uprooted thousands of people, especially women and children, and created a hunger crisis that has put millions of citizens in danger of starvation.[40]

In May 2015, there was a failed coup in Burundi.[41] The attempted coup took place during the mass unrest that followed the announcement by the country's president, Pierre Nkurunziza, that he would seek a third term in office even though he was constitutionally barred from doing so.[42] Yet, despite its failure, tensions between President Nkurunziza's ethnic Hutu majority and the Tutsi minority continued, forcing thousands of citizens, many Tutsi, to

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up/index.html; *Sudan Coup: Why Omar al-Bashir Was Overthrown*, BBC NEWS (Apr. 15, 2019), https://www.bbc.com/news/world-africa-47852496.

[35] Le Vine, *supra* note 25, at 190.

[36] *Id.*

[37] *See* Winsor, *supra* note 16.

[38] *Id.*

[39] *Id.*

[40] Megan Specia & Kassie Bracken, *In South Sudan, a Never-Ending Hunger Season Puts Millions in Danger*, N.Y. TIMES (May 30, 2018), https://www.nytimes.com/2018/05/30/world/africa/south-sudan-hunger-season.html.

[41] Aryn Baker, *Attempted Coup in Burundi Fails But Tensions Linger*, TIME (May 15, 2015), http://time.com/3859920/burundis-attempted-coup-fails/.

[42] *Id.*

seek refuge in Rwanda.[43] It has been four years since the violence started but it has not yet abated as Nkurunziza and his fellow ethnics continue to dominate and control the government.[44] In fact, in 2018, the country's constitution was amended to significantly increase President Nkurunziza's powers and allow him to potentially remain in office until 2034.[45]

Fourth, in countries with imperial or reinforced presidencies, executives abused their powers and engaged in activities that stunted human development, exacerbated inter-ethnic conflicts, failed to promote and enhance national integration and nation-building, and derailed any efforts to deepen and institutionalize democratic governance. As argued by Le Vine, these reinforced presidencies were found in "Senegal, Côte d'Ivoire, Guinea, Mauritania, and Cameroon."[46] In these countries, "elected legislative assemblies tended to be relegated to the role of a prebendiary pasturage, and their members usually gave automatic assent to the initiatives of the 'reinforced' presidencies."[47] The results of Le Vine's research were published in 1997.[48] Yet, as of this writing, these imperial presidencies remain and they continue to wield virtually unchecked or unguarded power.[49] In a book published in 2006 listing the world's twenty worst living dictators, eight were in Africa and included Paul Biya of Cameroon, the late Muammar al-Qaddafi of Libya, and the late Robert Mugabe of Zimbabwe.[50]

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[43] *Id.*

[44] *Id.*

[45] *See Burundi Backs New Constitution Extending Presidential Term Limits*, AL JAZEERA (May 22, 2018), https://www.aljazeera.com/news/africa/2018/05/burundi-backs-constitution-extending-presidential-term-limits-180521134736408.html.

[46] *See* Le Vine, *supra* note 25, at 189.

[47] *Id.*

[48] *Id.*

[49] Charles Manga Fombad and Enyinna Nwauche, experts on constitutionalism in Africa, argue that despite the constitutional amendments that took place in Cameroon in 1996, "the purported separation of powers [remains] purely symbolic" and the President of the Republic continues to dominate the legislature and control the judiciary. Charles Manga Fombad & Enyinna Nwauche, *Africa's Imperial Presidents: Immunity, Impunity and Accountability*, 5 AFR. J. LEGAL STUD. 91, 96 (2012).

[50] DAVID WALLECHINSKY, TYRANTS: THE WORLD'S 20 WORST DICTATORS (2006) (listing and examining the world's twenty worst dictators). Qaddafi was killed during Libya's civil war, which started in 2011; Biya remains the president of the Republic of Cameroon—in fact, he was re-elected for a seventh term in elections held in 2018; and Mugabe was ousted by military coup in 2017. *See, e.g.*, Eyong Blaise & Bukola Adebayo, *Cameroon's Paul Biya Wins Seventh Term in Office*, CNN (Oct. 22, 2018), https://www.cnn.com/2018/10/22/world/africa/cameroon-paul-biya-gets-seventh-term/index.html; Bill Chappell, *Zimbabwe's Mugabe Out of Power for First Time Since 1980s as Military Takes Control*, NPR (Nov. 15, 2017), https://www.npr.org/sections/thetwo-way/2017/11/15/564320495/zimbabwes-mugabe-is-out-of-power-for-first-time-since-1980s-military-denies-coup; Peter Beaumont & Chris Stephen, *Gaddafi's Last Words as he Begged for Mercy: 'What Did I Do to You?'*, GUARDIAN (Oct. 22, 2011), https://www.theguardian.com/world/2011/oct/23/

Finally, in recent years, the *constitutional coup* has emerged as a major threat to "democratic institutions and individual liberty, as well as peaceful coexistence in the continent" [of Africa].[51] But, what is the constitutional coup? It involves the amendment of the constitution either to eliminate presidential term limits or other constraints (e.g., age limits or citizenship requirements) on the ability of the incumbent president to extend his or her mandate.[52] The constitutional coup can also involve the situation in which incumbent presidents amend or have the constitution amended to "invalidate the candidacies of their opponents, weaken the opposition, and guarantee regime survival."[53]

In countries such as Cameroon, Burundi, Rwanda, and Uganda, incumbent presidents have been able to change their constitutions, with the help of a compliant legislature, to remain in power indefinitely.[54] In 2008, Paul Biya, who had been President of the Republic of Cameroon since 1982 and was constitutionally prohibited from running for another term in office, had a compliant parliament amend the constitution to clear the way for him to stand for another term in office.[55] After the constitution was amended, Biya ran for reelection in the 2011 presidential election and won another seven year term in office with 77.99% of the vote.[56] Most Cameroonians believed that he would step down after that term, having served 36 years in office.[57] However, at the end of his term in 2018, he refused to leave office and again stood for another term.[58] In an election marred by violence and the failure of voters in the country's two Anglophone Regions to participate, Biya emerged as the winner and

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gaddafi-last-words-begged-mercy.

[51] Mbaku, *supra* note 33, at 81.

[52] *Id.*

[53] *Id.*

[54] *See, e.g.*, *Changing the Constitution to Remain in Power*, FRANCE 24 (Oct. 23, 2009), https://www.france24.com/en/20091023-changing-constitution-remain-power (listing African countries whose presidents have changed their constitutions to extend their mandates); *see also* Isaac Mufumba, *Presidents Who Amended Constitution to Stay in Power*, DAILY MONITOR (UGANDA) (Sept. 18, 2017), https://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html (listing African countries whose presidents have changed their constitutions to extend their stay in power).

[55] Tansa Musa, *UPDATE 1-Cameroon's Biya Signs Law Allowing Third Term Bid,* REUTERS (Apr. 15, 2008), https://uk.reuters.com/article/cameroon-constitution-idUKL1529602420080415.

[56] Tapang Ivo Tanku, *Cameroonian President Wins Vote, Extending 29-Year-Rule*, CNN INT'L (Oct. 22, 2011), https://www.cnn.com/2011/10/22/world/africa/cameroon-election-outcome/index.html.

[57] Moki Edwin Kindzeka, *Cameroon Protesters Demand Biya Step Down,* VOA NEWS (October 28, 2018), https://www.voanews.com/africa/cameroon-protesters-demand-biya-step-down.

[58] *Id.*

is expected to remain in office until at least 2025, at which time, he would have been president of Cameroon continuously for forty-three years.[59]

Studies of extreme poverty and underdevelopment in Africa now point to the absence or lack of governing processes that guarantee the rule of law as the main obstacle to peaceful coexistence and the creation of the wealth that the African countries need to deal fully and effectively with the various types of poverty.[60] The behaviors listed above, such as military and constitutional coups, as well as high levels of corruption, are "manifestations of non-democratic governance systems."[61] In each of these African countries, the people, through their governments, have failed to provide themselves with governing processes undergirded by the rule of law. In fact, a governing process that guarantees the rule of law is also one that effectively constrains the state and guards against government impunity, majoritarian tyranny, and other forms of political opportunism that have exacerbated inter-ethnic conflict and stunted human development in many African countries.[62]

E. A. Brett, a scholar of African political economy, has argued that the causes of extreme poverty and economic regression in Africa during the last several decades "are clearly structural rather than contingent, since breakdown is almost universal and cannot simply be attributed to particular national circumstances."[63] He continued that the causes of underdevelopment and extreme poverty in Africa "must stem from the nature of the institutional arrangements developed under colonialism and hastily modified during the political transition of the 1950s and 1960s."[64]

As argued by the late Douglass C. North,[65] the Noble Laureate in economics, "it is the success and failures in *human organization* that account for the

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[59] Brenda Kiven, Sam Stone & Ruth Maclean, *Biya Wins Again in Cameroon as Crackdown Disrupts Anglophone Vote*, GUARDIAN (Oct. 22, 2018), https://www.theguardian.com/world/2018/oct/22/paul-biya-cameroon-85-year-old-president-wins-re-election-landslide.

[60] *See, e.g.*, John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959 (2013) (examining the importance of the rule of law to wealth creation and human development in Africa).

[61] JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 147 (2018).

[62] *Id.* at 37.

[63] E. A. Brett, *Institutional Theory and Social Change in Uganda*, *in* THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT 200, 200 (John Harriss, Janet Hunter & Colin M. Lewis eds., 1995).

[64] *Id.*

[65] Professor Douglass Cecil North was well-known for applying economic theory to historical events. He died in 2015. *See* Robert D. Hershey, Jr., *Douglass C. North, Maverick Economist and Nobel Laureate, Dies at 95*, N.Y. TIMES (Nov. 24, 2015), https://www.nytimes.com/2015/11/25/business/economy/douglass-c-north-nobel-laureate-economist-dies-

progress and retrogression of societies."[66] Hence, the most important public policy priority for each African country is to make certain it has a governing process that adequately constrains the state and guards the government against the abuse of power. In other words, to enhance peaceful coexistence, eradicate extreme poverty, and promote human development, each African country must provide itself with a governing process undergirded by the rule of law. For, without adherence or fidelity to the rule of law, peace and security will be threatened, and there would be a general failure for countries to create the wealth that they need to confront extreme poverty and significantly improve the people's quality of life. In the African countries, the rule of law is very important for stability and development.

II. WHAT IS THE RULE OF LAW?

A. Introduction

Throughout the years, many legal and constitutional scholars have contributed to the definition of the rule of law.[67] Among these scholars, British legal philosopher Albert Venn Dicey is one of the most important.[68] The rule of law is "typically contrasted with arbitrary exercise of power."[69] The rule of law is supposed to "eliminate arbitrariness in the exercise of power,"[70] a problem that is pervasive throughout many African countries.[71] It has been argued that, despite the differences in how scholars and practitioners perceive the meaning of the rule of law, "the leading judicial and academic authorities on the rule of law subscribe to a common idea of the meaning of the principle. This core meaning is simply that the rule of law requires that individuals be protected

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at-95.html. He and Professor Robert W. Fogel won the Nobel Memorial Prize in Economic Sciences in 1993 "for having renewed research in economic history by applying economic theory and quantitative methods in order to explain economic and institutional change." *Id.*

[66] DOUGLASS CECIL NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 59 (1981) (emphasis added).

[67] These have included practicing lawyers, judges, and legal scholars and researchers. *See, e.g.*, GERANNE LAUTENBACH, THE CONCEPT OF THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS (2013) (examining contributions to the definition of the rule of law); *see also* RONALD A. CASS, THE RULE OF LAW IN AMERICA (2001) (examining the evolution of the rule of law in the United States and its relevance in the United States).

[68] ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183 (The Macmillan Press Ltd. 10th ed. 1961). The first edition of this book was published in 1885 under the title LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION.

[69] *See* Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, *in* RELOCATING THE RULE OF LAW 45 (Gianluigi Palombella & Neil Walker eds., 2009).

[70] *Id.*

[71] *See* STEPHEN CHAN, ROBERT MUGABE: A LIFE OF POWER AND VIOLENCE (2003) (examining the abuse of presidential power in Mugabe's Zimbabwe).

from arbitrary government."[72] E. C. S. Wade, in his "Introduction" to Dicey's *Introduction to the Study of the Law of the Constitution*,[73] argued that while "the rule of law must not be conceived of as being linked to any particular technique," it is important and "fundamental that there must exist some technique for forcing the Government to submit to the law."[74] He continued and stated that "if such a technique does not exist, the Government itself becomes the means whereby the law is achieved. This is the antithesis of the rule of law."[75] In other words, *the law must be supreme*.

Wade reminded readers that "[t]here is no doubt that arbitrary power is today resented and feared to an even greater extent than in the late nineteenth century in those States which retain their faith in a democratic form of government."[76] Thus, Wade continued, criticisms of some aspects of Dicey's work "have been superseded by a revival of interest in the conception of the rule of law as being the antithesis to the arbitrary and despotic forms of government"[77]—these, of course, include those which, since the 1950s and 1960s, came into being in Africa. Finally, Wade provided a summary of what is today the general or common understanding of the concept of the rule of law:

> The rule of law presupposes the absence of arbitrary power and so gives the assurance that the individual can ascertain with reasonable certainty what legal powers are available to government if there is a proposal to affect his private rights. A person who takes the trouble to consult his lawyer ought to be able to ascertain the legal consequences of his own acts and what are the powers of others to interfere with those acts.[78]

In his study of the law of the constitution, Dicey argued that an effective definition of the rule of law must embody three very important principles: (1) the law is supreme; (2) all citizens, regardless of their economic, political, or social position, are equal before the law; and (3) the rights of individuals, which are established through court decisions, must be accepted and respected.[79] Other scholars have since made additional contributions to defining and explaining the principle of the rule of law. For example, the late Rt. Hon. Lord Bingham of Cornhill KG, House of Lords, a well-respected and

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[72] Patrick J. Monahan, *Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government*, 33 OSGOODE HALL L.J. 411, 429 (1995).

[73] *See* DICEY, *supra* note 68, at cx.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at cx–cxi.

[79] *Id.* at 201–202.

distinguished British jurist and legal scholar, argued that "the core of the existing principle" of the rule of law is that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts."[80]

Some legal scholars have argued, however, that to effectively define the rule of law, one must distinguish between formal and substantive definitions.[81] Craig Stern argues that "[f]ormal definitions of the rule of law speak to the rules that are designed to constrain civil government and the courts."[82] Substantive definitions of the rule of law, on the other hand, concern the extent to which these rules "embody principles of justice such as human rights."[83] The late Anglo-Austrian economist and philosopher, Friedrich August von Hayek, provided a formal definition of the rule when he stated that:

> Nothing distinguishes more clearly conditions in a free country from those in a country under the arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge. Though this ideal can never be perfectly achieved, since legislators as well as those to whom the administration of the law is [e]ntrusted are fallible men, the essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough. While every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by *ad hoc* action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the

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[80] Rt. Hon. Lord Bingham of Cornhill KG, House of Lords, *The Sixth Sir David Williams Lecture at the University of Cambridge Centre for Public Law: The Rule of Law* 5 (Nov. 16, 2006), https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law. This lecture was later published in book form: TOM BINGHAM, THE RULE OF LAW 8 (2011).

[81] *See* Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99, 105–06 (2004).

[82] Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, *supra* note 5, at 369 (citing Craig A. Stern, *Human Rights or the Rule of Law–The Choice for East Africa?*, 24 MICH. ST. INT'L L. REV. 45 (2015)).

[83] Stern, *supra* note 82, at 47.

> powers of government will not be used deliberately to frustrate his efforts.[84]

Von Hayek's definition of the rule of law is formal because "it prescribes how law should operate generally rather than prescribing any particular content of the law."[85] According to this formal definition of the rule of law, "there is law formally enacted, and both state custodians (that is, government officials)[86] and citizens are bound by and must abide by that law."[87] Professor Robert Stein argues that the most critical aspect of the rule of law is that "the law is superior, applies equally, is known and predictable, and is administered through a separation of powers."[88]

Where the rule of law functions properly, "no one, including senior civil servants and politicians, is above the law."[89] Thus, in such a society, all citizens, "regardless of their economic and political status, are bound by and subject to the law."[90] This principle is very important, especially for countries in Africa where some people or population groups (e.g., Whites or people of European ancestry in apartheid South Africa; members of the ruling majority faction in several countries, like Cameroon) consider (or historically have considered) themselves above the law. Hence, for each African country, adherence or fidelity to the rule of law implies that "one's ethnic or racial . . . status should not have any bearing on how the law treats them—all persons are subject to the law and all persons are equal before the law."[91]

While the law must generally be known and understood by the people, it must also apply equally to all citizens, and in addition "must be that which the people can obey."[92] According to U.S. suffragist and women's advocate, Elizabeth Cady Stanton, "[t]o make laws that man can not and will not obey, serves to bring all law into contempt. It is very important in a republic, that the people should respect the laws, for if we throw them to the winds, what becomes of civil government?"[93] Of course, in order for the rule of law to function properly and effectively, "there must be available mechanisms and

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[84] *See* F. A. HAYEK, THE ROAD TO SERFDOM 80–81 (Univ. of Chicago Press ed., 1994).

[85] Stern, *supra* note 82, at 48.

[86] More specifically, state custodians are civil servants and political elites. *See, e.g.*, John Mukum Mbaku, *Corruption and Economic Development*, *in* AFRICAN ECONOMIC DEVELOPMENT 331, 340 (Emmanuel Nnadozie & Afeikhena Jerome eds., 2d ed. 2019) (noting that "state custodians" means "civil servants and politicians").

[87] Mbaku, *supra* note 82, at 370.

[88] Robert Stein, *Rule of Law: What Does it Mean?*, 18 MINN. J. INT'L L. 293, 301 (2009).

[89] Mbaku, *supra* note 82, at 371.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Elizabeth Cady Stanton, *Address at the 10th National Women's Rights Convention (May 10–11, 1860)*, *in* HISTORY OF WOMAN SUFFRAGE 721 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage eds., 2d ed. 1881).

institutions that have the capacity to enforce the legal rules when they are breached, regardless of who breaches them."[94]

The substantive definition of the rule of law, unlike its formal counterpart, constrains the content of law. For example, Thomas Carothers argues:

> The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.[95]

Carothers expanded the formal approach to the definition of the rule of law to link it to and emphasize the protection of human rights. With respect to African countries, it is important that national laws and constitutions[96] accord with the provisions of international human rights instruments.[97] But, why the emphasis on linking national constitutions and laws to the provisions of international human rights instruments? It has been argued that "the need to link domestic law to universally accepted human rights principles is made necessary by the fact that throughout history, even civil servants and politicians in

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[94] Mbaku, *supra* note 82, at 371. Within such a system, impunity is minimized. For an examination of how contrasting systems have resulted in pervasive government impunity in African countries, *see* Mbaku, *Struggle Against Impunity*, *supra* note 5.

[95] Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 2, 95–96 (1998).

[96] These laws include not just the constitution and laws enacted by the legislature, but also customary laws and traditions. *See, e.g.*, T. W. Bennett, *The Compatibility of African Customary Law and Human Rights*, 1991 ACTA JURIDICA 18 (1991) (examining the relationship between customary law and the protection of human rights in Africa).

[97] Such international human rights instruments include the International Bill of Human Rights, which consists of five important instruments: (1) Universal Declaration of Human Rights; (2) International Covenant on Economic, Social and Cultural Rights; (3) International Covenant on Civil and Political Rights; (4) Optional Protocol to the International Covenant on Civil and Political Rights; and (5) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. U.N. HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO.2 (REV.1), THE INTERNATIONAL BILL OF HUMAN RIGHTS (1996), https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.

dictatorial governmental regimes have justified their impunity by claiming that their behaviors actually adhered to the rule of law."[98] Consider what former U.S. President Richard Nixon said during an interview with Sir David Frost in 1977. He declared as follows: "Well, when the president does it, that means it is not illegal."[99]

Scholars also argue that "if a legal system fails to meet the standards of the formal version of the rule of law, it fails to meet the standards of the substantive version also."[100] It is important to note, however, that even if the national laws of a country dutifully "incorporate provisions that address human rights issues and hence, make national laws reflect universally accepted human rights principles, there is no guarantee that such rights would be protected, especially if those who serve in government (civil servants and politicians) do not respect and obey the law."[101] In fact, if the country does not have a governing process that adequately constrains or guards the government, civil servants and political elites are likely to act with impunity even if the constitution incorporates provisions of international human rights instruments.[102] This implicates Professor Best's argument that fundamental rights are not secured by parchment barriers alone but by "a competent and balanced governing process."[103]

The United Nations has also provided a definition for the rule of law:

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[104]

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[98] Mbaku, *supra* note 82, at 372.

[99] Sir David Frost, *'I Have Impeached Myself': Edited Transcript of David Frost's Interview with Richard Nixon Broadcast in May 1977*, GUARDIAN (Sept. 7, 2007), https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1.

[100] Stern, *supra* note 82, at 52.

[101] Mbaku, *supra* note 82, at 373.

[102] Mbaku, *supra* note 60, at 1001–04.

[103] Judith A. Best, *Fundamental Rights and the Structure of Government*, *in* THE FRAMERS AND FUNDAMENTAL RIGHTS 37, 37 (Robert A. Licht ed., 1992).

[104] *United Nations and the Rule of Law: What is the Rule of Law?*, UNITED NATIONS, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (last visited Oct. 28, 2019).

Professor John Mitchell Finnis, an international expert on jurisprudence and legal philosophy, has argued that the rule of law is "[t]he name commonly given to the state of affairs in which a legal system is legally in good shape."[105] He argues further:

> A legal system exemplifies the Rule of Law to the extent . . . that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.[106]

The English-born American political activist and 18th century revolutionary, Thomas Paine, argued during the revolution that gave birth to the American Republic that "in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law *ought* to be King; and there ought to be no other."[107] In 1690, John Locke, the English philosopher and physician who is considered the father of Liberalism, argued:

> Where-ever law ends, tyranny begins*,* if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject which the law allows not, ceases in that to be a magistrate, and, acting without authority may be opposed, as any other man, who by force invades the right of another.[108]

The Founders of the American Republic adopted Locke's idea of the right of the people to remove public officials who abuse the power granted to them by the law and extended it to include "revolution," which they defined as the

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[105] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270 (2d ed. 2011).

[106] *Id.* at 270–71.

[107] THOMAS PAINE, COMMON SENSE 75 (Edward Larkin ed. 2004) (emphasis in original).

[108] JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT 297 (George Routledge and Sons ed., 2d ed. 1887).

"right of the people to dissolve the government and replace it with an entirely new one."[109]

Although many countries in Africa now boast of governing processes with separation of powers, with checks and balances, the rule of law remains elusive and is threatened on a daily basis by various actions undertaken by both state and non-state actors. Among these activities are violent and destructive mobilization by subcultures that consider themselves marginalized by government policies; impunity by state custodians (i.e., civil servants and political elites); and the activities of extremist groups, such as Boko Haram in West Africa[110] and Al Shabaab in East Africa.[111] Before we examine threats to the rule of law in Africa, it is necessary that we briefly elaborate the rule of law's most important and universally accepted elements.

B. The Elements of the Rule of Law

In order to fully examine the major threats to the rule of law in the African countries, it is important to take a closer look at the elements of the rule of law. A very important aspect of the rule of law is that "the government must obey the law in its actions."[112] This view of the rule of law is shared by former U.S. Supreme Court Associate Justice, Anthony M. Kennedy, who stated that "[t]he Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all of its officials."[113] Thus, the law must be supreme and the supremacy of law is, for the purposes of this article, the first element of the rule of law.

As argued by the American Bar Association (A.B.A.), "[i]t is very difficult for a nation to maintain the rule of law if its citizens do not [accept and] respect the law."[114] The A.B.A. then makes this very revealing statement: "Assume that people in your community decided that they didn't want to be bothered by traffic laws and began to ignore stop signs and traffic signals. The ability

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[109] Best, *supra* note 103, at 39.

[110] *See generally* Ekpenyong Obo Ekpenyong, *Boko Haram: A Threat to Nigerian National Security*, 10 EUR. SC. J. 244 (2014) (examining the role of the extremist religious group Boko Haram as a threat to peace and security in Nigeria).

[111] *Somalia: Why is Al-Shabaab Still a Potent Threat?*, INT'L CRISIS GROUP (Feb. 11, 2016), https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-why-al-shabaab-still-potent-threat.

[112] Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, 46 JUDGES J. 4, 6 (2007).

[113] Stein, *supra* note 88, at 299 (quoting Justice Anthony M. Kennedy, Written Constitutions and the Common Law Tradition, 20th Sultan Azlan Shah Law Lecture in Kuala Lumpur, Malaysia (Aug. 10, 2006)).

[114] *What Is the Rule of Law*, AM. BAR ASS'N, https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law (last visited May 20, 2019).

of police officers to enforce the laws would be overwhelmed and the streets of your community would quickly become a chaotic and dangerous place."[115] But, why do people voluntarily obey the law? The A.B.A. argues that "[t]he rule of law functions because most of us agree that it is important to observe the law, even if a police officer is not present to enforce it."[116]

If the majority of citizens in a country refuse to voluntarily accept and obey the law, it would likely be very difficult for government agencies, such as the police, whose job it is to enforce the laws and maintain order, to perform their jobs. In fact, in such countries, maintaining law and order "would be extremely costly and the government would likely be forced to devote a significant portion of national income to compliance activities, a process that can reduce expenditures on important sectors of the economy such as health care and human capital development."[117] The second element of the rule of law is that the majority of citizens in a country must voluntarily accept, respect, and obey the law.[118]

In its many decisions, the U.S. Supreme Court has contributed significantly to the development of the rule-of-law jurisprudence. For example, in *U.S. v. United Mine Workers*,[119] Justice Frankfurter concurred in the Court's judgment, writing:

> In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.[120]

Many of the definitions of the rule of law found in the legal literature share the ruling of the U.S. Supreme Court in *U.S. v. United Mine Workers* that "[t]here can be no free society without law administered through an independent judiciary."[121] As argued by Professor Chemerinsky, an expert on constitutions and constitutionalism, "[a]n independent judiciary is essential to the rule of law."[122] The United Nations also acknowledged the importance of an independent judiciary to the rule of law when it stated that "the rule of law is a principle of governance in which all persons, institutions and entities, public

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[115] *Id.*

[116] *Id.*

[117] Mbaku, *supra* note 60, at 988.

[118] *Id.*

[119] U.S. v. United Mine Workers, 330 U.S. 258, 307 (1947) (holding that the trial court's restraining order to prevent a strike was proper).

[120] *Id.* at 312.

[121] *Id.*

[122] Chemerinsky, *supra* note 112, at 6.

or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and *independently adjudicated*."[123] The third element of the rule of law, then, is judicial independence.

In any country, the law cannot function effectively unless citizens "are aware of, understand, and appreciate the law."[124] For countries in Africa, "[r]obust and broad-based educational programs, including especially those targeting heretofore marginalized and deprived groups,[125] can help citizens, not only understand the laws, but also appreciate them and the role that they play in their daily lives."[126]

It is important, however, to understand that these educational programs must only supplement but not replace the full and effective participation of each country's relevant stakeholders in the constitution- and law-making processes.[127] This includes: (1) developing and adopting the constitutional principles that would undergird, inform, and constrain the designers of the constitution; (2) selecting individuals to serve on the Constituent Assembly (that is, the group that is empowered to draft the constitution); (3) providing necessary input to the Constituent Assembly; (4) participating in the ratification of the constitution; and (5) taking an active role in law-making in the post-constitutional period.[128] The entire constitution-making process, as well as the enactment of laws in the post-constitutional period, must be open, transparent and participatory.[129] Finally, "[t]he application of laws must be predictable and uniform and must not be capricious or arbitrary."[130] Hence, the fourth and fifth elements of the rule of law are openness and transparency, and predictability of the law respectively.

Many legal scholars have argued that the rule of law developed "around the belief that a primary purpose of the rule of law is the protection of certain

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[123] UNITED NATIONS, *supra* note 104 (emphasis added).

[124] Mbaku, *supra* note 60, at 990.

[125] These groups include "women, young people, rural inhabitants, the urban poor, and religious and ethnic minorities." Mbaku, *Struggle Against Impunity*, *supra* note 5, at 192 n. 648.

[126] *Id.*

[127] *Id.* (noting that the educational programs "must be considered as supplementing but not replacing the participation of citizens in constitutional design and the enactment of post-constitutional laws").

[128] *See* MBAKU, *supra* note 61, at 81 (noting that the constitution-making process must begin with the development and adoption of "the constitutional principles on which the constitution would be based and which would guide the Constituent Assembly" and that free and fair elections should be used to select members to the constitution-writing or Constituent Assembly).

[129] Mbaku, *Struggle Against Impunity*, *supra* note 5, at 192–93 (noting that the constitution-making process, as well as the enactment of laws in the post-constitutional period, "must be open, transparent and participatory").

[130] *Id.* at 193.

basic rights."[131] Many of the people who fought against colonialism and in favor of independence in the African colonies "believed that independence would provide them with the opportunity to rid themselves of the dysfunctional European institutions and replace them with institutional arrangements designed exclusively by Africans and which would be undergirded by the rule of law."[132] The hope of those Africans who participated in the decolonization project was that the departure of the Europeans would allow them to dismantle colonial institutions and develop and adopt governing processes capable of adequately constraining the state, minimizing impunity, and guaranteeing the recognition and protection of human rights.[133] Hence, the sixth element of the rule of law is the recognition and protection of human rights.

III. THE RULE OF LAW AND LEGITIMACY OF AFRICAN GOVERNMENTS

The rule of law is the cornerstone of any legitimate democratic State. In general, the rule of law requires that the state "subject the citizenry" and itself "to publicly promulgated laws."[134] In addition, "the state's legislative function [must] be separate from the adjudicative function" and "no one within the polity [must] be above the law."[135] Adherence or fidelity to the rule of law is one of the "three essential characteristics of modern constitutionalism."[136] The others are protection of human rights and the guarding or constraining of the exercise of government power.[137]

The rule of law is so important to constitutional democracy that, without it, it would be impossible to have constitutional government. One cannot consider a contemporary African state as legitimate, particularly from the point of view of the majority of its citizens, if it is lacking any or all of the three characteristics of the modern constitutional State. In today's African countries, the absence or lack of these three elements or characteristics has not only greatly diminished prospects for the practice of constitutionalism but has also delegitimized the State—at least, in the eyes of some of the country's subcultures—and has significantly increased the distrust that many subcultures have

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131 *What is the Rule of Law*, *supra* note 114.

132 Mbaku, *Struggle Against Impunity*, *supra* note 5, at 192.

133 *See* John Mukum Mbaku & Julius O. Ihonvbere, *Introduction: Issues in Africa's Political Adjustment in the 'New' Global Era*, *in* THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 1, 2 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) (noting that Africans expected that independence would grant them the opportunity to create their own constitutions and institutions).

134 *See* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001).

135 *Id.*

136 *Id.*

137 *Id.*

for their governments.[138] This is particularly true among groups that have historically been exploited and "marginalized and pushed to the economic and political periphery."[139]

But, why should Africans bother themselves about constitutionalism and how the latter is related to the rule of law? First, the practice of constitutionalism will ensure that, in each country, the constitution will not eventually become just "another instrument of rule" that is likely to be "discarded altogether."[140] Second, constitutional government can and "must provide a solid basis for the respect of the rule of law, democracy, and good governance."[141] Nevertheless, constitutionalism has been distinguished from democracy and the rule of law.[142] As argued by constitutional scholar, Professor Charles Manga Fombad, while "many of the core elements of constitutionalism . . . are also necessary for the rule of law to exist, . . . the latter concept [i.e., the rule of law] is slightly narrower in scope."[143] Although "[r]espect for the rule of law on its own may not necessarily lead to the existence of constitutionalism," however, "constitutionalism is safeguarded by the rule of law and without the rule of law there can be no constitutionalism."[144]

It has been argued that "constitutional democracy under the rule of law" may not always be desirable or "the best alternative"[145] and that, in some situations, it might be "superfluous and undesirable."[146] Rosenfeld argues, for example, that "in a close knit homogeneous society that is deeply religious and ruled by revered leaders who are widely believed to have direct access to divine commands, a theocracy would plainly seem more appropriate than a constitutional democracy"[147] and that "instructions and directions imparted by the religious leaders would be paramount, leaving little, if any, room for the rule of law."[148]

Nevertheless, in divided or heterogeneous societies, which are likely to face "various competing conceptions of the good, constitutional democracy

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[138] *See* Mbaku, *supra* note 60, at 1013 (noting that "making certain that public decisions are made through transparent processes can significantly minimize the distrust that many ethnic and religious groups have for their governments").

[139] *Id.*

[140] Le Vine, *supra* note 25.

[141] *See* Charles Manga Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFF. L. REV. 1007, 1015 (2011).

[142] *See* Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 8–10 (2007).

[143] *Id.* at 8.

[144] *Id.*

[145] Rosenfeld, *supra* note 134, at 1310.

[146] *Id.*

[147] *Id.*

[148] *Id.*

and adherence to the rule of law may well be indispensable to achieving political cohesion with minimum oppression."[149] African countries are divided societies—they comprise of different subcultures or ethnocultural groups that usually do not share the same culture, customs, traditions, and values. It is possible that these different groups do not share the "same conceptions of the good."[150] It is also argued that even if a society is homogenous, it can still be "pluralistic-in-fact" if "every person is viewed as entitled to pursue his or her own individual good."[151]

Where society is "pluralistic-in-fact," that is, groups or individuals within the society do not have or share the same values, the question of the legitimacy of the state and its "fundamental political institutions" will "ultimately depend[] on some kind of consent among all those who are subjected to such institutions."[152] This tradition ties the legitimacy of the state and governing institutions to the consent of the governed (i.e., the sovereign) and can be traced to the ideas of the Founders of the American Republic, such as James Madison, as well as those of Thomas Hobbes[153] and John Locke.[154]

When designing of the U.S. Constitution, the drafters argued that a government had to "stand on the original and *ongoing* consent of the governed."[155] The founders of the American Republic adopted John Locke's idea of "ongoing consent" and greatly extended it to include "the right of the people to dissolve the government and replace it with an entirely new one,"[156] even if that had to be undertaken or achieved through revolution. James Madison, considered the Father of the American Constitution, defined the "republican" form of government in *Federalist No. 39* as:

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[149] *Id.*

[150] *Id.* at 1311. It is clear that those white South Africans who subscribed to and supported the apartheid system in South Africa did not share the same conceptions of the good with the African groups that were being oppressed and exploited. Apartheid's supporters preached a gospel of white supremacy and permanent African inferiority. Hence, the country's two main groups—peoples of African origin and those of European ancestry—did not share the same view or conceptions of the good. *See generally* GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY OF AMERICAN AND SOUTH AFRICAN HISTORY (1981) (examining U.S. and South African experiences with white supremacy).

[151] Rosenfeld, *supra* note 134, at 1311.

[152] *Id.*

[153] Thomas Hobbes was an English philosopher who is considered one of the founders of modern political philosophy. Hobbes is best known for the book *Leviathan*, which he wrote and published in 1651. In this book, Hobbes expounded his theory of the social contract. *See* THOMAS HOBBES, THE LEVIATHAN (1651).

[154] John Locke was an English philosopher and physician who is widely regarded as the father of Liberalism. His ideas about government influenced many of the Founders of the American Republic, including James Madison and Alexander Hamilton. *See* LOCKE, *supra* note 108.

[155] Best, *supra* note 103, at 39 (emphasis in original).

[156] *Id.*

> [A] government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.[157]

There are a lot of reasons why some groups within African countries consider their governments illegitimate. These include, but are not limited to, the fact that many incumbent governments (1) did not come into being with the consent of these groups; (2) do not seek these groups' ongoing consent to govern; (3) do not protect the rights of all groups; (4) promote values that are totally different from, and in many cases antithetical, to those that many groups hold dear; and (5) engage in behaviors (e.g., corruption) that marginalize some subcultures and force them to live perpetually in extreme poverty on the economic margins. Among African governments that are seen as illegitimate by some subcultures within their individual countries, the Republic of Cameroon is a very good example. In today's Republic of Cameroon, many Anglophones do not see the Francophone-dominated central government as legitimate. This is due primarily to (1) the atrocities committed against the Anglophones by the central government; (2) the failure of the central government to include Anglophones in the design and implementation of public policy; (3) concerted efforts by the central government to destroy Anglophone institutions (e.g., the replacement of the Common Law by French Civil law in Anglophone courts); and (4) the failure of the central government to promote economic growth and development in the Anglophone Regions.[158]

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[157] James Madison, *Federalist. No. XXXIX (For the Independent Journal)*, *in* THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, BEING A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION AGREED UPON SEPTEMBER 17, 1787, 232, 233 (James Madison & John Jay eds., G.P. Putnam's Sons, 1888) (emphasis in original). Some scholars argue that Locke's consent is "actual consent of the governed," while that professed by the likes of John Rawls is "hypothetical consent" based "on the basic institutions of society." *See* JOHN RAWLS, A THEORY OF JUSTICE 11–13 (1971).

[158] *See* Walters Samah, *Anglophone Minority and the State in Cameroon: Historical and Contemporary Perspectives*, *in* MINORITIES AND THE STATE IN AFRICA 243, 253 (Michael U. Mbanaso & Chima J. Korieh eds., 2010) (noting that the Anglophone Regions of Cameroon are "relatively largely underdeveloped" and that "there is a feeling of frustration among Anglophones regarding their second-class status"). The Republic of Cameroon is divided into ten sub-national units called Regions. Of these, two of them are located in the former UN Trust Territory of Southern Cameroons under British administration, which is generally referred to as the Anglophone part of the country. The two Anglophone Regions are Northwest Region and Southwest Region. *See* BOBBO NFOR TANSI, AN ASSESSMENT OF CAMEROON'S WIND AND SOLAR ENERGY POTENTIAL: A GUIDE FOR A SUSTAINABLE

What is now the Republic of Cameroon came into being in 1961 through a merger of the UN Trust Territory of Southern Cameroons under British administration with the *République du Cameroun*.[159] While Cameroon "is made up of over 250 ethnic groups, which form five major regional-cultural groupings," the most politically divisive and challenging division of the population is that which is based on colonial heritage.[160] When unification took place in 1961 between the U.N. Trust Territory of Southern Cameroons under British administration and the *République du Cameroun*, the new country that was created brought together what came to be known as the Anglo-Saxon[161] and Gaullist[162] traditions. In the new union, Southern Cameroonians came to be known as "Anglophones" and citizens of the *République du Cameroun* were called "Francophones."[163]

Since 1961, Anglophones have complained that they have been systematically marginalized, both politically and economically, by the Francophone-

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ECONOMIC DEVELOPMENT 20 (2011) (providing a list of Cameroon's ten Regions and their capital cities).

[159] After World War I, the German colony of Kamerun became League of Nations Mandates to be administered by Great Britain and France. Britain received one-fifth of the territory and divided it into Southern Cameroons and Northern Cameroons. When the UN was founded in 1945, the Mandates were converted into UN Trust Territories. On January 1, 1960, the UN Trust Territory of Cameroons under French administration gained independence and took the name *République du Cameroun*. In 1961, the UN held plebiscites in the UN Trust Territory of Southern Cameroons and the UN Trust Territory of Northern Cameroons under British administration to determine modalities for independence. Northern Cameroons opted to join the Federal Republic of Nigeria, which had gained independence from Britain in 1960, and the Southern Cameroons voted to join the now independent *République du Cameroun* to form a federation called the Federal Republic of Cameroon. That federation was unilaterally abolished in 1972 and since then, the country has functioned as a unitary republic. *See, e.g.*, VICTOR T. LE VINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (1964) (examining the struggle of French Cameroons for independence); *see also* WILLARD R. JOHNSON, THE CAMEROON FEDERATION: POLITICAL INTEGRATION IN A FRAGMENTARY SOCIETY (1970) (examining the challenges of federation in Cameroon).

[160] *See* JOHN MUKUM MBAKU, CULTURE AND CUSTOMS OF CAMEROON 1 (2005).

[161] In Cameroon, the Anglo-Saxon tradition includes the English language and the common law of England and Wales. The common law is a legal system in which judicial precedent is considered an important source for future decision making, and a highly decentralized form of government and political decision making. *See, e.g.*, H. N. A. ENONCHONG, CAMEROON CONSTITUTIONAL LAW: FEDERALISM IN A MIXED COMMON-LAW AND CIVIL-LAW SYSTEM (1967) (examining Cameroon's mixed common law and civil law system).

[162] The Gaullist tradition includes the French language, French Civil law, and a highly decentralized form of government and political decision making with an imperial or reinforced presidency. *See, e.g.*, RICHARD A. JOSEPH, GAULLIST AFRICA: CAMEROON UNDER AHMADU AHIDJO (1978) (examining the Gaullist system in Cameroon).

[163] *See* FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS & CIVIL LIBERTIES 2000–2001, 123 (Adrian Karatnycky & Freedom House Survey Team eds., 2001) (arguing that in Cameroon, "[t]he linguistic distinction constitutes the country's most potent political division").

dominated central government. In addition to the fact that virtually all of the top-level civil servants and political elites that have governed Cameroon have been Francophones, no Anglophone has ever served as President of the Republic of Cameroon. All Anglophones who have served in the president's cabinet have usually been given positions with no real decision-making authority. In fact, in 2017, fifty-six years after unification, "there was only one Anglophone among 36 ministers with portfolio."[164]

It is estimated that about seventy percent of the natural resources that are exported from Cameroon are extracted out of the Anglophone Regions of the country.[165] Yet, the two Anglophone Regions receive less than ten percent of the revenues accruing to the government from such exploitation. In addition, infrastructure in the Anglophone Regions, including especially the road system, remains essentially either underdeveloped or nonexistent.[166]

Many Anglophones have complained that their political and economic marginalization is due to the fact that since unification in 1961, the central government has governed the country without their consent.[167] That failure to consult, the Anglophones argue, has resulted in the design and implementation of public policies that have underdeveloped the Anglophone Regions of the country and forced the people to live in abject poverty while the Francophone Regions continue to enjoy relatively robust rates of development.[168]

In late-2016, Anglophone lawyers and teachers organized and carried out a peaceful protest against efforts by the Francophone-dominated central government to impose French institutions on the Anglophone Regions.[169] Specifically, Anglophone lawyers were complaining about the central government's decision to impose French civil law on courts in the Anglophone Regions and to require that the adjudication of court cases should be undertaken only in French.[170] Anglophone teachers joined the strike and demonstrations in response to the central government's decision to impose the French language on

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[164] CAMEROON'S ANGLOPHONE CRISIS AT THE CROSSROADS, INTERNATIONAL CRISIS GROUP 8 (2017), https://www.crisisgroup.org/africa/central-africa/cameroon/250-cameroons-anglophone-crisis-crossroads.

[165] Samah, *supra* note 158, at 253–54 (stating that "Anglophone Cameroon produces 70 percent of the country's natural resources").

[166] *Id.*

[167] *See generally* CAMEROON'S ANGLOPHONE CRISIS AT THE CROSSROADS, *supra* note 164.

[168] *See, e.g.*, MUFOR ATANGA, THE ANGLOPHONE CAMEROON PREDICAMENT (2011) (examining the marginalization of Anglophones in Cameroon); *see also* PIET KONINGS & FRANCIS B. NYAMNJOH, NEGOTIATING AN ANGLOPHONE IDENTITY: A STUDY OF THE POLITICS OF RECOGNITION AND REPRESENTATION IN CAMEROON (2003) (examining issues of Anglophone marginalization in Cameroon and making suggestions on how to resolve the issues).

[169] Moki Edwin Kindzeka, *Lawyers, Teachers in Cameroon Strike for More English in Anglophone Regions*, VOA NEWS (Nov. 29, 2016), https://www.voanews.com/a/lawyers-teachers-strike-cameroon-more-english-anglophone-regions/3616197.html.

[170] *Id.*

schools in the Anglophone Regions, as well as send French-speaking teachers to teach subjects other than French language and literature in Anglophone schools.[171] In addition to requesting that both the French Civil law system and the French language not be imposed on Anglophone courts, the striking lawyers also wanted the central government to remove all French-speaking judges, specifically those who cannot communicate and write well in English, from Anglophone courts, as well as make certain that all national laws, including treaties and international conventions to which Cameroon is a State Party, are also provided in English.[172]

Although the Constitution of the Republic of Cameroon guarantees the equality of English and French, the latter dominates in political discourse, including especially the communications of the central government, and that includes not just decrees issued by the President of the Republic, but also legislative enactments, treaties, and conventions signed or entered into by the country.[173] This situation is especially troublesome for many Anglophone lawyers who must secure, at their own expense, translations of treaties signed and ratified by the country, since the documents are all in French. These unofficial translations, of course, are not accepted as legal documents before the country's courts and tribunals.[174]

The demonstrations against actual and perceived marginalization of the Anglophones by the Francophone-dominated central government started in late-2016.[175] Rather than engage in dialogue with the protesters, the central government responded with brute force and extreme violence.[176] In fact, security forces sent to the Anglophone Regions by the central government used "live bullets and tear gas to disperse" the protesting Anglophones and in the process, several people were killed.[177] In view of the government's violent response to the peaceful protests, as well as President Paul Biya's unwillingness to engage in dialogue with the aggrieved Anglophones, more radical groups within the Anglophone Regions declared their intention to secede and

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[171] *Id.*; *see also Teachers in English-Speaking Areas of Cameroon Remain on Strike*, VOA (Oct. 7, 2017), https://learningenglish.voanews.com/a/4059569.html (noting that the Cameroon Anglophone Teacher's Union, which joined striking lawyers, was concerned about the government's practice of sending French-speaking teachers to the Anglophone Regions to teach "in areas outside of their training").

[172] John Russell, *Lawyers in Cameroon Are Fighting the Justice System*, VOA NEWS (Nov. 17, 2016), https://learningenglish.voanews.com/a/lawyers-in-cameroon-are-fighting-the-justice-system/3600857.html.

[173] CONSTITUTION OF THE REPUBLIC OF CAMEROON, Jan. 18, 1996, arts. 1–3.

[174] *Id.* (stating that most official documents are written only in French).

[175] Conor Gaffey, *Understanding Cameroon's Anglophone Protests*, NEWSWEEK (Feb. 13, 2017), http://www.newsweek.com/cameroon-anglophone-problem-paul-biya-556151.

[176] *Id.*

[177] *Id.*

form the independent Republic of Ambazonia.[178] That decision significantly escalated what had already deteriorated into a bloody and extremely violent conflict—in fact, by the spring of 2018, the international press was reporting that more than 2,000 people had been killed in the Anglophone Regions and as many as 170 villages burned.[179] Some members of the international community were calling the activities of the central government in the Anglophone Regions a genocide against the Anglophone peoples.[180]

Cameroon, of course, is not the only country in which the failure of the government to adhere to the rule of law or practice constitutionalism has forced some population groups within the country to consider the government illegitimate. Other examples include Mali,[181] South Sudan,[182] and the Central African Republic.[183]

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[178] The declaration creating a new country called the Republic of Ambazonia was made on October 1, 2017. *See, e.g.*, Abu-Bakarr Jalloh, *Cameroon in Angst Over 'Ambazonia Independence Anniversary*', DW (Oct. 2, 2018), https://www.dw.com/en/cameroon-in-angst-over-ambazonia-independence-anniversary/a-45712977.

[179] Samuel Smith, *Cameroon: Over 2,000 Killed, 170 Villages Burned as Military Takes Control of Churches*, CHRISTIAN EXAMINER (Aug. 11, 2018), https://www.christianexaminer.com/article/cameroon-over-2000-killed-170-villages-burned-as-military-takes-control-of-churches/51812.htm.

[180] *See* Peter Zongo, *'This Is a Genocide': Villages Burn as War Rages in Blood-Soaked Cameroon*, THE GUARDIAN (May 30, 2018), https://www.theguardian.com/global-development/2018/may/30/cameroon-killings-escalate-anglophone-crisis (noting, inter alia, that the international community is now referring to the Anglophone crisis as a genocide committed by the central government on Anglophone citizens).

[181] In Mali, the Tuareg, who have fought the central government since 1963, have remained unwilling to recognize the legitimacy of any of the regimes that have ruled the country from Bamako, the capital city. *See, e.g.*, Ra'pheal Davis, *Addressing Conflict in Mali: Political, Humanitarian, and Security Problems*, SIGMA IOTA RHO J. OF INT'L REL. (Oct. 1, 2018), http://www.sirjournal.org/research/2018/10/1/addressing-conflict-in-mali-political-humanitarian-and-security-problems; *see also* YUSUF IBRAHIM GAMAWA, THE TUAREGS AND THE 2012 REBELLION IN MALI 35–37 (2017) (examining the continuing struggle between the central government and various militias for control of the northern parts of Mali).

[182] Since December 2013, the Sudan People's Liberation Movement-in-Opposition (SPLM-IO), led by former Vice President, Riek Machar and populated mainly by members of the Nuer subculture, have fought the government of President Salva Kiir and the Sudan People's Liberation Movement (SPLM). The SPLM is led by Kiir and is dominated by Kirr's Dinka subculture. The SPLM-IO does not see the SPLM and Kiir as the country's legitimate governors. The civil war has killed more than 400,000 people and displaced more than four million others. *See* Winsor*, supra* note 16.

[183] The Central African Republic's present civil war started after *Séléka* rejected the legitimacy of President François Bozize and overthrew him in early 2013. Bozize's support came primarily from the Christian *anti-Balaka* militias. The war has involved primarily struggles between rebels from the *Séléka* coalition and *anti-Balaka* militias. The *Séléka* are made up primarily of Muslim groups while the *anti-Balaka* consists primarily of Christian militias. Although the various armed groups reached a peace deal early in 2019, the violence has not fully abated. *See Central African Republic Armed Groups Reach Peace Deal*,

In pluralistic societies, consent is not only important and critical to the legitimacy of the government, but it also provides a foundation for constitutional democracy and the rule of law. It is important to note, however, that constitutional democracies usually implement "the will of political majorities" and as a consequence, can force "political minorities to contribute to the realization of majority objectives with which minorities may strongly disagree."[184] The Founders of the American Republic faced this problem and sought ways to place significant checks or constraints on the power of the majority in order to minimize what they referred to as majority (majoritarian) tyranny or tyranny of majority faction.[185] In doing so, Madison and his contemporaries argued that minimizing tyranny by majority faction required much more than using the constitution to place constraints on the government or guard the latter. These constitutional constraints, which Madison referred to as "parchment barriers," were a necessary but not a sufficient condition for the effective and full protection of fundamental rights and the minimization of majority tyranny. A constitution, it is argued, is just "a piece of paper, and 'parchment barriers' are never much use against lead and steel and chains and guns."[186] Madison argued, in correspondence with Thomas Jefferson, that "experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State."[187] In *Federalist No. 51*, Madison argued that given the fact that an oppressive majority "cannot be restrained," it is necessary, then, to make certain that an oppressive majority does not form.[188] He then proceeded to present arguments for "extent of territory" and "multiplicity of interests, which he argued were the "cure" for this major threat to "majority-rule regimes."[189] He then stated that:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one

N.Y. TIMES (Feb. 2, 2019), https://www.nytimes.com/2019/02/02/world/africa/central-african-republic-peace-deal.html. In 2015, Noureddine Adam, head of one of the factions of *Séléka*, proclaimed an autonomous state in the northeastern part of the country. *See* Crispin Dembassa-Kette, *Rebel Declares Autonomous State in Central African Republic*, REUTERS (Dec. 15, 2015), https://uk.reuters.com/article/uk-centralafrica-politics/rebel-declares-autonomous-state-in-central-african-republic-idUKKBN0TY1FO20151215.

184 Rosenfeld, *supra* note 134, at 1312.

185 THE FEDERALIST NO. 48, 276–77 (James Madison) (Clinton Rossiter ed., 1999).

186 *See* Benjamin R. Barber, *Constitutional Rights—Democratic Instrument or Democratic Obstacle?*, *in* THE FRAMERS AND FUNDAMENTAL RIGHTS 23, 30 (Robert A. Licht ed., 1991).

187 ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 97 (1997) (quoting Madison to Jefferson (Oct. 17, 1788)).

188 *Id.* (quoting THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1999)).

189 *Id.*

> part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.[190]

The Constitution, Madison argued, was crafted to minimize or prevent the formation of oppressive majorities "by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable."[191] Madison went on to argue that:

> There are but two methods of providing against this evil:[192] the one by creating a will in the community independent of the majority—that is, of society itself; . . . . [This] method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties.[193]

Madison's argument was that without effective and robust supporting political institutions, the rights contained in the Constitution (e.g., a Bill of Rights) would be nothing but parchment barriers to majoritarian tyranny.[194] Hence, rights are secured, not just by parchment barriers alone, but also by the existence of what Best refers to as "a competent and balanced governing process."[195]

But, is there a relationship between constitutional democracy, the rule of law, and the legitimacy of government? First, if a constitutional democracy is used only to implement the will of the majority or push through policies that benefit exclusively or even primarily the majority and marginalize the minority, it is likely the case that the minority will consider the government illegitimate. The minority, as has been illustrated by several situations in the African countries,[196] may opt for violent and destructive mobilization in an effort

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[190] THE FEDERALIST NO. 51, *supra* note 188, at 291.

[191] *Id.* at 292.

[192] That is, majoritarian tyranny.

[193] THE FEDERALIST NO. 51, *supra* note 188, at 291–92.

[194] Best, *supra* note 103. Such a governing process is undergirded by the separation of powers with effective checks and balances—an independent judiciary; a bicameral legislature, with each chamber allowed to exercise an absolute veto over legislation passed by the other; and an independent and competent executive.

[195] *Id.*

[196] This situation is aptly illustrated by the decision of a group of subcultures in Eastern Nigeria, led by Col. Emeka Ojukwu, to secede and found their own state called the

either to capture the government or secede and form their own State.[197] In other words, if, as feared by Madison and other Founders of the American Republic, constitutional democracy becomes a tool used to inflict tyranny on the minority by majority faction, regardless of how it is constituted,[198] the minority can resort to revolution, as happened in Nigeria (1967–1970) and is currently taking place in Cameroon (2019).[199]

The founders of the American Republic recognized the problem of tyranny by majority faction and borrowed Locke's idea of the right of the governed (i.e., the people) to remove from office officials—whether civil servants or politicians—who had abused the power granted them by the people through the constitution.[200] They then extended Locke's idea to include revolution, which the founders of the American Republic defined as the "right of the people to dissolve the government and to replace it with an entirely new one."[201] Thus, to ensure the state does not lose its legitimacy in the eyes of the various groups that exist within the country, it is necessary to guard against tyranny by majority faction and make certain that the apparatus of government is not used to suppress or exploit some groups within the country.

Republic of Biafra. For example, in a State of the Nation speech to the people of the secessionist Republic of Biafra, its leader, Col. Ojukwu, justified the decision to secede from the Federal Republic of Nigeria by stating that "Nigeria persecuted and slaughtered her minorities; Nigerian justice was a farce; her elections, her census, her politics—her everything—was corrupt." Emeka Ojukwu, *The Ahiara Declaration: The Principles of the Biafran Revolution*, BIAFRA NATION http://www.biafraland.com/ahiara_declaration_1969.html (last visited Oct. 29, 2019).

[197] *See generally* AL J. VENTER, BIAFRA'S WAR, 1967–1970: A TRIBAL CONFLICT IN NIGERIA THAT LEFT A MILLION DEAD (2015) (summarizing the efforts of supporters of Biafra to destabilize Nigeria).

[198] Most majority factions in the African countries are coalitions of subcultures. An example is the ruling coalition in Kenya, which is made up primarily of the Kikuyu and Kalenjin subcultures. President Uhuru Kenyatta is a Kikuyu (Gikuyu) and his Deputy President, William Ruto, is a Kalenjin. *See, e.g.*, *Uhuru Kenyatta: Kenya's 'Digital President'*, BBC NEWS (Nov. 27, 2017), https://www.bbc.com/news/world-africa-21544245 (noting that Kenyatta receives most of his support primarily from the Kikuyu subculture and Ruto's from the Kalenjin subculture).

[199] Between 1967 and 1970, several minority ethnic groups in Nigeria, reacting to what they argued was oppression by the majority faction, opted to secede to form their own state. Ojukwu, *supra* note 196. Although the effort, which resulted in a brutal civil war, was unsuccessful, it nevertheless revealed several forms of dysfunction within the Nigerian political system. *See, e.g.*, PETER BAXTER, BIAFRA: THE NIGERIAN CIVIL WAR, 1967–1970 (2015) (examining the civil war that followed the decision by several minority ethnic groups in the Eastern Region of Nigeria to secede and found the Republic of Biafra). In October 2016, lawyers and teachers in the Anglophone Regions of Cameroon engaged in peaceful demonstrations against what they argued was their marginalization by the Francophone-dominated central government. The government responded with brute force, leading to what the international community has described as genocide against the Anglophones. *See, e.g.*, Zongo, *supra* note 180.

[200] *See* Best, *supra* note 103, at 39.

[201] *Id.*

Second, the rule of law only functions if (1) the law is supreme; (2) a majority of citizens voluntarily accept and respect the law; (3) the judiciary is independent; (4) there is openness and transparency in government communication; (5) the law is predictable; and (6) there is a recognition and protection of human rights.[202] Take the supremacy of law, for example. In a country where there is fidelity to the rule of law, it is the case that "[t]he law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power."[203] As argued by Dicey, fidelity to the rule of law implies that:

> [N]o man is above the law, but that every man, whatever his rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals . . . . With us, every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.[204]

Unfortunately, in many African countries, certain high-ranking civil servants and political elites consider themselves above the law and act with impunity. These high-ranking officials are called "untouchables" in many African countries and are rarely, if ever, prosecuted for their crimes, which include corrupt enrichment, as well as various atrocities committed against their fellow citizens.[205] In fact, in 2008, the President of the Republic of Cameroon, Paul Biya, had the constitution amended to place himself above the law.[206] Specifically, the constitution was amended to grant Biya blanket immunity from all crimes committed while in office.[207] According to Article 53(3) of the Constitution of the Republic of Cameroon, "[a]cts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his functions."[208]

If high-ranking officials, including especially the president, consider themselves above the law and act accordingly, marginalized and oppressed

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[202] Stein, *supra* note 88, at 301–02.

[203] *Id.* at 302.

[204] JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 34 (1959).

[205] *See, e.g.*, JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS 96–97 (2010) (noting the failure or unwillingness of the government in Cameroon to prosecute certain high-ranking civil servants and political elites who act above the law).

[206] *Constitution Amended to Open Door for Biya's Third Term*, RADIO FR. INT'L (Nov. 4, 2008), http://www1.rfi.fr/actuen/articles/100/article_53.asp.

[207] *Id.*

[208] CONST. OF THE REPUBLIC OF CAMEROON (1972) art. 53(3).

individuals and groups are likely to lose their trust in the government. Some groups may actually consider the government illegitimate and seek ways, including the use of violence, to either oust that government or secede and form their own state.

Effectively resolving this political quagmire requires, at the minimum, that the country put in place the following: (1) provide, through a democratic, bottom-up, people-driven, participatory and inclusive constitution-making process, a constitution that creates a governing process undergirded by separation of powers, with checks and balances. Those checks and balances should include an independent judiciary; (2) a guarantee of freedom of the press—social scientists have determined that a country in which civil society possesses "free speech, a free press, and freedom of opposition has a greater potential for influencing the decisions of the elites than does a country where these liberties do not exist";[209] (3) a bicameral legislature, with each chamber allowed to exercise an absolute veto over legislation passed by the other; and (4) an independent and competent executive.

In countries where (i) civil servants and political elites consider themselves above the law and act with impunity; (ii) there is a lack of openness and transparency in government communication, making it very difficult for the people to have access to the information that they need to check on the government; (iii) there is a lack of predictability in the law, making it extremely difficult for citizens to understand what the law is; (iv) the judiciary is not independent but is subservient to the executive and, in addition, is subject to political manipulation; (v) there is an imperial or reinforced presidency, with the president engaging routinely in various forms of abuse of power; and (vi) there exists a subservient and extremely weak legislature, and governance is *unlikely* to be characterized by the practice of constitutional democracy and adherence to the rule of law.

Public policy-making in these countries is likely to be dominated by the ruling majority faction, with virtually no participation by minority groups. As a consequence, the outcome of the policy-making process would usually be policies that do not reflect the interests and values of the country's various minorities. Within such an institutional environment, there is likely to be a rise in government impunity and a marked deterioration in the protection of fundamental rights, including especially those of vulnerable groups, such as women, infants and children, and ethnic and religious minorities. Tyranny by majority faction will eventually become a pervasive part of public policy. The resulting economic and political marginalization of these minority groups and their subsequent relegation to the margins, can force some of them to resort to violent mobilization, creating conditions that can deteriorate into prolonged civil strife and perhaps, war. Hence, it is important that each country provide

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[209] *See* Kenneth A. Bollen, *Issues in the Comparative Measurement of Political Democracy*, 45 AM. SOC. REV. 370, 372 (1980).

itself with institutional arrangements undergirded by the rule of law and the practice of constitutional democracy. In the absence of such institutional arrangements, the government is unlikely to be considered legitimate, especially by groups that have been driven to the political and economic margins by the ruling majority faction.

IV. THREATS TO THE RULE OF LAW IN AFRICA

A. Introduction

Although African countries currently suffer from a plethora of economic, political and social problems, the most important of them include how to (1) effectively manage diversity and significantly enhance peaceful coexistence; (2) create an institutional environment that encourages and enhances entrepreneurship and the creation of wealth that can be used to deal with extreme poverty and provide for human development; (3) eradicate, or at the very least, minimize corruption and other behaviors that stunt entrepreneurship and economic growth; (4) recognize and protect human rights, including especially those of vulnerable groups, such as women, children, and religious and ethnic minorities; (5) emphasize public policies that are pro-poor and enhance the ability of people living in extreme poverty to develop the skills and competencies that they need to participate more productively and gainfully in economic growth; (6) prevent government impunity, particularly the abuse of power by the president and other high-ranking officials and political elites; and (7) minimize opportunities for the capture of the state by private business interests.[210] These issues are directly linked to the failure of African countries to have effective and fully-functioning constitutional governance and rule-of-law regimes. In the sections that follow, this article examines the most important threats to the rule of law in the African countries.

B. Government Impunity as a Major Threat to the Rule of Law in Africa

One of the most important threats to the rule of law in the African countries is government impunity, particularly the abuse of power by the president and other high-ranking public servants and politicians. In each African country, "[i]mpunity usually arises from the failure by relevant public authorities, either through lack of capacity or political will, to bring perpetrators of crimes

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[210] *See generally* MBAKU, *supra* note 61, at 41–45, 91–112 (examining the pervasiveness of certain political and economic problems in the African countries); *see also* John Mukum Mbaku, *Rule of Law, State Capture, and Human Development in Africa*, 33 AM. U. INT'L L. REV. 771 (2018) (examining state capture in Africa and its impact on human development, with emphasis on the Democratic Republic of Congo and the Republic of South Africa).

to account for those crimes."[211] Specifically, impunity can occur in a country when the government deliberately or through neglect, exempts "from prosecution and punishment," individuals, whether state- or non-state actors, who engage in criminal activities or behaviors.[212] Impunity can also arise from the case where an individual who is convicted and fined by a recognized tribunal is allowed by the government to escape the payment of the fines.[213]

In international law, impunity often involves the failure of governments to bring to justice individuals who violate human rights or commit atrocities that threaten international peace and security, and the failure of governments to redress the wrongs done to victims. In countries, such as Somalia, Democratic Republic of Congo, South Sudan, and the Republic of Sudan,[214] where the perpetrators of human rights violations are likely to be members of the incumbent government or their agents, it is often the case that those who commit the various atrocities are not likely to be brought to justice.[215] In these countries, the government either no longer has control over most of the national territory or, for a variety of reasons, is not willing or able to bring those who have committed international crimes to justice.[216]

In Africa, impunity is endemic in countries, which have weak[217] or dysfunctional[218] governing processes. In these countries, civil servants and

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[211] Mbaku, *Struggle Against Impunity*, *supra* note 5, at 94.

[212] *Id.*

[213] *Id.*

[214] For example, consider the Interahamwe in Rwanda and the Janjaweed in the Republic of Sudan. In Rwanda, the Interahamwe was an extremist government-backed militia that was responsible for most of the killings that took place during the Rwanda Genocide in the Spring of 1994. *See, e.g.*, DENISE BENTROVATO, NARRATING AND TEACHING THE NATION: THE POLITICS OF EDUCATION IN PRE- AND POST-GENOCIDE RWANDA (2015) (examining the role played by the Interahamwe in the Rwanda Genocide). The Janjaweed are a militia group in western Sudan that has actively participated, along with the government in Khartoum, in the genocide in Darfur. Founded in 1987, its membership consists primarily of Sudanese Arab tribes. *See generally* MODERN GENOCIDE: THE DEFINITIVE RESOURCE AND DOCUMENT COLLECTION 641 (Paul R. Bartrop & Steven Leonard Jacobs eds., 2014) (examining the participation of the Janjaweed in the atrocities committed by the government of Sudan in the Darfur Region of the country). Many scholars of genocide studies have recognized the Janjaweed as "the principal agent of mass murder, rape, and property destruction in the Darfur region of Sudan." *Id.* at 693.

[215] Mbaku, *Rule of Law, State Capture, and Human Development in* Africa, *supra* note 210, at 94.

[216] *Id.*

[217] In a country, such as South Sudan, the government has been severely weakened by fighting between subcultures—mainly the ruling Dinka and the opposition Nuer—for control of the apparatus of government. In fact, in 2013, the fighting deteriorated into a civil war that continues to this day. *See, e.g.*, JOHN YOUNG, SOUTH SUDAN'S CIVIL WAR: VIOLENCE, INSURGENCY AND FAILED PEACEMAKING (2019) (examining South Sudan's descent into violent and destructive civil war in December 2013).

[218] In some countries, such as Cameroon, the main issue is not the lack of capacity by the government. Instead, it is the fact that state capacity is being used by the president and

political elites are not well-constrained or guarded by the law, and, as a consequence, these individuals are able to act with impunity. For example, in Cameroon, government security forces, which have committed and continue to commit atrocities in the Anglophone Regions of the country, have been protected by the government. None of them has ever been brought to justice for the massacre of Anglophones and the burning of their villages. In fact, some international observers now refer to the atrocities committed against Anglophones by Cameroon's central government as "genocide."[219] In addition, the police "routinely arrest and torture individuals suspected of being homosexuals or engaging in same-sex intimacy but are not prosecuted for such human rights abuses."[220] In recent years, government security forces have been using laws against terrorism to arrest, torture, and violate the rights of journalists and other members of civil society who are working to check the exercise of government power.[221] Yet, none of these security officials, who "arrest and detain journalists without probable cause" have ever been brought to justice.[222]

The culture of impunity that pervades the government of the Republic of Cameroon starts from the top—the country's president, Paul Biya, can be considered the leader and chief culprit in "this insidious culture of impunity."[223] In 2008, Biya had the constitution amended to grant him immunity from crimes committed while in office. As made possible by Article 53(3) of the amended constitution,[224] after he leaves office, Biya cannot be prosecuted for

members of his government to oppress several sectors of the population, primarily the Anglophones. *See, e.g.*, Denis Foretia, *Cameroon Continues Its Oppression of English Speakers*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/news/global-opinions/wp/2017/03/21/cameroon-continues-its-oppression-of-english-speakers (examining the continued oppression of the Anglophones by the Francophone-dominated central government in Cameroon); *see also* Hollie McKay, *War of Words: Oppressed English Speakers Targeted in Escalating Cameroonian Conflict*, FOX NEWS (Mar. 28, 2019), https://www.foxnews.com/world/oppressed-english-speakers-in-cameroon-targeted-in-escalating-conflict (noting that since the conflict started, "more than 400 [people] have been killed . . . , and a further 437,000 people have been displaced, the vast majority being women and children").

219 Zongo, *supra* note 180.

220 Mbaku, *Struggle Against Impunity*, *supra* note 5, at 95; *see also Guilty by Association: Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law*, HUMAN RIGHTS WATCH (Mar. 21, 2013), https://www. hrw.org/report/2013/03/21/guilty-association/human-rights-violations-enforcement-cameroons-anti.

221 Mbaku, *Struggle Against Impunity supra* note 5, at 95 (noting that "Cameroon's security forces have been using laws against terrorism to torture and violate the human rights of journalists and other citizens").

222 *Id.*

223 *Id.* at 96.

224 The official name of the amended constitution is "*Loi n° 2008–1 du 14 avril 2008 modifiant et complétant certaines dispositions de la loi n° 96 –6 du 18 janvier 1996 portant révision de la Constitution du 2 juin 1972*." Law No. 2008–1 of 14 April 2008 to Amend

any crimes that he committed while he was in office. The amended constitution effectively puts him above the law.[225]

The constitutional amendment of 2008 granted the President of the Republic of Cameroon a blanket exemption. It "does not make an exemption in the case of serious offenses, such as war crimes, crimes against humanity, ethnic cleansing, and genocide."[226] As a consequence, the country's legal system will not hold Biya accountable for the various atrocities that his troops have committed (and continue to commit) in the Anglophone Regions of Cameroon.[227]

There is no question that the impunity of President Paul Biya and members of his government has contributed significantly to the destruction of the rule of law in Cameroon. The rule of law cannot function effectively in a country if its top leaders do not recognize the supremacy of law but instead place themselves above the law. It is not likely that a significant part of the population of a country would voluntarily accept and respect the law if their political leaders, including especially the president, place themselves above the law and act with impunity. And, without voluntary acceptance and respect of, as well as fidelity to, the law by a majority of citizens, it would be virtually impossible to maintain the rule of law.

In his discussion of the rule of law, Lord Bingham argued that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts."[228] When Lord Bingham mentioned "all persons," he did not make any exceptions. In fact, other contributors to the legal literature and jurisprudence on the rule of law have stated that in a country where the rule of law is guaranteed, "[t]he law is superior to all members of society, including government officials vested with either *executive*, legislative, or judicial power."[229]

The A.B.A. has argued that "[t]he rule of law does not depend on a U.S.-style separation of powers . . . . The key point is that every form of government has to have some system to ensure that no one in the government has so much power that they can act above the law."[230] Unfortunately, for African countries with imperial or reinforced presidencies, such as Cameroon, the president has been granted enough power to act above the law. Hence, government impunity, including especially that by the president, is a major threat to the rule of law in African countries.

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and Supplement some Provisions of Law No. 96–6 of 18 January 1996 to Amend the Constitution of 2 June 1972, art. 53(3) (Cameroon).

225 *See id.*

226 Mbaku, *Struggle Against Impunity*, *supra* note 5, at 96.

227 *Id.*

228 BINGHAM, *supra* note 80, at 5.

229 Stein, *supra* note 88, at 302 (emphasis added).

230 *See What is the Rule of Law*, *supra* note 114.

C. The Military Coup as a Challenge to the Rule of Law

As colonies in Africa gained independence and formed new sovereign states, the military coup emerged as one of the most important threats to the maintenance of the rule of law, as well as to peace and security in these new countries. The first military coup d'état in an independent African country took place in Egypt on July 23, 1952 when members of the Free Officers Movement overthrew King Farouk.[231] Although Nasser was the brains behind the coup, General Muhammad Naguib, a co-leader of the coup, was asked to take leadership of the movement and post-coup government because Nasser feared that he and his fellow soldiers might not be considered serious leaders because of their youth.[232] However, two years later, Nasser ousted Naguib and assumed the presidency of Egypt.[233]

The 1952 Egyptian "revolution" placed the military in a position to remain an integral part of governance in the country indefinitely. In fact, the country's first four presidents were drawn from the military and the present president, Abdel Fattah el-Sisi, is a former military officer who came to power through a military coup that ousted democratically-elected president, Mohamed Morsi.[234]

The Egyptian military coup of 1952 appeared to have paved the way for the emergence of the coup d'état as a popular method of regime change in post-independence Africa. It was hoped that the push from both internal and external forces for transition to democratic governance that began in the continent in the mid-1980s would provide each African country with institutional arrangements that were capable of enhancing constitutionalism and preventing military officers from intervening in national politics.[235] In fact, after the

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[231] *See* GORDON, *supra* note 31, at 4, 57–59 (examining the Egyptian coup of 1952 and the role played by Nasser's Free Officers). The Free Officers Movement was led by Muhammad Naguib and Gamel Abdel Nasser. The coup was also referred to as the July Revolution. Although the coup makers' initial aim was simply to oust King Farouk, the coup eventually grew into a movement with more broader objectives, which included the abolition of the constitutional monarchy, establishment of a republic, putting an end to British occupation of the country, and seeking the independence of Sudan, which had been governed as an Anglo-Egyptian condominium. The post-coup government was a revolutionary one that promoted Arab nationalism and opposed imperialism. *See* STEVEN A. COOK, THE STRUGGLE FOR EGYPT: FROM NASSER TO TAHRIR SQUARE 38–40 (2012).

[232] GORDON, *supra* note 31, at 59.

[233] COOK, *supra* note 231, at 56.

[234] *See, e.g.*, ERIC TRAGER, ARAB FALL: HOW THE MUSLIM BROTHERHOOD WON AND LOST EGYPT IN 891 DAYS 225 (2016) (examining the rise and fall of Mohamed Morsi, in Egypt).

[235] *See, e.g.,* John Makum Mbaku, *Constitutionalism and the Transition on Democratic Governance in Africa, in* THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 103, 113 (John Mukum Mbaku & Julius Omozuanvbo Ihonvbere

fall of the racially-based apartheid regime in South Africa and the subsequent introduction, through a progressive constitution, of a non-racial democratic system, there was renewed interest throughout Africa in constitutional government and constitutionalism.[236]

As authoritarian regimes collapsed and gave way to the establishment of more democratic, participatory, and inclusive governance systems, it was generally believed that the era of the military coup or non-constitutional regime change had finally come to an end. Unfortunately, the governing processes that emerged in many African countries in the post-1990s period were not capable of fully and effectively constraining the military and preventing its officers from acting opportunistically and intervening in government. In addition, in countries such as Burkina Faso, Chad, Democratic Republic of Congo, and The Gambia, military elites who had come to power through force turned themselves into civilian presidents through carefully controlled elections.[237] Through this process, the military remained an integral part of governance in these countries and continued to engage in practices that were antithetical to the rule of law and constitutional government.

For example, Blaise Compaoré, who came to power in Burkina Faso through a military coup in 1987, carefully manipulated his country's transition to democracy and turned himself into a civilian ruler.[238] He and his ruling coalition, the *Organisation pour la Démocratie Populaire/Mouvement du Travail* (ODP/MT), subsequently drafted and adopted a new constitution that introduced multiparty competition.[239] Nevertheless, "repression of political dissidents (including many university students) continued, and government control over preelection campaigning and media led opposition parties to boycott the December 1991 presidential elections."[240] Through the manipulation of the electoral process, as well as the use of various methods of repression, Compaoré remained in office until he was forced out by a popular youth revolt in October 2014.[241] As a consequence, the transition to democratic

eds., 2003) (examining the transition to democratic governance that began in various African countries in the mid-1980s).

[236] *See, e.g.*, PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA (1997) (examining the demise of apartheid and the evolution of a new non-racial democracy in South Africa).

[237] *See, e.g.*, ENCYCLOPEDIA OF AFRICA 210 (Kwame Anthony Appiah & Henry Louis Gates, Jr. eds., 2010) (examining political developments in Burkina Faso).

[238] *See, e.g.*, Ken Opalo, *Burkina Faso's Silver Lining*, FOREIGN POLICY (Nov. 1, 2014), https://foreignpolicy.com/2014/11/01/burkina-fasos-silver-lining/ (noting that after Blaise Compaoré came to power in Burkina Faso through a military coup in 1987, he legitimized his rule through a series of five elections).

[239] *See* ENCYCLOPEDIA OF AFRICA, *supra* note 237, at 214.

[240] *Id.*

[241] *See* Boukari Ouoba, *A Triumph for Young People*, D+C (Dec. 14, 2016), https://www.dandc.eu/en/article/burkinabe-youth-united-end-rule-president-blaise-compaore (examining the role played by young people in the ouster of Blaise Compaoré in Burkina Faso in

governance in Burkina Faso was still-born and the country failed to provide itself with a governing process undergirded by the rule of law or constitutionalism.

Lieutenant Yahya Jammeh came to power in The Gambia after overthrowing the government of Sir Dawda Kairaba Jawara on July 22, 1994.[242] Sir Jawara had served as The Gambia's Prime Minister from independence (February 18, 1965) to 1970 and as President from 1970 to 1994.[243] Jammeh's coup was considered an "outlier event" for a region that, since the early-1990s, had been moving away from "unconstitutional forms of regime change, such as the military coup."[244] The Gambia gained independence from Great Britain on February 18, 1965 and, prior to 1989, was one of only a few countries in the West Africa region that could boast of a functioning democratic political system.[245]

After the 1994 coup, Jammeh and other members of the Armed Forces Provisional Ruling Council (AFPRC) went on to destroy The Gambia's opportunity to develop and sustain a governing process undergirded or characterized by adherence to the rule of law and the practice of constitutionalism.[246] In fact, Jammeh remained in power as President of The Gambia until he was forced out in 2017.[247] On December 1, 2016, The Gambia held presidential elections in which incumbent Jammeh was a candidate for re-election. When preliminary results of the election were released on December 2, 2016, it was determined that Jammeh had lost to Adama Barrow of the Coalition 2016.[248] In a statement on national television following the announcement of the results, Jammeh conceded to and congratulated the winner.[249]

However, on December 9, 2016, Jammeh changed his mind and told the nation that he would not accept the results of the December 1, 2016 electoral exercise and that he would not vacate the office of the president of The

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2014).

[242] *See* Abdoulaye S. Saine, *The Military and "Democratization" in The Gambia: 1994-2002, in* POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES 179 (Julius O. Ihonvbere & John Mukum Mbaku eds., 2003).

[243] *Id.*

[244] Mbaku, *supra* note 33, at 167.

[245] ABDOULAYE SAINE, EBRIMA J. CEESAY & EBRIMA SALL, STATE AND SOCIETY IN THE GAMBIA SINCE INDEPENDENCE: 1965–2012 (2013) (noting that from independence in 1965 until the military coup in 1994, The Gambia enjoyed a period of constitutional democracy and political stability).

[246] *See* Mbaku, *supra* note 33, at 167.

[247] *See id.* at 169–70.

[248] *See id.* at 168.

[249] *See* Ruth Maclean & Emma Graham-Harrison, *The Gambia's President Jammeh Concedes Defeat in Election*, GUARDIAN (Dec. 2, 2016), https://www.theguardian.com/world/2016/dec/02/the-gambia-president-jammeh-concede-defeat-in-election.

Gambia.[250] Claiming that there had been several irregularities in the election, he called for new elections.[251] Jammeh's unwillingness to leave office was condemned by many civil society organizations in The Gambia, as well as the Economic Community of West African States (ECOWAS) and the African Union ("AU").[252] Although the diplomatic missions of many countries in The Gambia's capital city Banjul, as well as several African heads of state, pleaded with Jammeh to leave office and allow the transition to proceed, he refused.[253] Jammeh was, however, eventually forced out of office with the help of a military force from ECOWAS called ECOMIG.[254] Subsequently, the country's democratically elected President, Adama Barrow, was able to return to the country from Senegal. Since then, he has been working hard to return constitutionalism and the rule of law to The Gambia.[255]

The late Victor T. Le Vine, a scholar of African political economy, examined the challenges presented to constitutionalism and the rule of law in Africa by military coups. He concluded that "[o]verall, in both francophone and anglophone West Africa, it was the military régimes that epitomized the low estate to which constitutionalism had fallen during 1963–89."[256] He continued and stated:

> Not only did they [i.e., the military] commit acts which in themselves amply spoke to their disdain of the rule of law, but after taking power, they frequently suspended or discarded existing constitutions, to be removed from sight as offensive remnants of previous régimes, and then (more often than not in order to help legitimise [sic] their own rule) proceeded to write new ones to suit themselves.[257]

In general, military coups either beget more military intervention, as occurred, for example, in Nigeria, or the military who took control of the apparatus of government through force went on to maintain governmental regimes

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[250] *See* James Doubek, *In Reversal, Gambian President Rejects Loss and Calls for New Election,* NPR (Dec. 10, 2016, 3:44PM), https://www.npr.org/sections/thetwoway/2016/12/10/505103338/in-reversal-gambian-president-rejects-loss-and-calls-for-new-election.

[251] *Id.*

[252] *See* Mbaku, *supra* note 33, at 169.

[253] *Mission in The Gambia (ECOMIG)*, AFRICAN UNION, https://www.aftrica-eu-partnership.org/en/projects/mission-gambia-ecomig (last visited Nov. 19, 2019).

[254] *Id.* ECOMIG stands for Economic Community of West African States Mission in The Gambia.

[255] *Id.*

[256] Le Vine, *supra* note 25, at 190.

[257] *Id.* Such military opportunism occurred in Nigeria (1967, 1976, 1984); Dahomey/Benin (1968, 1977); Upper Volta/Burkina Faso (1970, 1977); Congo People's Republic (1973); Mali (1974); The Central African Empire (1974); Mauritania (1978, 1981). *See id.*

that adhered neither to the rule of law nor to constitutionalism. As argued by Le Vine, "[e]ven when the armed forces intervened ostensibly to 'save' or 'uphold' a constitution—as in Ghana in 1966, or in Nigeria in 1975/6—their own vision tended to be strictly utilitarian; that is, seeing constitutions as conditional charters to 'clean' and 'sanitize' civilian régimes."[258] African military plotters who seek to overthrow the government "place [themselves] outside the law and . . . show contempt for institutions or authorities."[259] Minabere Ibelema has noted that "[w]ith few exceptions, military coups in Africa were met with press and popular support. Coup announcements typically engender widespread jubilation on the streets and fawning editorials in newspapers."[260] He went on to argue that "[t]he primary reason is that when people are in economic distress or under political turmoil, the natural tendency is to seek a messiah to deliver them."[261] However, as argued by Mbaku:

> Contrary to the pronouncements of these military elites in the immediate aftermath of the coups, which included claims that they had intervened to save the country from corrupt and opportunistic civilian-led regimes, the military regimes were, more often than not, characterized by levels of corruption and other forms of impunity that were actually higher than those obtaining in the civilian regimes that the military had overthrown.[262]

Since the Free Officers Movement took control of the government of Egypt in 1952, the military coup and military elites have remained an important part of political economy in many African countries.[263] In addition to the fact that military rule has stunted economic growth and development, it has also had a significantly negative impact on political development. In fact, African countries whose political systems have been dominated and controlled by military elites (whether in or out of uniform) have not been able to promote the rule of law and the practice of constitutional government.[264]

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[258] *Id.* Le Vine also notes that "[m]ilitary régimes which promised to restore civilian rule tended officially, at least initially, to ostracize the politicians they had replaced, declaring that they were now searching, Diogenes-like, for *les hommes valables*, 'the good men who could run morally irreproachable, effective governments.'" *Id.* at 190 n. 18.

[259] ROBERT H. JACKSON & CAR. G. ROSBERG, PERSONAL RULE IN BLACK AFRICA: PRINCE, AUTOCRAT, PROPHET, TYRANT 59 (1982).

[260] MINABERE IBELEMA, THE AFRICAN PRESS, CIVIC CYNICISM, AND DEMOCRACY 130 (2008).

[261] *Id.* at 130.

[262] Mbaku, *Struggle Against Impunity*, *supra* note 5, at 80.

[263] Mbaku, *supra* note 33, at 95.

[264] *Id.* at 96.

D. The Constitutional Coup as a Threat to the Rule of Law

In recent years, another type of coup, which does not involve the military, has emerged as a major threat to the rule of law and constitutional government in African countries. This is called the constitutional coup and it "involves the amending or revising of the constitution to eliminate presidential term limits, and allows the incumbent to [unconstitutionally] extend his mandate."[265] Mbaku has extended this definition to include additional constitutional changes, which not only can extend the incumbent's stay in power, "but also [have] the potential of: '"(1) eliminating opponents to the regime and their organizations; (2) silencing regime critics; (3) minimizing political competition; and (4) generally supporting regime impunity.'"[266]

Mbaku then goes on to provide what he argues is a more comprehensive and robust definition of the constitutional coup. He states that a:

> constitutional coup is evidenced by revision or amendment of the constitution to: (1) eliminate presidential term limits; (2) eliminate presidential age limits; (3) change citizenship requirements for candidates to the position of president—such a change is expected to invalidate the eligibility of opposition candidates; (4) change residency requirements for candidates to the position of president; and (5) grant the incumbent president immunity from prosecution for crimes committed while in power.[267]

Constitutional coups, argues Mbaku, also include:

> (1) manipulating the interpretation of constitutional provisions to postpone elections indefinitely and allow the incumbent

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[265] *Id.* at 141–42.

[266] *Id.* at 142.

[267] *Id.* For example, in 2008, President of the Republic of Cameroon, Paul Biya, had the country's constitution changed to immunize him from all crimes committed while in office. *See* Joshua Norman, *The World's Enduring Dictators: Paul Biya, Cameroon*, CBS NEWS (June 19, 2011), https://www.cbsnews.com/news/the-worlds-enduring-dictators-paul-biya-cameroon-19-06-2011/. President Yoweri Museveni, who has ruled Uganda for more than 30 years, was ineligible to participate in presidential elections due to take place in 2021 because of a 75-year limit for presidential candidates. Elias Biryabarema, *Uganda's Museveni Signs Law Removing Age Cap for President*, REUTERS (Jan. 2, 2018), https://www.reuters.com/article/us-uganda-polititcs/ugandas-museveni-signs-law-removing-age-cap-for-president-idUSKBN1ER1CY. Nevertheless, in 2018, he had a compliant parliament change the constitution to allow him to stand for the presidency in 2021 despite the fact that he will be 76 in 2021. *Id.* Earlier in 2005, the same compliant parliament had changed the constitution to remove a limit of two five-year terms, which had prevented Museveni from standing for a third term as president. *Id.*

> whose mandate has expired to unconstitutionally stay in power;[268] (2) manipulating electoral and other laws in order to disqualify political opponents and extend the incumbent's mandate or ensure an electoral win for the incumbent; and (3) changing the electoral laws to disqualify other candidates for the presidency.[269]

In 1996, then President of the Republic of Zambia, Frederick J. Chiluba, changed the constitution to disqualify the candidacy of former and independence president, Kenneth David Kaunda, in the presidential election that was scheduled for November 18, 1996.[270] Chiluba and the ruling Movement for Multiparty Democracy ("MMD") changed the constitution to require that all candidates for the presidency of the Republic of Zambia have parents who were both Zambians by birth.[271] President Chiluba, the MMD and those Zambians who engineered the constitutional amendments were quite aware of the fact that, although Kaunda was a Zambian citizen who had led the country to independence in 1964 and had served as president from 1964 to 1991, his parents were born in what was then the British colony of Nyasaland and which gained independence as Malawi on July 6, 1964. Under the amended constitution, Kaunda was not eligible to participate in the 1996 election as a candidate for the presidency.[272]

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[268] Joseph Kabila took office as President of the Democratic Republic of Congo (DRC) ten days after the assassination of his father, President Laurent-Désiré Kabila, in January 2001. *Joseph Kabila*, *in* ENCYCLOPAEDIA BRITTANICA, https://www.britannica.com/biography/Joseph-Kabila (last visited Nov. 19, 2019). He was subsequently elected President of the DRC in 2006 and re-elected in 2011 for a second term. *Id.* However, the second term was supposed to expire on December 20, 2016, as mandated by the Constitution of the Democratic Republic of Congo, which had been adopted in 2006. *Id.* Elections were supposed to be held in November 2016 to select his successor but on September 29, 2016, an electoral commission controlled by Kabila announced that the election would not be held until early 2018. *Id.* The delayed election allowed Kabila to unconstitutionally extend his mandate and remain in office until 2019. *See* Mo Ibrahim & Alan Doss, *Congo's Election: a Defeat for Democracy, a Disaster for the People*, GUARDIAN (Feb. 9, 2019), https://www.theguardian.com/global-development/2019/feb/09/democratic-republic-of-the-congo-election-a-defeat-for-democracy-disaster-for-people-mo-ibrahim; *see also* John Mukum Mbaku, *The Postponed DRC Elections: The Major Players for 2018*, BROOKINGS INST. (Dec. 2, 2016), https://www.brookings.edu/blog/africa-in-focus/2016/12/02/the-postponed-drc-elections-the-major-players-for-2018/.

[269] Mbaku, *supra* note 33, at 142.

[270] *See, e.g.*, John Mukum Mbaku, *Citizenship Laws and Political and Economic Participation in Africa*, 43 N.C.J. INT'L L. 110, 114–15 (2018).

[271] *Id.* at 115.

[272] *Id.* at 115; *see* CONST. OF ZAMBIA (1996) § 34(3)(b).

Félix Houphouët-Boigny ruled Côte d'Ivoire from independence in 1960 until his death in office on December 7, 1993.[273] After his death, there was a power struggle between Henri Konan Bédié, who at the time was the President of the National Assembly, and Alassane Ouattara, who was the country's Prime Minister.[274] Bédié won and assumed the position of interim President of the Republic of Côte d'Ivoire and Ouattara resigned as Prime Minister on December 9, 1993.[275] In preparation for presidential elections, which were scheduled for October 22, 1995 to select an individual to serve as the country's permanent president, Bédié changed the electoral code.[276] The new electoral code required that a candidate for the presidency was required to have parents who were Ivorian citizens by birth.[277] At the time, it was generally believed that the parents of then Prime Minister, Alassane Ouattara, were born in Burkina Faso.[278] As a consequence, under the new electoral code, Ouattara was not qualified to participate in the October 22, 1995 presidential elections.[279]

Bédié eventually won the 1995 election and went on to become the President of Côte d'Ivoire.[280] However, his government was overthrown through a military rebellion that began on December 24, 1999.[281] Out of the chaotic military rebellion emerged General Robert Guéï, who was Bédié's Chief of Staff, to lead the nation.[282] Guéï eventually formed a relatively inclusive government, which included members of the opposition.[283] Nevertheless, Guéï and his government soon turned to xenophobia, especially against immigrants and their descendants, many of whom were Muslim and supporters of the main opposition leader, Ouattara.[284] In 2000, Guéï's government produced a new constitution, which was approved by a referendum that was held during the period July 23–24, 2000.[285] The new constitution codified the requirements

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[273] Kenneth B. Noble, *Felix Houphouet-Boigny, Ivory Coast's Leader Since Freedom in 1960, is Dead*, N.Y. TIMES (Dec. 8, 1993), https://www.nytimes.com/1993/12/08/obituaries/felix-houphouet-boigny-ivory-coast-s-leader-since-freedom-in-1960-is-dead.html.

[274] Mbaku, *supra* note 270, at 122–23.

[275] *Id.* at 122.

[276] *Id.*

[277] *Id.* at 123.

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.* at 124.

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.* at 124–124; *see also* CONSTITUTION DE LA CÔTE D'IVOIRE, July 23, 2010, art. 35 (Ivory Coast). Article 35 states that "[Le candidat à l'élection présidentielle] doit être ivoirien d'origine, né de père et de mère eux-mêmes ivoiriens d'origine" ([The presidential candidate] must be of Ivorian origin, born of a mother and father who are themselves of Ivorian origin).

for presidential candidates that were introduced into the electoral code by the Bédié government.[286] As a result, Alassane Ouattara was ruled ineligible for participation in the presidential election that was scheduled for October 22, 2000.[287]

In 2019, an Egyptian Parliament made up primarily of supporters of President Abdel-Fattah el-Sisi, approved a menu of proposed constitutional amendments that would allow el-Sisi to remain in power until 2034.[288] In addition to providing el-Sisi with the right to remain in office for fifteen more years, the new constitutional amendments would also "further enshrine the authority of the [Egyptian] Armed Forces in 'maintaining the foundations of the civil state.'"[289] During the last few decades or so, several African presidents, including those of Algeria (Abdelaziz Bouteflika), Burkina Faso (Blaise Compaoré), Burundi (Pierre Nkurunziza); Cameroon (Paul Biya), Chad (Idriss Déby), Gabon (Omar Bongo), Namibia (Sam Nujoma), Niger (Tandja Mamadou), Rwanda (Paul Kagame), Togo (Étienne Gnassingbé Eyadéma), Tunisia (Zine el Abidine Ben Ali), Uganda (Yoweri Museveni), and Zambia (Frederick Chiluba), have changed or attempted to amend their national constitutions to remain in office indefinitely.[290] It appears that the constitutional coup remains a major threat to the rule of law in Africa.

E. Political Interference with the Judiciary

Another important threat to the rule of law in Africa is the failure of many countries to constitutionally guarantee judicial independence. In fact, many national executives and other political elites regularly interfere with the functioning of the judiciary in "a fair, rational, objective and predictable manner."[291] As a consequence, many judicial decisions are influenced

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[286] Mbaku, *supra* note 270, at 126.

[287] *Id.*

[288] *See* Merrit Kennedy, *With Constitution Changes, Egypt's President Could Stay in Power Until 2034*, NPR (Feb. 14, 2019), https://www.npr.org/2019/02/14/694675332/with-constitution-changes-egypts-president-could-stay-in-power-until-2034; *see also* Nada Altaher & Bianca Britton, *Egypt Approves Bill That Means Sisi Could Be President Until 2034*, CNN (Feb. 14, 2019), https://www.cnn.com/2019/02/14/africa/egypt-sisi-parliament-approves-presidential-term-extension-intl/index.html.

[289] *See* Kennedy, *supra* note 288. The Egyptian Parliament consists of 596 members and 485 of them, who were mostly supporters of President el-Sisi, voted in favor of the constitutional amendments. *See id.*; *see also* Natasha Turak, *Egypt's Sisi Set to Dramatically Extend Presidency, Despite Previously Pledging No Changes to Constitution*, CNBC (Feb. 12, 2019), https://www.cnbc.com/2019/02/12/egypt-president-sisi-pushes-toward-term-extensions-in-constitution.html (noting that, despite promises from el-Sisi that he would not tamper with the constitution in order to extend his mandate, he has done just that).

[290] *See Changing the Constitution to Remain in Power*, *supra* note 54.

[291] Charles Manga Fombad, *Judicial Power in Cameroon's Amended Constitution of 18 January 1996*, JURDIS INFO: REVUE DE LÉGISLATION ET DE JURISPRUDENCE CAMEROUNAISES

significantly by political considerations. For example, in 1996, Cameroon amended its constitution and introduced separation of powers, with what was supposed to be an independent judiciary. Article 37 deals with judicial power and states that "[j]udicial power shall be exercised by the Supreme Court, Courts of Appeal and Tribunals. The *Judicial Power shall be independent of the executive and legislative powers*."[292] However, the same constitution also grants the President of the Republic, one of the three branches of government, the power to guarantee judicial independence.[293]

The President of the Republic of Cameroon is expected to guarantee the independence of judicial power by appointing "members of the bench and of the legal department"[294] and by taking "disciplinary action against judicial and legal officers."[295] Despite these constitutional provisions, argues Charles Manga Fombad, an expert on Cameroon constitutional law, the President of the Republic of Cameroon continues to "appoint, transfer, dismiss, suspend and can interfere with the so-called judicial power with no constitutional provisions to control and ensure that this is done in a fair, rational, objective and predictable manner."[296] In addition, Cameroon's Supreme Court, which is the country's highest court, is located within the Ministry of Justice, which is a "cabinet department within the Presidency of the Republic, and thus, under the control of the executive."[297]

In its 2018 report on human rights in Cameroon, the U.S. Department of State notes that "[d]espite the [Cameroon] judiciary's partial independence from the executive and legislative branches, the president [of the Republic of Cameroon] appoints all members of the bench and legal department of the judicial branch, including the president of the Supreme Court, and may

54, 68 (1998). At a workshop held in Pretoria, South Africa, on "Challenges to the Rule of Law in Africa" from April 12 to 13, 2016, and designed to help "identify the challenges that confront the African Union (AU) Member States with respect to the rule of law," participants agreed that "an independent judiciary is vital for the rule of law." *See* INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, CHALLENGES TO THE RULE OF LAW IN AFRICA 7, 19 (2016), https://www.idea.int/publications/catalogue/challenges-rule-law-africa. One participant in the workshop, Professor André Mbata Mangu, made reference to the Democratic Republic of Congo, where, he argued, the majority of citizens do not "understand or appreciate a constitution, relative to the authority exercised by an individual, such as the president." *Id.* at 19.

[292] CONSTITUTION OF THE REPUBLIC OF CAMEROON, 1996 art. 37(2) (emphasis added).

[293] According to Article 37(3), "[t]he President of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and of the legal department." *Id.* at art. 37(3).

[294] *Id.*

[295] *Id.*

[296] Fombad, *supra* note 291, at 68.

[297] *See* John Mukum Mbaku, *Judicial Independence, Constitutionalism and Governance in Cameroon: Lessons from French Constitutional Practice*, 1 EUR. J. COMP. L. & GOVERNANCE 357, 371 (2014).

dismiss them at will."[298] The U.S. Department of State report states further that Cameroon's "court system is subordinate to the Ministry of Justice, which in turn is under the president."[299] In addition, "[t]he constitution designates the president as 'first magistrate,' thus 'chief' of the judiciary, making him the legal arbiter of any sanctions against the judiciary."[300] Although the constitution states that "[m]agistrates of the bench shall, in the discharge of their duties, be governed only by the law and their conscience,"[301] it is often the case that in some legal matters that come before a court, judges are "subordinate to the minister of justice or to the minister in charge of military justice."[302] For example, "[w]ith approval from the minister of justice, the Special Criminal Court may drop charges against a defendant who offers to pay back the money he is accused of having embezzled, which essentially renders the act of corruption free of sanctions."[303]

As argued by Fombad, all of Cameroon's executives[304] have been in total control of the judicial branch of government, and they have been able to do so through their ability to appoint and dismiss judicial officers as well as control the budgets of the judiciary.[305] In addition, Fombad argues that in Cameroon, the judiciary functions essentially as "allies and partners of the executive in enjoying the spoils of power."[306] He provides an example of how the executive manipulates and controls the judiciary, especially during elections.

In Cameroon, argues Fombad, "[j]udges preside over the divisional election supervisory and vote-counting commissions which tabulate election results, which are then sent to the national vote-counting commission."[307] The

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[298] U.S. DEP'T. OF STATE, *supra* note 24.

[299] *Id.*

[300] *Id.*

[301] CONSTITUTION OF THE REPUBLIC OF CAMEROON, 1996 art. 37(2).

[302] U.S. DEP'T OF STATE, *supra* note 24.

[303] *Id.*

[304] Since the founding of the Republic of Cameroon in 1961, the country has had only two executives—Ahmadou Ahidjo (1961–1982) and Paul Biya (1982–present) (2019). *See* Kehbuma Langmia, *Social Media Technology and the 2011 Presidential Election in Cameroon*, *in* MEDIA ROLE IN AFRICAN CHANGING ELECTORAL PROCESS: A POLITICAL COMMUNICATION PERSPECTIVE 111, 113 (Cosmas Uchenna Nwokeafor & Kehbuma Langmia eds., 2013) (noting, inter alia, that "since gaining independence from their French and English colonial masters, Cameroon has had only two presidents": the first was Ahmadou Ahidjo and the second was Paul Biya); ABRAHAM KICHA, RESCUING AFRICAN MARRIAGES IN THE DIASPORA 28 (noting, inter alia, that "[s]ince independence, Cameroon has had only two presidents" and that "Ahmadou Ahidjo was the first" and "Paul Biya [was] his successor" and "current leader" of the country).

[305] *See* Charles M. Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, *in* CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 234, 247 (Kempe Ronald Hope & Bamwell C. Chikulo, eds., 2000).

[306] *Id.* at 247.

[307] *Id.* at 248.

Supreme Court, which is under the control of the Ministry of Justice—a cabinet department within the Presidency of the Republic—"verifies and proclaims [the] results" of each election.[308] During each election, the president engages in activities that ensure that any election-related disputes resolved by the judiciary are done so in his favor and that of his supporters.[309]

For example, during the 1996 and 1997 elections, Biya took action that would ensure that the judiciary remained loyal and resolve any election-related disputes in his favor. He issued a "presidential decree [that] doubled [judicial] salaries, and in the case of Supreme Court judges," there was an "increase of almost 200 percent" and it came with "numerous perks and privileges."[310] In addition to the fact that all the judges of the Supreme Court are appointed by the President of the Republic, "prior to each election there are judicial promotions, appointments and transfers to ensure that compliant judges are placed in strategic positions."[311] Rather than serve as a "credible check" on the exercise of government power, the Cameroon judiciary and its officers have, instead, functioned essentially "[a]s the malleable instruments of politicians who are the most prominent purveyors of corruption."[312]

Cameroon, of course, is not an exception when it comes to the lack of effective independence by the judiciary. Throughout the continent, the judicial systems of many African countries are not able to function independently of the executive branch of government. Specifically, judges in the judicial systems of many African countries do not have "security of tenure," "financial security," or "institutional independence," which are very important elements of judicial independence.[313] In *Valente v. The Queen*, the Supreme Court of Canada defined minimum requirements for judicial independence: these are (1) "security of tenure," (2) "financial security" free from "arbitrary interference by the Executive in a manner that could affect judicial independence," and "institutional independence with respect to the judicial function . . . [and] judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function."[314]

But, what about the reforms that began in the continent in the early-1990s? Did they not enhance judicial independence in many countries on the continent? Many of the African countries that engaged in institutional reforms in the early-1990s actually provided themselves with constitutions that guarantee the independence of the judiciary.[315] Post-apartheid South Africa was one

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[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *Id.*

[313] Valente v. The Queen, [1985] 2 S.C.R. 673 (Can.).

[314] *Id.* at paras. 27, 40, 43, 47.

[315] For example, the constitutions of the following African countries specifically and expressly guarantee judicial independence: Ghana (Articles 125 & 127); Namibia (Article

of the countries that undertook reforms to provide itself with a new constitution and one that provided for separation of powers with judicial independence. The Constitution of the Republic of South Africa (No. 108 of 1996) states that

> (1) The judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
>
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.[316]

In addition to the fact that South Africa's constitution guarantees judicial independence, the country's highest court, the Constitutional Court (CC), has recognized the independence of the judiciary in several of its rulings. The CC has held that "judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law."[317] In its ruling in *De Lange v. Smuts*, the CC endorsed the view expressed by the Supreme Court of Canada in the case *Valente v. The Queen* regarding judicial independence.[318] In another case, the CC held that:

> The Constitution thus not only recognises [sic] that courts are independent and impartial, but also provides important institutional protection for courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply

78); Uganda (Articles 126 & 128); and Zambia (Article 91). *See* CONSTITUTION OF GHANA 1992, art. 125, 127; CONSTITUTION OF NAMIBIA Feb 9, 1990, art 78; CONSTITUTION OF UGANDA 1995, art. 126, 128; CONSTITUTION OF ZAMBIA (1996) § 91. *See also* H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1304–1307 (2006).

316 *See* S. AFR. CONST., 1996.

317 De Lange v. Smuts (1998) (3) SA 785 (CC), para. 59 (S. Afr.).

318 *Id.* at paras. 70, 73.

> to all courts and judicial officers, including magistrates' courts and magistrates. These provisions bind the judiciary and the government and are enforceable by the superior courts, including this Court.[319]

Through its rulings, the CC has clarified the nature of judicial independence in the country. It has made clear that judicial independence has two important dimensions, namely, (1) individual independence, which mandates that when judges adjudicate cases, they must act independently and impartially; and (2) institutional independence, which requires that the country provide "specific structures and guarantees . . . so that judicial officers and the courts are adequately protected against interference from external actors."[320] External actors include other branches of government—for example, the executive, who is likely to come before the courts.[321]

South Africa's post-apartheid judiciary has, in its rulings, exercised a significant level of independence. When the judiciary has been called upon to check the exercise of government power, it has done so without succumbing to political pressure. For example, shortly after then President of the Republic of South Africa, Jacob Zuma, took unilateral action[322] to withdraw the country from the International Criminal Court (ICC), a civil society organization, and the country's main opposition political party to the ruling African National Congress (ANC), the Democratic Alliance (DA), argued that the decision to withdraw South Africa from the Rome Statute of the ICC was unconstitutional because the South African Parliament was not consulted as required by the national constitution.[323] The DA subsequently initiated legal action to force the government to abandon its effort to withdraw South Africa from the Rome Statute.[324]

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[319] Van Rooyen v. The State (2002) (5) SA 24 (CC), para. 18 (S. Afr.).

[320] Mbaku, *supra* note 60, at 1008–09.

[321] AMY GORDON & DAVID BRUCE, CTR. FOR THE STUDY OF VIOLENCE & RECONCILIATION, THE TRANSFORMATION AND THE INDEPENDENCE OF THE JUDICIARY IN SOUTH AFRICA 1, 7 (2007), http://www.csvr.org.za/docs/transition/3.pdf (examining judiciary independence in post-apartheid South Africa).

[322] The president took the action without consulting the legislative branch as required by the constitution. *Democratic Alliance v. Minister of Int'l Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP), para. 57 (S. Afr.).

[323] Christopher Torchia, *South African Court Blocks Government's International Criminal Court Withdrawal Bid*, INDEP. (Feb. 22, 2017), https://www.independent.co.uk/news/world/africa/international-criminal-court-icc-withdrawal-south-africa-racist-jacob-zuma-president-a7594346.html.

[324] *See Democratic Alliance v. Minister of Int'l Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP) (S. Afr.).

Specifically, the DA argued that "[t]he notice of withdrawal [was] in breach of section 231 of the Constitution [of South Africa, 1996], as it was delivered without first securing a resolution of Parliament authorizing withdrawal from the Rome Statute."[325] On February 22, 2017, the Gauteng Division of the South African High Court at Pretoria held, in the case *Democratic Alliance v. Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*, that the president did not have the authority to terminate an existing international agreement and ordered the government to revoke the notice of withdrawal.[326] Specifically, the court held that "the decision of the executive to deliver the notice of withdrawal from the Rome Statute of the ICC without the requisite prior parliamentary approval violated section 231 of the South African Constitution and was a breach of the principle of separation of powers."[327] Subsequently, on March 7, 2017, the government of South Africa accepted the court ruling and revoked the notice of withdrawal from the Rome Statute.[328]

In the violence that gripped Kenya in the aftermath of the presidential election in December 2007, the country engaged in constitutional discourse to produce a new constitution.[329] The result of this nation-wide reform effort is the *Constitution of the Republic of Kenya, 2010*.[330] That constitution provided for the separation of powers with an independent judiciary.[331] It states that "[i]n the exercise of judicial authority, the Judiciary . . . shall be subject only to this Constitution and the law shall not be subject to the control or direction

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[325] Paul Herman, *Decision to Withdraw from ICC in Breach of Constitution—DA Court Papers*, NEWS24 (Oct. 24, 2016), https://www.news24.com/SouthAfrica/News/decision-to-withdraw-from-icc-in-breach-of-constitution-da-court-papers-20161024.

[326] *Democratic Alliance v. Minister of Int'l Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*, 2017 (3) SA 212 (GP) (S. Afr.). *See also* Robbie Gramer, *South African Court Tells Government It Can't Withdraw from the ICC*, FOREIGN POL'Y (Feb. 22, 2017), http://foreignpolicy.com/2017/02/22/south-african-court-tells-government-it-cant-withdraw-from-the-icc/.

[327] *South Africa: Notice of Withdrawal from the Rome Statute Revoked*, GLOBAL LEGAL MONITOR (Mar. 10, 2017), https://www.loc.gov/law/foreign-news/article/south-africa-notice-of-withdrawal-from-the-rome-statute-revoked/; *see also Democratic Alliance v. Minister of Int'l Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP), para. 57 (S. Afr.). Section 231 of the Constitution of the Republic of South Africa, 1996, deals with international agreements. S. AFR. CONST., 1996, art. 132.

[328] Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html.

[329] *Kenyans Back Change to Constitution in Referendum*, BBC (Aug. 5, 2010), https://www.bbc.com/news/world-africa-10876635.

[330] CONSTITUTION (2010) (Kenya).

[331] *Id.* at art. 160, 174.

of any person or authority."[332] The Constitution also granted the Supreme Court the power to answer all questions related to the validity of presidential elections. Specifically, the Constitution states as follows:

> (1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.
>
> (2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.[333]

On August 8, 2017, general elections were held in Kenya to elect the President, members of Parliament, and officials for various sub-national governments.[334] The official results showed that incumbent president, Uhuru Kenyatta, had been re-elected with 54.27 percent of the votes cast.[335] The main opposition leader, Raila Odinga, received 44.74 percent of the votes.[336] Shortly after the results were released, Odinga argued that the election had been marred with many irregularities and that the results were "hacked and rigged in favour [sic] of the incumbent" (i.e., Uhuru Kenyatta).[337] Odinga and his supporters subsequently took their case to the Supreme Court.[338] On September 1, 2017, the Supreme Court rendered its historic decision in which it stated that the electoral commission had "failed, neglected, or refused to conduct the presidential election in a manner consistent with the dictates of the Constitution."[339] And, in accordance with § 140(3) of the Constitution, the Supreme Court ordered that "a fresh election shall be held within sixty days" to select a new President-elect.[340] The September 1, 2017 ruling by the Kenya

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[332] *Id.* at art. 160.

[333] *Id.* at art. 140.

[334] *See, e.g.*, THE CARTER CTR., KENYA 2017 GENERAL AND PRESIDENTIAL ELECTIONS: FINAL REPORT (2018), https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf.

[335] *See* Hamza Mohamed, *Uhuru Kenyatta Wins Kenya Presidential Election*, AL JAZEERA (Aug. 11, 2017), https://www.aljazeera.com/news/2017/08/uhuru-kenyatta-wins-kenya-presidential-election-170811090542971.html.

[336] *Id.*

[337] *See Kenya's Odinga to Challenge Kenyatta's Victory in Court*, AL JAZEERA (Aug. 16, 2017), https://www.aljazeera.com/news/2017/08/kenya-odinga-challenge-kenyatta-victory-court-170816144507189.html.

[338] *Id.*

[339] *See* Kimiko de Freytas-Tamura, *Kenya Supreme Court Nullifies Presidential Election*, N.Y. TIMES (Sept. 1, 2017), https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html?mcubz=0.

[340] CONSTITUTION (2010) (Kenya) art. 140.

Supreme Court was considered very important because it was the first time in the history of independent Kenya that the courts had successfully stood up to what had, since independence, evolved into an imperial presidency.[341]

The independence exhibited by the Constitutional Court in South Africa and the Supreme Court of Kenya has contributed significantly to the gradual evolution of a culture of adherence to the rule of law in these countries. Unfortunately, this has not been the case in many other countries on the continent. Although many of them have constitutions that guarantee judicial independence, these guarantees remain essentially parchment barriers to the abuse of executive power, which, unfortunately, do not have any practical effects. The Founders of the American Republic recognized this problem, that is, that parchment barriers alone cannot protect government tyranny; there must exist a robust and effective governing process, one that adequately guards the government and prevents civil servants and political elites from acting with impunity.[342]

In her study of judicial independence and its relation to the protection of human rights, Keith states that many legal scholars and political scientists have asserted that judicial independence "is *the* indispensable link in the machinery for securing individual protection against states' human rights abuses."[343] Monica Macovei, in a study of the protection of human rights by the judiciary in Romania, argues that "[a]s a necessary check on the potential excesses of both the executive and legislative branches, only an independent and impartial judiciary may effectively guarantee the protection of human rights."[344]

International organizations, such as the United Nations (UN) and the International Bar Association (IBA) recognize the "nexus between the independence of the judiciary and human rights"[345] and have produced resolutions that "enumerate an independent judiciary as one of the essential elements for safeguarding human rights."[346] In addition to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the UN "has set forth standards for achieving an independent judiciary in its *Basic*

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[341] John Aglionby, *Kenya Election Ruling Raises Hopes of Independent Judiciary,* FIN. TIMES (Sept. 4, 2017), https://www.ft.com/content/753583f2-9178-11e7-a9e6-11d2f0ebb7f0.

[342] *See, e.g.*, Best, *supra* note 103, at 37.

[343] *See* Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 JUDICATURE 195, 195 (2002) (emphasis in original).

[344] *See* Monica Macovei, *Protection of Human Rights by the Judiciary in Romania*, *in* JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 3, 6 (Mark Gibney & Stanislaw Frankowski eds., 1999).

[345] Keith, *supra* note 343, at 195.

[346] *Id.*

Principles on the Independence of the Judiciary."[347] Noting that "the U.N. principles represent a substantial degree of global consensus on what judicial independence is or should be,"[348] Keith constructs "seven ordinal measures"[349] for what can be described as "the seven key constitutional elements necessary to produce an independent judiciary able to safeguard human rights."[350] These key indicators of judicial independence are (1) a ban against exceptional or military courts; (2) separation of powers; (3) exclusive authority; (4) finality of decisions; (5) enumerated qualifications; (6) guaranteed terms; and (7) fiscal autonomy.[351]

Several legal scholars have studied judicial independence in Nigeria under the Fourth Republic, which came into being with the Constitution of the Federal Republic of Nigeria, 1999.[352] In one such study, Professor Philip Aka states that "[a] judicial tribunal's independence breathes life into the liberties guaranteed for citizens in a national constitution, and promotes human rights."[353] Aka adds that judicial independence is also "imperative for rooting the culture of the rule of law."[354] In fact, the ability of the courts to operate freely and without political interference and deliver justice timely and fairly directly affects the people's trust in the law and hence, is a major determinant of people's willingness to voluntarily accept, respect, and obey the law.

In every country, judges and the courts are tasked with the responsibility to make decisions that affect people's lives, their freedoms, rights, as well as their property. According to the UN's *Basic Principles on the Independence of the Judiciary*, "judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens."[355] Unless the judiciary is independent of outside influence and interference, it is not likely that it would be able to successfully carry out or undertake these duties.

In his study of judicial independence in Nigeria, Professor Aka uses the seven indicators of judicial independence developed by Keith to determine the extent to which the judiciary in Nigeria's Fourth Republic is independent. The ban against exceptional or military courts prohibits the trial of citizens by

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[347] *Id.* These principles were adopted by the UN General Assembly in 1985 through Resolution 40/32 of November 29, 1985 and Resolution 40/146 of December 13, 1985. *See* Basic Principles on the Independence of the Judiciary, Preamble, U.N. G.A. Res. 40/32 (Nov. 29, 1985) and 40/146 (Dec. 13, 1985) [hereinafter Basic Principles on Judicial Independence].

[348] Keith, *supra* note 343, at 196.

[349] *Id.*

[350] *Id.*

[351] *Id.* at 196–97.

[352] CONSTITUTION OF NIGERIA (1999). This was the constitution that marked the end of military rule and ushered in what was expected to be a democratic dispensation.

[353] Philip Aka, *Judicial Independence Under Nigeria's Fourth Republic: Problems and Prospects*, 45 CAL. W. INT'L L.J. 1, 4 (2014).

[354] *Id.*

[355] Basic Principles on the Independence of the Judiciary, *supra* note 347.

extraordinary tribunals and this is in accordance with the Basic Principles on Judicial Independence that "[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures."[356] Specifically, "[t]ribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."[357] Aka argues that this right, as stated in the Basic Principles on Judicial Independence, is "the testament that the people, rather than solely the judges, are the ultimate beneficiaries of judicial independence."[358]

In some African countries, one can find "special courts" that are granted the power to operate without the benefit of "the duly established procedures of the legal process" and that "displace the jurisdiction belonging to ordinary courts or judicial tribunals."[359] An example is Cameroon's Special Criminal Court ("SCC"), which was created in 2011 to adjudicate cases involving the embezzlement of public funds and to force those convicted to restore the property stolen.[360] Although some scholars have argued that a court, such as Cameroon's SCC, is "an example to emulate and confirms that corruption can be fought if and only if the political will to do so is present,"[361] others have argued that the SCC, like other judicial institutions in Cameroon, is subject to manipulation by senior-level civil servants and politicians for their own benefit and that of their benefactors.[362]

The second key indicator of judicial independence is the separation of powers, "which requires that the authority of the judicial branch be formally separated from the authority of the executive and legislative branches, who must also refrain from taking any steps likely to endanger the independence of judges."[363] The Basic Principles on Judicial Independence mandate that "judicial independence [should] 'be guaranteed by the State and enshrined in the Constitution or the law of the country.'"[364] More importantly, the Basic

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[356] *Id.*

[357] *Id.*

[358] Aka, *supra* note 353, at 11 (footnotes omitted).

[359] Basic Principles on Judicial Independence, *supra* note 347, at para. 5.

[360] *See* Avitus Agbor, *Prosecuting the Offense of Misappropriation of Public Funds: An Insight into Cameroon's Special Criminal Court*, 20 POTCHEFSTROOM ELECTRONIC L.J. 1, 2–3 (2017).

[361] *Id.* at 1.

[362] In fact, as determined by the U.S. Department of State in its investigations of human rights in Cameroon, the Special Criminal Court can drop cases before it if instructed to do so by the Ministry of Justice. Such interference not only undermines the ability of the SCC to fully and fairly perform its functions, it also threatens the rule of law in the country. *See* U.S. DEP'T. OF STATE, 2017 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CAMEROON (2018), https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/cameroon/.

[363] Aka, *supra* note 353, at 11–12.

[364] *Id.* at 12.

Principles on Judicial Independence state that "[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[365] Unfortunately, for many African countries, while national constitutions may guarantee judicial independence, civil servants and political elites in these countries have refused to accept, respect and "observe the independence of the judiciary."[366]

It is important, for the sake of enhancing judicial independence, that the judiciary must not be housed within either the executive or legislative branches. The judiciary must be housed in a branch that is separate from either the executive or legislative branch in order to minimize political interference with the country's court system. Yet, in Cameroon and many Francophone countries, the Supreme Court, the country's highest court, is actually housed within the Ministry of Justice, a cabinet position within the executive branch of government. It is no wonder that the president and members of his cabinet routinely interfere with judicial deliberations and rulings, a process that has seriously undermined the rule of law in each of these countries.[367]

The third indicator of judicial independence is that courts be granted "exclusive authority" to adjudicate cases "based on their own competence and free from unwarranted pressures of any type."[368] The Basic Principles on Judicial Independence mandate that the judiciary be granted exclusive "jurisdiction over all issues of a judicial nature," as well as the "exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."[369] In order for the rule of law to function in a country, the judiciary must have the authority to deal with all issues of a judicial nature and, in addition, be granted the authority to determine which matters fall within the jurisdiction of the courts.

The fourth indicator of judicial independence is the finality of court decisions. This indicates that "decisions of judges [must] not be subject to any revision outside the appeal procedures by the law."[370] The Basic Principles on Judicial Independence support this principle, stating that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision."[371]

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[365] *See* Basic Principles on Judicial Independence, *supra* note 347, at para. 1.

[366] *Id.*

[367] U.S. DEPARTMENT OF STATE, *supra* note 24.

[368] Aka, *supra* note 353, at 12; *see also* Keith, *supra* note 343 (noting the critical role played by an independent judiciary in the protection of human rights).

[369] *See* Basic Principles on Judicial Independence, *supra* note 347, at para. 3.

[370] Aka, *supra* note 353, at 12.

[371] Basic Principles on Judicial Independence, *supra* note 347, at ¶ 4. The Principles proceed to state that the principle stated in para. 4 does not prejudice judicial review or the "mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law." *Id.*

Interference with the performance of the judicial function by state- and, to a certain extent, non-state actors, is one of the most important constraints to the rule of law in African countries. Judges and judicial institutions must be safeguarded from political interference, which can severely handicap their ability to perform their functions and contribute to the maintenance of the rule of law.

The fifth indicator deals with the selection of judicial officers. Those who serve in positions in the judicial system must be individuals who are fully qualified as judged by their "professional qualifications, ability, and integrity."[372] While it is important, especially for African countries, that staffing of the courts reflect the diversity of each country, judicial appointments should not be based solely on political considerations—individuals who serve in the judiciary must possess the required professional qualifications and must also adhere to the rules of professional conduct for lawyers and judges. The International Bar Association (IBA) Minimum Standards of Judicial Independence provide some advice on what role, if any, the executive should play in the hiring of judicial officers.[373] The IBA Minimum Standards state that "[p]articipation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority."[374]

Aka argues that the main reason for making certain that judicial officers are only selected based on "merit factors"[375] is to ensure that the judiciary is staffed only by individuals who can "perform their functions competently, and who have been socialized to the norms of judicial independence."[376] Such a caliber of professionals is likely to be able to resist corruption by the executive.

With respect to the disciplining of judges, a process that has been used by many African presidents to influence their national judiciaries, the IBA states that "[t]he power to discipline or remove a judge must be vested in an institution, which is independent of the Executive" and that that power "should preferably be vested in a judicial tribunal."[377] The IBA, nevertheless, prescribes a role for the executive in the disciplining of judicial officers. It states that "[t]he Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not

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[372] Aka, *supra* note 353, at 13.

[373] INT'L BAR ASSOC., IBA MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE (1982),https://www.icj.org/wp-content/uloads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf [hereinafter IBA].

[374] *Id.* at § 3(a) (emphasis added).

[375] Aka, *supra* note 353, at 13.

[376] *Id.*

[377] IBA, *supra* note 373, at §§ 4(a), 4(b).

the adjudication of such matters."[378] More specifically, the IBA states that "[t]he Executive shall not have control over judicial functions."[379]

The sixth indicator of judicial independence requires that the "constitution guarantees judges' terms of office, governing their appointment, discipline, and removal from office."[380] Professor Aka then argues that this indicator is consistent with provisions of the IBA's Minimum Standards of Judicial Independence, which state that "[t]he position of the judges, their independence, their security, and their adequate remuneration shall be secured by law,"[381] and that the remuneration of judges and other judicial officers shall not "be decreased during the judges' services, except as a coherent part of an overall public economic measure."[382]

The last indicator of judicial independence is "fiscal autonomy" and requires that the judiciary be "provided with adequate resources allowing it to properly perform its functions while insulating it from possible financial retribution of an abusive regime."[383] In order for judicial officers to perform their functions properly, they must be guaranteed financial security. This is in line with the minimum requirements for judicial independence defined by the Supreme Court of Canada in the case *Valente v. The Queen*.[384]

After ruling the country for nearly 30 years,[385] the Nigerian military produced a new constitution[386] and handed the apparatus of government to an elected civilian regime in 1999.[387] Professor Aka has studied judicial

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[378] *Id.* at § 4(a).

[379] *Id.* at § 5.

[380] Aka, *supra* note 353, at 13.

[381] *Id.* at 13, 14 (quoting IBA, *supra* note 373, at § 15(a)).

[382] *Id.* at 14 (quoting IBA, *supra* note 373, at § 15(b)).

[383] *Id.*

[384] *See* Valente v. The Queen, [1985] 2 S.C.R. 673 (Can.). In this case, the Canadian Supreme Court elaborated three minimum conditions for judicial independence. First is "security of tenure"—"[t]he essentials of such security are that a judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard." *Id.* at 2–3. Second, is "financial security—security of salary or other remuneration, and where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence." *Id.* at 3. Third is "institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function." *Id.* at 4.

[385] The military ruled Nigeria during the periods 1966–1979 and 1983–1999. *See* Norimitsu Onishi, *Nigeria's Military Turns Over Power to Elected Leader*, N.Y. TIMES (May 30, 1999), https://www.nytimes.com/1999/05/30/world/nigeria-s-military-turns-over-power-to-elected-leader.html; *see also* Max Siollun, *How First Coup Still Haunts Nigeria 50 Years On*, BBC (Jan. 15, 2016), https://www.bbc.com/news/world-africa-35312370.

[386] *See* CONSTITUTION OF NIGERIA (1999). This constitution ushered in Nigeria's Fourth Republic, with former military leader, Olusegun Obasanjo, as its first elected president.

[387] *See* Onishi, *supra* note 385.

independence in Nigeria under the Fourth Republic and determined the following: the country's constitution "contains ample provisions relating to judicial independence."[388] Professor Aka then goes on to argue that "[e]ntrenchment of these provisions in the constitution [of Nigeria] as ground norm or basic law of the land signifies that an independent judiciary is a value that Nigerians cherish."[389]

Professor Aka then uses the seven indicators of judicial independence to determine the extent to which the provisions of Nigeria's 1999 Constitution conform with these provisions.[390] He concludes that the institutional arrangements of Nigeria's Fourth Republic meet all the indicators, except that dealing with fiscal autonomy.[391] In analyzing the problems and failures of the judiciary in Nigeria, Okechukwu Oko argues that "[b]oth the appearance and reality of independence demand that the judiciary should have complete control over its funds."[392] This speaks directly to one of the minimum requirements for judicial independence defined by the Supreme Court of Canada in the case *Valente v. The Queen*[393] and adopted by the Constitutional Court of South Africa in the cases *De Lange v. Smuts*[394] and *Van Rooyen v. The State*.[395] In its ruling, the Supreme Court of Canada identified "financial security" free from "arbitrary interference by the Executive in a manner that could affect judicial independence" as one of the minimum requirements for judicial independence.[396] This part of judicial independence—that is, financial security—is provided for in the U.S. Constitution at Article III, section one, which states that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[397]

In his study of judicial independence in Nigeria's Fourth Republic, Professor Aka determined that although constitutional provisions seem to guarantee

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[388] Aka, *supra* note 353, at 26. *See, e.g.*, CONSTITUTION OF NIGERIA § 231(1–2) (dealing with the appointment of the Chief Justice of Nigeria); § 238(1) (dealing with the appointment of the President of the Court of Appeal); § 238(2) (dealing with the appointment of a Justice of the Court of Appeal); § 250(1) (dealing with appointment of a person to the Office of Chief Judge of the Federal High Court); § 271(1) (dealing with appointment of a person to the Office of Chief Judge of a State); § 271(2) (dealing with appointment of a person to the Office of a Judge of a High Court of a State).

[389] Aka, *supra* note 353, at 27.

[390] *Id.* at 28.

[391] *Id.*

[392] Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT'L L. 9, 77 (2005).

[393] *See* Valente v. The Queen [1985] 2 S.C.R. 673 (Can.).

[394] *See* De Lange v. Smuts 1985 (3) SA 1 (CC) at 62 para. 73 (S. Afr.).

[395] *See* Van Rooyen v. State 2002 (5) SA 1 (CC) at 99 para. 155 (S. Afr.).

[396] *See* Valente, at para. 40.

[397] U.S. CONST. art. III, § 1.

judicial independence, the reality is that fiscal autonomy is lacking for judges and the judiciary.[398] Rather, "under the Fourth Republic, the President controls funds allocated to the judiciary, impelling judges to 'depend on the goodwill of the executive branch for funding.'"[399] Such financial dependence seriously undermines the ability of the judiciary to function independently and perform its constitutional duties fairly and without political interference. As argued by Fombad in the case of Cameroon, control of the judiciary's finances by the executive has allowed the latter to turn judges and other judicial officers into "malleable instruments" for the advancement of the interests of the president and his benefactors.[400]

Judicial independence in Nigeria is threatened not only by the lack of financial autonomy by the judiciary. The IBA Minimum Standards of Judicial Independence state that "[j]udicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment."[401] With respect to the removal of a judge, the Constitution of Nigeria provides the following procedure: "A judicial officer shall not be removed from his office or appointment before the age of retirement except in the following circumstances—(a) in the case of (i) Chief Justice of Nigeria, . . . by the President acting on an address supported by two-thirds majority of the Senate."[402]

Just three weeks before Nigeria was to hold a general election in 2019 in which incumbent president, Muhammadu Buhari, was a candidate for re-election, the president suspended Chief Justice Walter Onnoghen,[403] who was facing charges for allegedly failing to declare his personal assets before taking office in 2017.[404] Although this was not an outright dismissal or removal, Justice Onnoghen's suspension was widely criticized by both internal and external observers for not "following legal procedures" and for not offering the

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398 Aka, *supra* note 353, at 28.

399 *Id.* at 31.

400 Fombad, *supra* note 305, at 248.

401 *See* IBA, *supra* note 373, at § 22.

402 *See* CONSTITUTION OF NIGERIA (1999) § 292 (1)(a)(i).

403 Justice Walter Onnoghen was suspended on January 25, 2019, three weeks before Nigeria held its presidential elections. *See* Paul Wallace, *Nigerian Leader Sparks Pre-Vote Crisis by Replacing Top Judge*, BLOOMBERG (Jan. 25, 2019), https://www.bloomberg.com/news/articles/2019-01-25/buhari-suspends-nigeria-s-top-judge-ahead-of-election-aide-says-jrcau3pn (noting the suspension of Nigerian Chief Justice Walter Onnoghen); *see also* Bashir Adigun & Haruna Umar, *Nigeria's Leader Suspends Chief Justice 3 Weeks Before Vote*, U.S. NEWS & WORLD REPORT (Jan. 25, 2019), https://www.usnews.com/news/world/articles/2019-01-25/nigeria-president-appoints-acting-chief-justice (noting the suspension of Nigeria's Chief Justice three weeks before the presidential election).

404 *Nigerian Chief Justice's Suspension Raises International Concerns*, BBC (Jan. 26, 2016), https://www.bbc.com/news/world-africa-47015698.

judge an opportunity to fully defend himself.[405] Officials from the UN Human Rights Council argued that the removal of the Chief Justice without substantive due process was "incompatible with the independence of the judiciary" and violated the spirit of the separation of powers.[406]

The truth of the matter is that, despite constitutional guarantees, the Nigerian judiciary does not currently enjoy any significant level of independence. Despite the improvements that have been made since the introduction of democracy in 1999, Nigeria's judiciary, like many others in Africa, does not enjoy the type of independence that would allow it to function effectively as a check on the exercise of government power and advance the rule of law.

F. Understanding and Appreciating the Constitution

The rule of law cannot function effectively in a country if the majority of citizens do not understand and appreciate the constitution, which is the country's basic law. Throughout the continent, many people are not aware of their national constitution, do not understand its provisions or its role in their lives, and are unable to appreciate the role that the constitution plays in regulating their socio-political interaction.[407] As argued by Professor André Mbata Mangu, most citizens of the Democratic Republic of Congo (DRC) usually do not understand the constitution or appreciate it.[408] Of course, the situation of the people of the DRC is not unique. Throughout the continent, many citizens are not aware that there exists, within their country, a basic law called the constitution and those who do, do not have firsthand knowledge of its contents, as well as what the role of this basic law is in their daily lives.[409]

Part of the reason why many citizens of the African countries are usually not aware of their constitutions or understand and appreciate them is directly related to the nature of the process through which national constitutions were designed and adopted. If the constitution-making process is participatory and inclusive—allowing all stakeholder groups or subcultures to participate—issues that are important to them can become part of constitutional discourse and hence, could be reflected in the constitution.[410] As argued by Mbaku, "[t]he constitution must be considered by the majority of citizens as a

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[405] *See UN Experts Says Suspension of Nigeria's Chief Judge Breaches Human Rights*, REUTERS (Nov. 2, 2019), https://www.reuters.com/article/us-nigeria-election-un/u-n-expert-says-suspension-of-nigerias-chief-judge-breaches-human-rights-idUSKCN1Q00UI.

[406] *Id.*

[407] *See Challenges to the Rule of Law in Africa 22*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (Sept. 1, 2016), https://www.idea.int/sites/default/files/publications/challenges-to-the-rule-of-law-in-africa.pdf.

[408] *Id.* at 7, 19.

[409] *Id.* at 38.

[410] *See* MBAKU, *supra* note 61, at 49.

negotiated legal mechanism to deal with the complex problems that arise from their socio-political interaction."[411]

Citizens must see the constitution generally and the law in particular, as a tool designed (i) to protect their rights; and (ii) "to organize their private lives—for example, to start and run a business for profit, acquire and dispose of property, get married, engage in contracting, protect one's values from encroachment by either state or non-state actors, or otherwise engage in productive activities to create wealth."[412] Making certain that the process through which the constitution and post-constitutional laws are selected is "participatory and inclusive achieves at least two critical objectives."[413] First is "that the resulting laws are locally-focused and therefore relevant to the lives of the people whose behaviors the laws are expected to regulate, reflecting their values."[414] Second is "that the laws are those that the people understand, respect, and are able and willing to obey."[415] Hence, the most effective way to make sure that the majority of the citizens of each African country voluntarily accept and obey their laws is "to make sure that the process through which laws are enacted in each country is open and transparent, and that citizens who so desire can participate fully."[416]

An important outcome of openness and transparency is that they can help citizens "know what the law is, understand the law, and make certain that the law reflects their values and is relevant to their lives, effectively enhancing compliance."[417] In addition, if the process through which the constitution, as well as, post-constitutional laws, is made is open and transparent, "citizens will be able to understand and appreciate the reason why a specific law has been enacted and why they must obey it."[418] Thus, openness and transparency contribute significantly to the ability and willingness of the majority of citizens to voluntarily accept, as well as, understand and appreciate the law, effectively enhancing adherence to the rule of law.

For many African countries, perhaps the most important reason why most citizens do not understand the provisions of their constitutions, including their Bill of Rights, is that these documents are written in languages that are alien to them. The majority of African countries have adopted the languages of their former colonizers as their official national languages. For example, the official languages of the Republic of Cameroon,[419] which at one time was

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411 *Id.* at 51.

412 Mbaku, *supra* note 60, at 1002.

413 *Id.* at 1003.

414 *Id.*

415 *Id.*

416 *Id.*

417 *Id.*

418 *Id.*

419 The present Republic of Cameroon is made up of two distinct geo-political entities, the former UN Trust Territory of Southern Cameroons under British administration which

colonized by France and the United Kingdom, are English and French.[420] The official language of Sierra Leone is English[421] and that of Senegal is French.[422]

The constitutions and laws of these countries are written in their official languages. Unfortunately, most of the citizens of these African countries are not literate in their countries' official languages. As a consequence, it is very difficult for citizens to be familiar with laws that are written in languages that they cannot read or understand. In Cameroon, for example, where most government communication is carried out in French, significant parts of the population cannot participate in governance because they can neither speak nor understand the French language.[423]

G. Failure to Domesticate Important International Human Rights Instruments

Upholding and protecting the rule of law requires that each African country mainstream international human rights law into national law either by legislation or by amending existing domestic laws where there is a contradiction.[424] Unfortunately, throughout the continent, many African countries have failed to domesticate regional and international legal instruments, especially those dealing with the recognition and protection of human rights.

It has been argued that "[a]n important consequence of globalization is the internationalization of constitutional law."[425] African countries, like their counterparts in other parts of the world, must now make certain that "in constitutional design and interpretation, [they] must take cognizance of international law, particularly international human rights instruments."[426] Alarmed

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gained independence on October 1, 1961 and subsequently united with the *République du Cameroun* to form the Federal Republic of Cameroon. The *République du Cameroun* was the former UN Trust Territory of Cameroons under French administration, which gained independence on January 1, 1960. Later, the name of the united country was changed from the Federal Republic of Cameroon (*République fédérale du Cameroun*) to the United Republic of Cameroon (*République unie du Cameroun*) and then to the Republic of Cameroon (*République du Cameroun*). *See, e.g.*, MBAKU, *supra* note 160 (examining a historical overview of present-day Cameroon).

420 CONSTITUTION OF THE REPUBLIC OF CAMEROON (1972) art. 1 para. 3.

421 CONSTITUTION OF SIERRA LEONE (1991) art. 90 ("The business of Parliament shall be conducted in the English Language.").

422 CONSTITUTION DE LA RÉPUBLIQUE DU SÉNÉGAL Jan. 22, 2001, art. 1 ("La langue officielle de la République du Sénégal est le Français").

423 *See* MBAKU, *supra* note 61, at 233 (arguing that since unification in 1961, "the French language has dominated all forms of communication in government and the economy" in Cameroon).

424 That is, where there is a contradiction between international law and domestic law. Here, domestic law includes constitutional and customary law.

425 John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT'L L. 43, 43 (2018).

426 *Id.* at 43.

at the atrocities that were committed during World War II, "the international community became quite concerned about how national governments treated or were treating their citizens."[427] As a consequence, when the United Nations was established in 1945, the global community moved very quickly to establish "minimum standards of human rights protection with monitoring bodies to scrutinize national performance."[428]

The international community eventually incorporated and elaborated these minimum standards into a UN General Assembly (UNGA) Resolution and two treaties that came to be referred to as the International Bill of Human Rights (IBHR). The IBHR consists of the Universal Declaration of Human Rights (UDHR),[429] the International Covenant on Civil and Political Rights (ICCPR) with its two Optional Protocols,[430] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[431] Although the UDHR is only a "declaration" and, as a consequence, is not legally binding on Member States of the UN, many of the UDHR's provisions have been incorporated into "other international and regional instruments as well as national constitutions."[432] Today, many of the provisions of the UDHR are "considered to express principles of customary international law."[433]

International legal scholars have argued that because of the fact that the provisions of the UDHR are now granted special status by many countries, these provisions and "other instruments which contain rules considered to be customary international law are automatically applicable in most common law countries . . . as part of national law and must therefore be taken into account in any interpretation of the constitution."[434] It has become imperative for many countries to consider the "provisions of these international human rights instruments, including those of the UDHR," as limits to their sovereignty and "take them into consideration when interpreting their national constitutions, as well as when designing their constitutions and enacting post-constitutional laws."[435]

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[427] *Id.* at 64.

[428] Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 444 (2012).

[429] G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[430] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

[431] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[432] Fombad, *supra* note 428, at 444.

[433] *Id.*

[434] *Id.* at 445.

[435] Mbaku, *supra* note 425, at 64–65.

Nevertheless, these international human rights instruments "do not automatically confer justiciable rights in national courts."[436] However, as argued by Mbaku, these instruments and standards "do and can have significant impact on national laws, including the constitution, how they are designed and how they are enforced."[437] The provisions of the constitutions of many African countries "have been substantially influenced by international human rights instruments and standards."[438] For example, in the Preamble to the Constitution of the Republic of Côte d'Ivoire, it is declared as follows:

> We, the People of Côte d'Ivoire . . . [r]eaffirm our determination to build a Rule of Law in which human rights, public freedoms, human dignity, justice and good governance as defined in the international legal instruments to which the Côte d'Ivoire is a party, in particular the United Nations Charter of 1945, the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples' Rights of 1981 and its supplementary protocols, the Constitutive Act of the African Union of 2001, are promoted, protected and guaranteed.[439]

Does this affirmation of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Côte d'Ivoire and other African countries "make [these rights and freedoms] part of national law and hence, make the rights contained in these international instruments justiciable in national courts?"[440] As argued by Professor Fombad, this affirmation, "does not render any of these instruments part of national law nor can they be invoked on this basis alone in the interpretation of the constitution."[441]

Let us now consider the Republic of Benin, where the country's constitutional designers "have directly incorporated provisions of certain international human rights instruments into the national constitution."[442] In the Preamble to the Constitution of the Republic of Benin, the people state as follows:

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[436] Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 108 (2002).

[437] Mbaku, *supra* note 425, at 65.

[438] Fombad, *supra* note 428, at 445.

[439] CONSTITUTION DE LA RÉPUBLIQUE DE CÔTE D'IVOIRE (2016) pmbl. Note that this is a translation from the French. Such affirmations can also be found in the constitutions of other African countries, including, for example, the Constitution of the Republic of Cameroon, 1996 (as amended through 2008). CONSTITUTION OF THE REPUBLIC OF CAMEROON (1996) pmbl.

[440] Mbaku, *supra* note 425, at 65.

[441] Fombad, *supra* note 428, at 445.

[442] Mbaku, *supra* note 425, at 65; *see* CONSTITUTION DE LE RÉPUBLIQUE DU BÉNIN (1990).

> WE, THE BÉNINESE PEOPLE . . . [r]eaffirm our attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 and *whose provisions make up an integral part of this present Constitution and of Béninese law and have a value superior to the internal law*.[443]

In addition, Article 7 of the same constitution renders the "rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights . . . an integral part of the . . . Constitution [of Bénin] and of Béninese law."[444] The Constitution of the Republic of Benin also imposes a duty on the State "to assure the diffusion and the teaching of the Constitution, of the Universal Declaration of Human Rights of 1948, of the African Charter on Human and Peoples' Rights of 1981 as well as all of the international instruments duly ratified and relative to human rights."[445] The Constitution of the Republic of Benin makes the provisions of the African Charter directly justiciable in Benin's domestic courts. The Republic of Benin, hence, has fully domesticated the provisions of the African Charter.

The Republic of Angola is another African country that has made an effort to domesticate international human rights instruments. For example, according to Article 26 of the Constitution of the Republic of Angola,

> 1. The fundamental rights established in this Constitution shall not exclude others contained in the laws and applicable rules of international law.
>
> 2. Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and international treaties on the subject ratified by the Republic of Angola.
>
> 3. *In any consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments*

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[443] CONSTITUTION DE LE RÉPUBLIQUE DU BÉNIN (1990) pmbl. (emphasis added).
[444] *Id.* at art. 7.
[445] *Id.* at art. 40.

> *referred to in the previous point shall be applied, even if not invoked by the parties concerned*.[446]

Additional elaboration is provided in Article 27 of the Constitution of Angola, which states that "[t]he principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of a similar nature that are established in the Constitution or are enshrined in law or international conventions."[447] Thus, Angola, like Benin, has made certain provisions of international human rights instruments directly justiciable in its national courts.

In the aftermath of post-election violence in Kenya in 2008, the country embarked on concerted efforts to produce a new constitution, one that was expected to improve the country's ability to practice constitutionalism and the rule of law. The result of Kenya's constitutional discourse was the Constitution of the Republic of Kenya, 2010.[448] The new constitution introduced a separation-of-powers regime with checks and balances, including an independent judiciary.[449] Kenya's new constitution speaks directly to the applicability of international law within the country and in its domestic courts. According to Article 2(5), "[t]he general rules of international law shall form part of the law of Kenya."[450] This provision effectively renders "the rules of international law" justiciable in Kenyan courts. In addition, Kenya's constitution also provides another avenue for domesticating international law, when it states that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[451]

Unlike Angola, Benin, and Kenya, most African countries do not make international law part of their constitutional law. Take, for example, the Constitution of the Republic of South Africa, 1996. While the constitution makes mention of international law, it fails to make provisions of the latter directly justiciable in the country's courts. Article 39(1)(b), however, imposes an obligation on national courts to "consider international law" when interpreting the Bill of Rights.[452] The Constitution of the Republic of Ghana obligates the government to "*promote respect for international law, treaty obligations* . . . ."[453] However, Ghana's constitution does not make any provisions of international law directly justiciable in its national courts.

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[446] CONSTITUTION OF THE REPUBLIC OF ANGOLA (2010), art. 26 (emphasis added).
[447] *Id.* at art. 27.
[448] CONSTITUTION (2010) (Kenya).
[449] *See id.*
[450] *Id.* at art. 2(5).
[451] *Id.* at art. 2(6).
[452] S. AFR. CONST., 1996, art. 39(1)(b).
[453] CONSTITUTION OF THE REPUBLIC OF GHANA (1992) art. 40(c) (emphasis added).

The failure of many countries in Africa to domesticate provisions of international law, including especially those of international human rights instruments, is a threat to the practice of constitutionalism and the rule of law. In the African countries, domestic or national law includes not just constitutional and statutory law, but also the customs and traditions of each country's various subcultures. It has been argued that "part of the effort to develop a culture of human rights must include the need to make certain that none of the customary and traditional practices of any subculture (e.g., female genital mutilation; virgin cleansing; the conscription of young girls to serve as slaves in fetish shrines; child marriage) violate provisions contained in various international human rights instruments."[454] In many of these countries, government impunity is pervasive and individuals (especially members of the government) who abuse human rights, including those of children, are rarely ever brought to justice. Where national laws do not reflect the provisions of international human rights instruments, it is often the case that impunity is pervasive, and, as a result, there cannot be adherence to the rule of law and/or practice of constitutional government.[455]

H. Political and Economic Exclusion and Extreme Poverty

The United Nations Development Program's (UNDP) 2018 report on human development shows that of the thirty poorest and least developed countries in the world, as measured by the human development index (HDI), twenty-seven or 90 percent of them are found in Africa.[456] Among the extremely poor African countries are Central African Republic, South Sudan, Burundi, Mali, and the Democratic Republic of Congo (DRC), which during the last several years have not been able to practice constitutionalism. In fact, most of these countries have been embroiled in either civil war or some form of sectarian violence. For example, since December 2013, South Sudan has fought a brutal and bloody civil war that has deepened the "rift between two [of the country's] largest ethnic groups—[President] Kiir's dominant Dinka and [former Vice President] Machar's Nuer people."[457]

Although Nigeria is not usually considered a poor country, it has surpassed India as the country that houses the largest population of people living in extreme poverty.[458] In 2018, as many as 86.9 million Nigerians were living in extreme poverty and this number is expected to increase to 120 million by the

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[454] Mbaku, *supra* note 425, at 69 n. 147.

[455] *See generally* Mbaku, *Struggle Against Impunity*, *supra* note 5; Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, *supra* note 5.

[456] UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), HUMAN DEVELOPMENT INDICES AND INDICATORS: 2018 STATISTICAL UPDATE (2018).

[457] *See* Winsor, *supra* note 16.

[458] *See* Kazeem, *supra* note 7.

year 2030 representing 45.5 percent of the country's population.[459] In terms of percentages, South Sudan has the highest percentage (93%) of people living in extreme poverty, followed by DRC (77%), Mozambique (62%), and Zambia (57%).[460] It is estimated that by 2030, unless South Sudan can significantly improve its governance architecture, the percentage of citizens living in extreme poverty is most likely to approximate 100 percent of the country's population.[461]

Studies of countries, such as South Sudan, DRC, and Central African Republic, show that the pervasiveness of extreme poverty is related to the existence of ineffective and dysfunctional governance systems, which are characterized by the lack of adherence or fidelity to the rule of law.[462] These countries are generally pervaded by extremely high levels of corruption, especially of the grand type, as state custodians—(i.e., civil servants and political elites) those who control the government—use the power, granted them by the people through the constitution, to enrich themselves at the expense of their fellow citizens.

Corruption is a major constraint to the ability of citizens to organize their private lives and engage in activities to create the wealth that they need to fight poverty and improve their quality of life.[463] This is an especially serious problem for individuals and groups that historically have been marginalized and exploited by ruling majority factions. These include women, youth, urban poor, rural inhabitants, and ethnic and religious minorities. Some of these groups (e.g., the Anglophones of Cameroon),[464] frustrated at their continued marginalization and permanent existence on the political and economic margins, have resorted to violent mobilization in an effort to either capture the

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[459] WORLD POVERTY CLOCK, *supra* note 8.

[460] Kazeem, *supra* note 7.

[461] *See* Jasmin Baier & Kristofer Hamel, *Africa: The Last Frontier for Eradicating Extreme Poverty*, BROOKINGS INST. (Oct. 17, 2018), https://www.brookings.edu/blog/future-development/2018/10/17/africa-the-last-frontier-for-eradicating-extreme-poverty/.

[462] *See* Mark Ferullo, *Safeguards to Peace: Steps Toward Economic Governance in South Sudan*, ENOUGH PROJECT (Mar. 2019), https://enoughproject.org/reports/safeguards-peace-south-sudan (noting that continued underdevelopment and poverty in South Sudan is fueled by pervasive corruption and violent kleptocracy); Sasha Lezhnev, *A Criminal State: Understanding and Countering Institutionalized Corruption and Violence in the Democratic Republic of Congo*, ENOUGH PROJECT (Oct. 2016), https://enoughproject.org/reports/criminal-state-understanding-and-countering-institutionalized-corruption-and-violence-democr (examining the extent to which corruption and violent kleptocracy have stunted economic and human development in the Democratic Republic of Congo); Yapatake Kosssele Thales Pacific, *Fragility of State in Central African Republic: An Econometric Approach to Efficiency Understanding*, 21 GLOBAL BUS. REV. 1, 7 (2018) (noting that "the cause of the [Central African Republic's] state fragility is corruption, which has a great influence on the political, economic and social stability of the country").

[463] *See* Mbaku, *Rule of Law, State Capture, and Human Development in Africa*, *supra* note 210, at 778.

[464] *See, e.g.*, Zongo, *supra* note 180.

government or, at the very least, minimize their further marginalization.[465] This violent mobilization by groups that are actually marginalized or consider themselves to be so, has produced the type of political and economic instability that has threatened peace and security and endangered the practice of constitutional government and adherence to the rule of law.[466]

The World Justice Project (WJP) produces an annual Rule of Law Index that "presents a portrait of the rule of law in 126 countries by providing scores and rankings based on eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice."[467] The index ranges from 0 to 1, with 1 indicating the strongest level of adherence to the rule of law.[468] Of the 30 countries that show the least level of adherence or fidelity to the rule of law, 18 (or 60%) of them are found in Africa.[469] These include countries like the DRC, Cameroon, Egypt, Ethiopia, Zimbabwe, and Uganda that are struggling with some form of religious extremism or violent mobilization by subcultures that consider themselves marginalized and pushed to the political and economic margins.[470]

The failure of many African countries to deal fully and effectively with poverty, including the extreme type, is a major threat to the rule of law. This is a complex issue because the absence of the rule of law in these countries stunts entrepreneurship and the creation of the wealth that these countries need to confront poverty. At the same time, the existence of high levels of poverty forces many of the poor, who include various minority factions, to engage in violent mobilization, a situation that creates political instability and further

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[465] In 2016, lawyers, teachers, and other members of civil society engaged in peaceful demonstrations against the efforts of the Francophone-dominated central government to destroy Anglophone institutions, which included replacing the Anglophone Regions' Common Law with French Civil law. The government responded with extreme violence, killing thousands of Anglophones and burning their villages. Radical Anglophone civil society groups responded to the central government's brutality with force of their own and subsequently declared their intention to found a new country called the Republic of Ambazonia. Since then, the violence in Cameroon has escalated. *See, e.g.*, Moki Edwin Kindzeka, *Homes, Villages Burned as Cameroon Targets Separatists*, VOA NEWS (Oct. 25, 2018), https://www.voanews.com/africa/homes-villages-burned-cameroon-targets-separatists; *Burning Cameroon: Images You're Not Meant to See*, BBC (June 25, 2018), https://www.bbc.com/news/world-africa-44561929; Francis Ajumane, *Rights Group Says Over 100 Villages Burnt in Cameroon's Anglophone Regions*, JOURNAL DU CAMEROUN.COM (Aug. 22, 2018), https://www.journalducameroun.com/en/rights-group-says-100-villages-burnt-cameroons-anglophone-regions/.

[466] *See generally* MBAKU, *supra* note 61 (examining sources of sectarian violence in African countries).

[467] WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2019 5 (2019), https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf.

[468] *Id.* at 6.

[469] *See id.*

[470] *Id.* at 17.

endangers the practice of constitutional government and adherence to the rule of law. The key to resolving this governance quagmire lies in institutional reforms to provide institutional arrangements that are capable of adequately guarding the government and preventing impunity. That is, each African country must be provided with a governing process undergirded by adherence to the rule of law.

V. THE AFRICAN UNION AND THREATS TO THE RULE OF LAW IN AFRICA

A. Introduction

Shortly after the Organization of African Unity (OAU) came into being in 1963,[471] it was generally believed that the continental organization would

> help liberate the rest of the continent, accelerate the decolonization process, and help the remaining colonies, including apartheid South Africa, to gain their independence; *promote democratic governance throughout the continent*; *advance the protection of human rights*; and provide the enabling institutional environment for the creation of the wealth that was needed to deal fully and effectively with poverty and promote economic and human development.[472]

Although the OAU was aware of and recognized the fact that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples,"[473] the Charter that brought the organization into being (OAU Charter or Charter) "did not specifically make the promotion of democracy and good governance one of its purposes or objectives."[474] Instead, the Charter required that Member States adhere to certain principles, including "[n]on-interference in the internal affairs of [member] States"[475] and "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."[476]

These principles, which were binding on Member States, meant that the OAU, as a continental organization, "could not intervene to prevent extra-constitutional regime changes, including military coups"[477] and other threats

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[471] Org. of African Unity [OAU], OAU Charter, May 25, 1963, https://au.int/en/treaties/oau-charter-addis-ababa-25-may-1963.

[472] Mbaku, *supra* note 33, at 83 (emphasis added).

[473] OAU Charter, *supra* note 471, at pmbl.

[474] Mbaku, *supra* note 33, at 83.

[475] OAU Charter, *supra* note 471, at art. III(2).

[476] *Id.* at art. III(3).

[477] Mbaku, *supra* note 33, at 83.

to peace and security generally and the rule of law in particular. As argued by some scholars of African political economy, "it was obvious, even to a casual observer, that military coups were a direct affront and constraint to the maintenance of the type of governance systems that promote many of the ideals (e.g., freedom, equality, and justice) that gave impetus to the founding of the OAU."[478] Perhaps, more importantly, military coups were and still are a major threat to constitutional government and the rule of law. But, how did the OAU deal with military coups and other threats to the rule of law?

The policy of the OAU and that of its successor organization, the African Union (AU), towards military coups and other forms of unconstitutional change of government can be found in three important documents. The first instrument is the *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government* (Lomé Declaration).[479] The second is the *African Charter on Democracy, Elections and Governance* (Democracy Charter), which was adopted by the African Union at the Eighth Ordinary Session of the Assembly of Heads of State and Government on January 30, 2007 at Addis Ababa, Ethiopia.[480] The third instrument is the *Constitutive Act of the African Union* (Constitutive Act), which was signed in Lomé, Togo, on July 11, 2000.[481]

The Lomé Declaration outlines four situations that OAU Member States had agreed could produce an unconstitutional change of government and these are: (1) military coup d'état against a *democratically elected* Government; (2) intervention by mercenaries to replace a democratically elected Government; (3) replacement of *democratically elected* Governments by armed dissident groups and rebel movements; and (4) the refusal by an incumbent government to relinquish power to the winning party after free, fair, and regular elections.[482]

While the Democracy Charter lists the same four situations that were elaborated in the Lomé Declaration, it provides for a fifth situation, which addresses changes to national constitutions that interfere with constitutional and democratic change of government: "Any amendment or revision of the

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[478] *Id.* at 83–84.

[479] Org. of African Unity, *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, OAU Doc. AHG/Decl.5 (XXXVI) (2000) [hereinafter Lomé Declaration].

[480] Org. of African Unity, *African Charter on Democracy, Elections and Governance*, OAU Doc. Assembly/AU/Dec.47 (VIII) (2007) [hereinafter Democracy Charter]. The Democracy Charter came into effect on February 15, 2012.

[481] Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

[482] Lomé Declaration, *supra* note 479, at 3 (emphasis added). The Lomé Declaration, however, did not address the situation where it was necessary to intervene to replace a *non-democratic government*.

constitution or legal instruments, which is an infringement on the principles of democratic change of government."[483]

In the context in which the expression is used in this article, a *military coup d'état* usually involves the "forceful removal from office of individuals who hold leadership positions in the polity's political institutions."[484] A military coup can also be defined as "an irregular transfer of a state's chief executive by the regular armed forces or internal security forces through the use (or threat) of force" that specifically excludes "nonmilitary irregular transfers such as cabinet reshufflings and palace coups that lack military participation."[485]

Although definitions of military coups d'état may differ, they all have one thing in common: they constitute an unconstitutional or non-democratic change of government and hence, represent a threat to the rule of law. In addition, military coups, even if they are bloodless—that is, they do not involve the loss of life—may unleash a series of actions that could lead to civil war or some form of violent sectarian conflict that can directly threaten the rule of law or, at the very least, interfere with the practice of constitutionalism. The military coup, being an unconstitutional change of government, is a direct threat to democratic governance and the rule of law, regardless of the intentions of coup leaders.[486]

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[483] Democracy Charter, *supra* note 480, at art. 23(5). This principle implicates what has been referred to as the constitutional coup, where incumbent presidents change the constitution in order to unconstitutionally extend their stay in power. *See generally* Mbaku, *supra* note 33 (examining the constitutional coup as a threat to democracy in Africa).

[484] JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 92 (1997).

[485] *See* J. Craig Jenkins & Augustine J. Kposowa, *Explaining Military Coups d'État: Black Africa, 1957–1984*, 55 AM. SOC. REV. 861, 861 (1990).

[486] Recall that since the Egyptian military coup of July 23, 1952, Africa's coup leaders have claimed that their actions were motivated by the desire to rid their societies of incompetent and corrupt leaders and restore integrity and professionalism to the government. Yet, without exception, all of Africa's military elites who have successfully overthrown their governments, including members of the Free Officers Movement who overthrew the government of King Farouk in Egypt in 1952, have not performed any better than the civilian regimes that they ousted. In fact, many of the military elites who have conducted successful military coups have gone on to establish what turned out to be extremely repressive and tyrannical regimes that have not only retarded economic development but have also stunted the deepening and institutionalization of democracy and the practice of constitutionalism. Perhaps, more important is the fact that it is difficult to find a situation in Africa where coup leaders successfully transitioned their countries to governance regimes underpinned by the rule of law. Examples of military regimes that have gone on to stunt political development in their respective countries include the reign of terror unleashed on Nigerians by military rule (1966–1979, 1993–1999), on the people of the Democratic Republic of Congo by the regime of Mobutu Sese Seko (1965–1997), who seized power by military coup in 1965, and on inhabitants of Togo by Gnassingbé Eyadéma (1967–2005). *See generally* JIMI PETERS, THE NIGERIAN MILITARY AND THE STATE (1997) (examining the role of the military in governance in Nigeria); OLAYIWOLA ABEGUNRIN, NIGERIAN FOREIGN POLICY UNDER

B. The OAU and the African Union and Efforts to Deal with Military Coups and Other Threats to the Rule of Law

The OAU was officially disbanded on July 9, 2002 and replaced by the African Union.[487] In this section of the paper we look closer at the position taken by the OAU and AU with respect to military coups and other unconstitutional changes of government. Since coups are a threat to the rule of law, this section of the paper will also consider how the OAU and AU have dealt with their impact on the rule of law in Africa.

Both the Lomé Declaration and the Democracy Charter provide the African Union with a general framework to respond and deal with unconstitutional changes of government.[488] Nevertheless, emphasis is placed on military coups to the neglect of other situations that produce unconstitutional changes of government, such as "constitutional coups."[489] It has been suggested that during the founding of the OAU, "many African leaders believed that military coups were the most pervasive of the four or five forms of extra-constitutional change of government."[490] Some scholars have argued, however, that some of Africa's post-independence leaders, especially those who had come to power through military coups, were likely to consider the military coup as the most important threat to the survival of their regimes, much more so than other forms of unconstitutional change of government.[491] Professor Victor T. Le Vine recognized the threat posed to the rule of law by the military coup when he stated that "it was the military regimes that epitomized the low state to which constitutionalism had fallen during [the] 1963–89" period in West Africa.[492] As evidenced by recent unconstitutional changes of government in

MILITARY RULE, 1966–1999 (2003) (examining the impact of the military on Nigerian foreign policy); GEORGES NZONGOLA-NTALAJA, THE CONGO: FROM LEOPOLD TO KABILA, A PEOPLE'S HISTORY (2002) (examining Mobutu's coup and his more than 30-year brutal rule); CHUKA ONWUMECHILI, AFRICAN DEMOCRATIZATION AND MILITARY COUPS (1998) (examining Eyadéma's coups in Togo and his subsequent domination of Togolese politics for many years).

[487] Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

[488] *See* Lomé Declaration, *supra* note 479; Democracy Charter, *supra* note 480.

[489] Mbaku, *supra* note 33, at 81.

[490] *Id.* at 87.

[491] *Id.*

[492] Le Vine, *supra*, note 25, at 190.

Egypt,[493] Sudan[494] and Zimbabwe,[495] the military coup remains a serious threat to the rule of law in Africa.

At this point in the analysis, one could ask why countries, such as the United States, Canada, the United Kingdom, and many of today's matured democracies, have managed to escape military coups, despite the fact that they have extremely strong militaries. The answer to this question lies in the fact that "all these countries have governing processes undergirded by separation of powers with effective checks and balances, which include [truly] independent judiciaries, robust civil societies, openness and transparency in government communication, and free and independent media."[496] To preserve the rule of law or to establish it, each African country must strengthen, deepen and institutionalize its democracy generally and its democratic institutions in particular. That calls for institutional reforms that create the type of governing processes described above.

But, what have been OAU/AU policy responses to military coups and other challenges to the rule of law? As stated in the Lomé Declaration, during the Thirty-Fifth Ordinary Session of the Assembly of Heads of State and Government of the OAU, delegates "unanimously rejected any unconstitutional change as an unacceptable and anachronistic act, which is in contradiction of our commitment to promote democratic principles and conditions."[497] Chapter 8 of the Democracy Charter prescribes sanctions that should be imposed on African countries and regimes that undertake unconstitutional changes of government.[498] The Lomé Declaration also provides similar sanctions as those provided in the Democracy Charter.

According to Article 25 of the Democracy Charter, whenever the AU's Peace and Security Council determines that there has been "an unconstitutional change of government in a State Party, and that diplomatic initiatives have failed, it shall suspend the said State Party from the exercise of its right to participate in the activities of the Union."[499] The suspension of such an

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[493] *See* David D. Kirkpatrick, *Army Outs Egypt's President; Morsi Is Taken into Military Custody*, N.Y. TIMES (July 3, 2013), https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html (examining the military coup that overthrew the democratically-elected government of Mohamed Morsi in Egypt).

[494] *See Sudan Coup: Why Omar al-Bashir Was Overthrown*, *supra* note 34 (examining the 2019 military coup that ousted the regime of al-Bashir in Sudan).

[495] *See* Tinashe Kairiza & Chipa Gonditii, *It Was a Military Coup: Obasanjo*, ZIMBABWE INDEP. (Mar. 29, 2019), https://www.theindependent.co.zw/2019/03/29/it-was-a-military-coup-obasanjo/ (examining the military coup that overthrew the government of Robert Gabriel Mugabe in Zimbabwe in 2017).

[496] *See* Mbaku, *supra* note 33, at 87.

[497] Lomé Declaration, *supra* note 479.

[498] Democracy Charter, *supra* note 480, at ch. 8.

[499] *Id.* at art. 25(1).

offending State Party is expected to "take effect immediately."[500] With respect to the perpetrators of the unconstitutional change of government (e.g., the military elites who organized and carried out the coup), they are permanently banned from participating "in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State."[501] In addition, "[p]erpetrators of unconstitutional change of government may also be tried before the competent court of the Union."[502] Other sanctions are prescribed for Member States and perpetrators of unconstitutional change of government. According to Article 25(7), "[t]he Assembly [of AU Heads of State and Government] may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures."[503]

But, how have the OAU and the AU performed in their efforts to deal with unconstitutional change of government? Although Article 25 of the Democracy Charter prohibits any individuals who have participated in an unconstitutional change of government (e.g., a military coup) from "democratizing" themselves and becoming part of the post-coup civilian government, the OAU and the African Union have often not imposed sanctions on individuals who have done so and the regimes that they have subsequently formed. For example, in 1979, then Flight Lieutenant Jerry Rawlings of the Ghana Air Force, attempted but failed to overthrow the regime of [General] Fred Akuffo.[504] Rawlings was arrested by the Ghanaian military, tried and sentenced to death for the abortive coup.[505]

However, during his court martial, Rawlings made declarations that endeared him to the Ghanaian public, especially those who were sick and tired of the country's "corruption and social injustices under the SMC[506]

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[500] *Id.*

[501] *Id.* at art. 25(4).

[502] *Id.* at art. 25(5).

[503] *Id.* at art. 25(7).

[504] *See Ghana: What Will Rawlings Do?*, AFR. CONFIDENTIAL (June 20, 1979), https://www.africa-confidential.com/special-report/id/26/What_will_Rawlings_do; *see also* Leon Dash, *Jerry Rawlings Again Leads Military Seizure of Power in Ghana*, WASH. POST (Jan, 1, 1982), https://www.washingtonpost.com/archive/politics/1982/01/01/jerry-rawlings-again-leads-military-seizure-of-power-in-ghana/47ebae98-3354-4e0e-81b9-cc9722e1a3bb/ (noting the overthrow of the government of Ghana by former Air Force officer Jerry Rawlings).

[505] *See* DAVID AFRIYIE DONKOR, SPIDERS OF THE MARKET: GHANAIAN TRICKSTER PERFORMANCE IN A WEB OF NEOLIBERALISM 39 (2016) (examining Jerry Rawlings' trial for treason in Ghana); *see also* Nugent, *infra* note 510 (noting the trial of Rawlings for the failed coup against the government of General Akuffo in May 1979).

[506] That is the regime of the Supreme Military Council (SMC), which lasted from October 9, 1975 to June 4, 1979. *See October 9, 1975, Supreme Military Council is Formed*, EDWARD A. ULZEN MEM'L FOUND. (Oct. 9, 2017), https://www.eaumf.org/ejm-blog/2017/

regime."[507] At this time in the country's history, many citizens of Ghana had come to associate the military and military rulers with "misrule and embezzlement than with courage and integrity."[508] On the other hand, they considered Rawlings a man of "courage and integrity" and hence, throughout his trial, the capital city was littered with posters with phrases, such as, "leave Rawlings alone," "Rawlings is our man," and "revolution or death."[509] On June 4, 1979, a group of soldiers, claiming that Ghana's existing leadership was extremely corrupt, dysfunctional, and no longer able to effectively lead the country, attacked the military barracks where Rawlings was awaiting execution and freed him. Rawlings subsequently led the group of soldiers that had freed him in a bloody coup that ousted the SMC and the Akuffo government.[510]

Shortly after the coup, Rawlings, who had been sprung from jail by junior officers, was made head of the fifteen-member Armed Forces Revolutionary Council (AFRC), "which was an instrument of junior [military] officers and the lower ranks."[511] The AFRC, nevertheless, allowed the presidential elections that were scheduled for July 9, 1979 to proceed. They were won by "Hilla Limann's People's National Party (PNP)" and on September 24, 1979, Rawlings "formally handed over to Limman and returned to the barracks."[512] Rawlings, however, grew increasingly interested in politics and "began to hang out at the campus of the University of Ghana where there was a

10/9/hse5813sxku8rlsgzd76wu1ukgs0ps (noting that Ghana's Supreme Military Council was formed on October 9, 1975 and disbanded on June 4, 1979); *see also* Eboe Hutchful, *Miliary Policy and Reform in Ghana*, 35 J. MOD. AFRI. STUD. 251, 251 (1997) (noting that Ghana's Supreme Military Council was terminated by military coup d'état on June 4, 1979 and replaced by "the Armed Forces Revolutionary Council (AFRC) headed by Flight-Lieutenant Jerry Rawlings").

[507] The SMC was led by Col. I. K. Acheampong (October 7, 1975 to July 5, 1978) and General Fred Akuffo (July 5, 1978 to June 4, 1979). *See, e.g.*, MICHAEL S. ASANTE, DEFORESTATION IN GHANA: EXPLAINING THE CHRONIC FAILURE OF FOREST PRESERVATION POLICIES IN A DEVELOPING COUNTRY 130 (2005) (examining the role of the SMC regime in political economy in Ghana).

[508] *Id.* at 39.

[509] *Id.*

[510] *See* ALEX EKE, KLEPTOCRACY: AFRICAN STYLE 45 (2018); *see also* Pranay Gupte, *Ex-Officer Outs Ghana's Government Again*, N.Y. TIMES (Jan. 1, 1982), https://www.nytimes.com/1982/01/01/world/ex-officer-ousts-ghana-s-government-again.html (noting that Rawlings, who had been put in jail for his failed attempt to overthrow the regime of Lieutenant General Frederick Akuffo, "was freed by fellow officers and quickly took charge of the [Akuffo] Government"); Paul Nugent, *Nkrumah and Rawlings: Political Lives in Parallel?*, 12 TRANSACTIONS OF THE HISTORICAL SOCIETY OF GHANA, NEW SERIES 35, 50 (2009–2010) (noting that Rawlings was "sprung from jail and brought to head the Armed Forces Revolutionary Council (AFRC)" after the second coup, which took place on June 4, 1979, was successful).

[511] *See* Nugent, *supra* note 510, at 50.

[512] *See id.*; *see also* TAPAN PRASAD BISWAL, GHANA: POLITICAL AND CONSTITUTIONAL DEVELOPMENTS 185 (1992).

substantial body of leftwing intellectuals who helped him to give greater shape to his raw gut-feelings."[513] On September 24, 1979, power was peacefully handed over to President Hilla Limann of the People's National Party (PNP).[514] However, Rawlings, convinced that the Limann regime did not have the capacity and political will to deal effectively with the country's multifarious economic and political problems, overthrew the government on December 31, 1981.[515]

Shortly after the overthrow of Limann, Rawlings constituted the Provisional National Defense Council (PNDC) as the country's ruling body with him as the head.[516] Rawlings' PNDC drafted a new constitution, which was subsequently approved by referendum on April 28, 1992.[517] That year, Rawlings resigned from the military and together with the PNDC and its supporters, founded a political party called the National Democratic Congress (NDC).[518] He subsequently participated in and won the presidential elections that were held on November 3, 1992 and assumed the position of President of Ghana's Fourth Republic.[519]

The OAU, however, did not condemn Rawlings's participation in the post-coup democratic dispensation, nor did it suspend Ghana's participation in its activities.[520] Of course, one can argue that the decision by Rawlings to resign from the army and engage in civilian politics was undertaken before the OAU

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[513] *See* Nugent, *supra* note 510, at 50.

[514] *See id.* at 51; *see also* Jeff Haynes, *Human Rights and Democracy in Ghana: The Record of the Rawlings' Regime*, 90 AFR. AFF. 407, 408 (1991); RUTH NORA CYR, TWENTIETH CENTURY AFRICA 209, 219 (2001) (examining President Hilmann's regime in Ghana).

[515] *See* CARLSON ANYANGWE, REVOLUTIONARY OVERTHROW OF CONSTITUTIONAL ORDERS IN AFRICA 144 (2012) (examining military coups in Africa, including the overthrow of the government of Limann by Rawlings).

[516] *See* David Abdulai, *Rawlings 'Wins' Ghana's Presidential Elections: Establishing a New Constitutional Order*, 39 AFR. TODAY 66, 66 (1992).

[517] U.S. Dep't of State, *State Department Issues Background Note on Ghana*, U.S. FED NEWS (Apr. 1, 2008) (noting that on April 28, 1992, Ghana held a national referendum to approve a new constitution and that "[o]n May 18, 1992, the ban on party politics was lifted in preparation for multi-party elections").

[518] *Id.* (noting that the "PNDC and its supporters formed a new party, the National Democratic Congress (NDC), to contest the elections").

[519] *See* OBED YAO ASAMOAH, THE POLITICAL HISTORY OF GHANA (1950–2013): THE EXPERIENCE OF A NON-CONFORMIST 440 (2014) (examining Rawlings's ascent to the presidency of the Republic of Ghana); *see also* U.S. Dep't of State, *supra* note 517 (noting that Rawlings won presidential elections held on November 3, 1992 and was inaugurated as President of Ghana on January 7, 1993); Abdulai, *supra* note 516, at 66–67 (noting that "presidential and parliamentary elections were [held in Ghana] on November 3 and December 8, 1992 respectively").

[520] Eki Yemisi Omorogbe, *A Club of Incumbents? The African Union and Coups d'État*, 44 VAND. J. TRANSNAT'L L. 123, 126 (2011).

and AU adopted the three documents related to unconstitutional change of government.[521]

The OAU was founded in 1963 and it was not until the mid-1990s that the organization began to seriously consider adopting a continent-wide uniform policy for dealing with unconstitutional change of government, including military coups.[522] Eki Yemisi Omorogbe states that "[t]he turning point"[523] in the OAU's attitude towards military coups and other forms of unconstitutional regime change came after the overthrow of the democratically-elected government of Tejan Kabbah in Sierra Leone.[524] Kabbah was elected president of Sierra Leone as part of the post-war reconstruction process.[525] However, on May 25, 1997, his government was overthrown by Major Johnny Paul Koromah.[526] When the OAU Assembly of Heads of State and Government met in Harare, Zimbabwe, during the period May 28–31, 1997, delegates addressed the coup in Sierra Leone, called for a return to "constitutional government" and "encouraged the Economic Community of West African States (ECOWAS) to achieve that goal."[527] Delegates at the Harare summit "strongly and unequivocally" condemned the military coup d'état "which took place in Sierra Leone on 25 May, 1997" and called for the "immediate restoration of constitutional order."[528] Finally, the delegates called on all African countries and the international community not to recognize the new regime and to refrain from "lending support in any form whatsoever to the perpetrators of the coup d'état."[529]

The military government of Koromah, however, was ousted in February 1998 by an ECOWAS military force named ECOMOG (Economic Community of West African States Monitoring Group) and Kabbah's regime was restored.[530] This time, it appears, the OAU, working with the regional group, ECOWAS, had succeeded in restoring constitutional government after

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[521] That is the Lomé Declaration (2000), the Democracy Charter (2007), and the Constitutive Act of the African Union (2000).

[522] Omorogbe, *supra* note 520, at 125–126.

[523] *Id.* at 127.

[524] *Id.*

[525] *Id.*

[526] *Id. See generally* JOHN L. HIRSCH, SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY 51 (2001) (providing background information on the military coup that overthrew the government of Tejan Kabbah in Sierra Leone in 1997).

[527] Omorogbe, *supra* note 520, at 127; *see also* Org. of African Unity Council of Ministers, Decisions Adopted by the Sixty-Sixth Ordinary Session of the Council of Ministers, DOC. CM/2004 (LXVI)-C (May 28–31, 1997), https://au.int/sites/default/files/decisions/9622-council_en_28_31_may_1997_council_ministers_sixty_sixth_ordinary_session.pdf (condemning the 1997 coup in Sierra Leone and appealing to the international community to restore constitutional order there).

[528] Omorogbe, *supra* note 520, at 127.

[529] *Id.*

[530] *Id.*

military intervention. The OAU then turned to situations in Comoros, Republic of Congo (Brazzaville), Guinea Bissau, and Niger, where there had been military coups since the Harare summit and declared that all these countries should restore "constitutional legality before the [2000] Summit."[531]

In Lomé, Togo, in July 2000, the OAU Assembly of Heads of State and Government adopted the first of three instruments that were designed specifically to deal with unconstitutional change of government—the *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*.[532] As argued by Mbaku, "[t]he events in Sierra Leone, thus, provided the impetus to the unequivocal condemnation and rejection of the military coup and other forms of unconstitutional regime changes on the continent."[533]

There have been arguments that some military coups are actually good and that they can rid a country of recalcitrant, corrupt, opportunistic, tyrannical, and dysfunctional regimes. For example, Paul Colier, a well-known economist who studies African political economy, has argued that "[a] truly bad government in a developing country is more likely to be replaced by a coup than by an election."[534] However, the idea or proposition that "some coups are acceptable, and therefore could be said to be good coups, whereas others are not acceptable, and are therefore bad coups," poses a lot of challenges to anyone interested in eliminating threats to the rule of law in the continent. First, most of the post-coup regimes that have been established in African countries during the last several decades have generally been opportunistic and have failed to successfully transition their countries to constitutional government and the rule of law.[535] Second, many of Africa's military coups have stunted

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[531] Org. of African Unity Assembly of Heads of State and Government, Declarations and Decisions Adopted by the Thirty-Fifth Assembly of Heads of State and Government, AHG/Decl. 1–2 (XXXV), at 24 (July 12-14, 1999), https://archives.au.int/handle/123456789/770. Note that the coup in Comoros took place in 1999, that in Congo (Brazzaville) in 1997, those in Guinea-Bissau in 1998 and 1999, and those in Niger in 1998 and 1999. Omorogbe, *supra* note 520, at 127 n. 27.

[532] *See* Lomé Declaration, *supra* note 479.

[533] Mbaku, *supra* note 33, at 93.

[534] Paul Colier, *Let Us Now Praise Coups*, WASH. POST (June 22, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/06/19/AR2008061901429.html.

[535] Examples include the military regime of Mobutu Sese Seko, which came to power in the DRC in 1965 and dominated the country's political economy for more than three decades (1965–1997) and during that time, made no effort to transition the country to constitutional government; the military regime that took power in Nigeria in 1967 and went on to impose a reign of terror on Nigerians that lasted until 1999; the military regime of Gnassingbé Eyadéma, which came into being in Togo in 1967 and lasted for nearly four decades, effectively stunting the development of constitutionalism in the country, etc. *See generally* NZONGOLA-NTALAJA, *supra* note 486 (examining Mobutu's tyrannous reign in the Democratic Republic of Congo); A. B. ASSENSOH & YVETTE M. ALEX-ASSENSOH, AFRICAN MILITARY HISTORY AND POLITICS: COUPS AND IDEOLOGICAL INCURSIONS, 1900–PRESENT (2001) (examining Eyadéma's coup and his subsequent domination of Togolese

the potential of many countries to develop constitutional governments—in fact, many of these continue to suffer today from the damage done to them by military coups and have not been able to establish and sustain rule of law regimes. These countries include Algeria, Benin Republic, Burkina Faso, Burundi, Chad, Central African Republic, Republic of Congo, Democratic Republic of Congo, Egypt, Guinea, Guinea-Bissau, Liberia, Libya, Madagascar, Mali, Mauritania, Niger, Nigeria, Sierra Leone, Somalia, Sudan, Togo, Uganda, and Zimbabwe.[536]

Naison Ngoma has argued that although the "military has a certain contribution to make towards the development of a state, this contribution has not always been successful."[537] In fact, military intervention in African politics has not only failed to improve governance in Africa but has actually stunted the development of governing processes undergirded by the rule of law.[538] Since "unconstitutional regime changes have usually led to or produced unconstitutional regimes, . . . military coups and other unconstitutional approaches to regime change cannot lead to the deepening and institutionalization of democracy" in Africa.[539]

Despite the African Union's uniform policy on unconstitutional change of government, the continental organization has not always provided a uniform response to situations involving military coups and other forms of unconstitutional regime change. Granted, the OAU acted firmly to restore democracy in Sierra Leone after the military coup that overthrew the government of Tejan Kabbah in 1997.[540] Nevertheless, when, for example, Joseph Kabila refused to step down after his term as President of the Democratic Republic of Congo had ended, the AU did not impose sanctions on him and his regime.[541] Kabila came to power in the DRC after the assassination of his father, Laurent-Désiré Kabila, who had overthrown the regime of Mobutu Sese Seko and taken control of the government.[542] He was subsequently elected president in 2006 and re-elected in 2011 for a second and final term that was supposed to expire on December 19, 2016.[543]

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political economy for nearly four decades); ABEGUNRIN, *supra* note 486 (examining the impact of Nigeria's various military regimes on the country's political economy).

[536] *See generally* ONWUMECHILI, *supra* note 486 (examining the impact of military coups on democratization in Africa).

[537] Naison Ngoma, *Coups and Coup Attempts in Africa: Is There a Missing Link?*, 13 AFR. SECURITY STUD. 85, 88 (2004).

[538] *See id.*

[539] Mbaku, *supra* note 33, at 97.

[540] *See* HIRSCH, *supra* note 526, at 61.

[541] *See* John Mukum Mbaku, *The Postponed DRC Elections: Behind the Tumultuous Politics*, BROOKINGS INST. (Nov. 18, 2016), https://www.brookings.edu/blog/africa-in-focus/2016/11/18/the-postponed-drc-elections-behind-the-tumultuous-politics/.

[542] *Id.*

[543] *Id.*

The DRC scheduled presidential elections for November 27, 2016 to select a successor to Joseph Kabila. However, before the elections could take place, the country's electoral authority (*Commission électorale nationale indépendante*—CENI), which was controlled by Kabila's government, postponed the elections, arguing that the country did not have enough money to carry out a credible election and that it did not have an accurate electoral register.[544] Kabila effectively manipulated the country's national institutions to unconstitutionally extend his presidential mandate for over two years.[545] Yet, the AU did not impose any sanctions on Kabila and his unconstitutional behavior.

On July 4, 2013, the Egyptian military overthrew the democratically-elected government of Mohamed Morsi.[546] The military coup was led by General Abdel Fattah el-Sisi who went on to become the 6th President of Egypt.[547] The AU initially condemned the coup as "an unconstitutional change of government and subsequently suspended Egypt's participation in AU activities."[548] However, after a presidential election was held between May 26 and 28, 2014, which resulted in the election of el-Sisi as president, the AU lifted the suspension. By doing so, the AU failed to apply Article 25(4) of the Democracy Charter, which states that "[t]he perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State."[549]

Abdel Fattah el-Sisi, who had participated in the post-coup presidential election as a candidate for the presidency, was the leader of the military coup that overthrew a democratically-elected government. As required by AU principles, el-Sisi should have been sanctioned for participating in post-coup elections designed to restore democratic order and for holding a position of responsibility in the government.[550] As argued by Mbaku, "[t]he decision by the AU to recognize [el-Sisi's] government and lift Egypt's suspension significantly undermined the AU's legitimacy and ability to consistently deal with unconstitutional changes of government"[551] and promote the rule of law in the continent.

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[544] *Id.; see also* John Mukum Mbaku, *What is at Stake for the DRC Presidential Election?*, BROOKINGS INST. (Aug. 29, 2018), https://www.brookings.edu/blog/africa-in-focus/2018/08/29/what-is-at-stake-for-the-drc-presidential-election/.

[545] *See Joseph Kabila, on Eve of Leaving Congo's Presidency, Urges Unity*, L.A. TIMES (Jan. 23, 2019), https://www.latimes.com/world/la-fg-congo-kabila-unity-20190123-story.html.

[546] M. CHERIF BASSIOUNI, CHRONICLES OF THE EGYPTIAN REVOLUTION AND ITS AFTERMATH: 2011–2016, 133 (2017).

[547] *Id.*

[548] Mbaku, *supra* note 33, at 161.

[549] Democracy Charter, *supra* note 480, at art. 25(4).

[550] *See id.*

[551] Mbaku, *supra* note 33, at 161.

As if to confirm how toothless and dysfunctional the AU has become, especially when it comes to the enforcement of its own directives, at the AU Summit in Addis Ababa on February 10, 2019, delegates elected el-Sisi Chairman of the African Union.[552] Human rights groups, including Amnesty International, condemned the elevation of el-Sisi to the chairmanship of the AU and noted that "[d]uring his time in power President Abdel Fattah el-Sisi has demonstrated a shocking contempt for human rights. Under his leadership the country has undergone a catastrophic decline in rights and freedoms."[553]

Earlier, this article discussed the constitutional coup as a major constraint to constitutionalism and the rule of law in Africa. Even though the AU has recognized the constitutional coup as a situation constituting an unconstitutional change of government, it has never imposed sanctions on individuals who have engaged in such behaviors or the governmental regimes formed by them. Article 23(5) of the Democracy Charter states as follows:

> State Parties agree that the use of, *inter alia*, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions of the Union: 5. *Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government*.[554]

Take, for example, the case of President Paul Biya of Cameroon. He became President of the Republic of Cameroon on November 6, 1982 when the country's first president voluntarily resigned the office.[555] At the time, Biya was the country's Prime Minister and succeeded Ahidjo as required by the country's constitution.[556] On December 19, 1990, Biya formally legalized multiparty politics in Cameroon.[557] The first presidential election after multiparty politics were legalized took place on October 11, 1992 and Biya

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[552] *See* Elias Meseret, *Egypt's El Sisi Elected New Chairman of African Union*, U.S. NEWS (Feb. 10, 2019), https://www.usnews.com/news/world/articles/2019-02-10/egypts-el-sisi-elected-new-chairman-of-african-union. This is the same el-Sisi who had come to power through a military coup and had subsequently "democraticized" himself and become a civilian president. Instead of condemning the coup and el-Sisi's subsequent efforts to participate in post-coup elections, the AU accepted his government.

[553] *Id.*

[554] Democracy Charter, *supra* note 480, at art. 23(5) (emphasis added).

[555] *Career of President Paul Biya*, REPUBLIC OF CAMEROON, https://www.prc.cm/en/the-president/career (last visited Nov. 11, 2019).

[556] *Id.*

[557] John Mukum Mbaku, *The State and Cameroon's Stalled Rransition to Democratic Governance*, *in* RECONSTRUCTING THE AUTHORITARIAN STATE IN AFRICA 18, 32 (George Klay Kieh Jr. & Pita Ogaba Agbese eds., 2014).

emerged victorious to serve a five-year term as president.[558] He won re-election in 1997.[559]

However, Cameroon's constitution was amended in 1996, introducing term limits for presidents—the president was limited to two seven-year terms.[560] Thus, if Biya was successfully re-elected in the presidential election scheduled for October 11, 2004, he was constitutionally required to leave office at the end of his mandate in 2011. Any effort by him to change the constitution and stay in the office beyond 2011 would have constituted a violation of Article 23(5) of the AU's Democracy Charter since that would have been a "revision of the constitution . . . which is an infringement on the principles of democratic change of government."[561] The AU, then, would have been required, as mandated by the Democracy Charter and other instruments, to impose sanctions on Biya and his regime.

In 2008 and in anticipation of the presidential election scheduled for October 9, 2011, Biya had the constitution changed so that he could run for another term in office.[562] This was a direct violation of the provisions of Article 23(5) of the Democracy Charter. Yet, the AU neither condemned the action nor imposed any sanctions on Biya and his regime. Biya continued his legal manipulations to stay in office and in 2018, he won re-election for another seven-year term and will potentially remain in office until 2025.[563]

With the help of the constitutional coup, Biya has been able to remain in power indefinitely and in the process, he has stunted Cameroon's transition to democratic governance and the rule of law. Many scholars of Cameroon political economy have termed the regime of Paul Biya "illegitimate [and] rights-abusive" and commented that even though the country is "technically a multiparty democracy, the reality is far from democratic."[564] Others have included him among the world's most enduring dictators.[565]

Other African presidents who have used constitutional coups to frustrate their countries' transitions to governing processes undergirded by the rule of

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[558] *Id.* at 33.

[559] *Id.* at 49.

[560] *Id.*

[561] Democracy Charter, *supra* note 480, at art. 23(5).

[562] Tansa Musa, *Cameroon Assembly Clears Way for Biya Third Term*, REUTERS (Apr. 10, 2008), https://www.reuters.com/article/idUSL10840480.

[563] Yomi Kazeem, *Paul Biya Will Rule Cameroon for Another Seven Years—from Wherever he Chooses*, QUARTZ (Oct. 22, 2018), https://qz.com/africa/1431949/cameroon-election-paul-biya-wins-seventh-term/. At the end of this present term, Biya will be 92 years old and would have been in office as president of the Republic of Cameroon for 43 years. Note, however, that before he became president in 1982, he had been Prime Minister since 1975. *See id.*

[564] Susan Dicklitch, *Failed Democratic Transition in Cameroon: A Human Rights Explanation*, 24 HUM. RTS. Q. 152, 175–176 (2002).

[565] Norman, *supra* note 267; *see also* WALLECHINSKY, *supra* note 50 *(*noting that Paul Biya of Cameroon is one of the world's most enduring dictators).

law include: Yoweri Museveni of Uganda, who has been in power since 1986 and has changed the constitution to eliminate both term and age limits for presidents;[566] Pierre Nkurunziza of Burundi, who had the constitution changed in 2018 allowing him to potentially remain in office until 2034;[567] Iddris Déby of Chad, who engineered a 2018 constitutional amendment that could allow him to stay in power until 2033;[568] Paul Kagame of Rwanda, who amended the constitution in 2015 to allow himself to potentially remain in office until 2034;[569] and Abdelaziz Bouteflika, who ruled Algeria from 1999 until he was ousted by a popular revolt in April 2019.[570] All these presidents used constitutional coups to extend their mandates and in doing so, effectively stunted efforts to develop and sustain a governing process undergirded by adherence to the rule of law.

VI. SUMMARY AND CONCLUSION

Recent studies show that extreme poverty continues to plague many African countries and that countries, like Nigeria, which are endowed with

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[566] Elias Biryabarema, *Uganda's Top Court Upholds Ruling on Extending President's Rule*, REUTERS (Apr. 18, 2019), https://www.reuters.com/article/us-uganda-politics/ugandas-top-court-upholds-ruling-on-extending-presidents-rule-idUSKCN1RU26V (noting the ruling by Uganda's Supreme Court backing constitutional changes that allow Museveni to stay in power indefinitely). In December 2017, Uganda's Parliament, which was controlled by Museveni's ruling party, the National Resistance Movement, overwhelmingly scrapped the age limit for presidential candidates, which had barred 74-year old Museveni from standing in presidential elections scheduled for 2021. *See id.* In 2005, Museveni had successfully orchestrated a constitutional amendment that eliminated term limits and allowed him to stand for the presidential elections that eventually took place in February 2006. After the term limits were eliminated, Museveni took part in those elections and was re-elected, capturing 59.26% of the votes to 37.39% for Kizza Basigye, Museveni's closest competitor in the electoral exercise. *See Uganda Leader's Victory Challenged*, CNN (Feb. 25, 2006), http://www.cnn.com/2006/WORLD/africa/02/25/uganda.elections/.

[567] Maggie Fick, *Burundi Approves New Constitution Extending Presidential Term Limit*, REUTERS (May 21, 2018), https://www.reuters.com/article/us-burundi-politics/burundi-approves-new-constitution-extending-presidential-term-limit-idUSKCN1IM1QG.

[568] *See* Madjiara Nako, Aaron Ross & Edward McAllister, *Chad Parliament Approves New Constitution Expanding President's Powers*, REUTERS (Apr. 30, 2018), https://www.reuters.com/article/us-chad-politics/chad-parliament-approves-new-constitution-expanding-presidents-powers-idUSKBN1I11RC. The new constitution reimposed the two-term limit on presidents that was eliminated through a constitutional amendment in 2005. Nevertheless, the new amendment would not be applied retroactively, implying that Déby could serve two six-year terms after the 2021 presidential elections. *See id.*

[569] *See* Tracy McVeigh, *Rwanda Votes to Give President Paul Kagame Right to Rule Until 2034*, GUARDIAN (Dec. 19, 2015), https://www.theguardian.com/world/2015/dec/20/rwanda-vote-gives-president-paul-kagame-extended-powers.

[570] *See* Hamdi Alkhshali & Caitlin Hu, *Algeria's President Resigns at 82*, CNN (Apr. 3, 2019), https://www.cnn.com/2019/04/02/africa/abdelaziz-bouteflika-algerias-president-resigns-at-82/index.html.

significant amounts of natural resources, including oil and gas, have large populations of people living in extreme poverty.[571] In fact, despite its oil wealth, Nigeria has surpassed India as the country with the largest number of people living in extreme poverty.[572]

Many scholars have studied the causes of poverty and underdevelopment in Africa. Some of these studies have concluded that persistent poverty in the continent can be attributed to several factors, including "pervasive military intervention in governance; natural disasters; excessive and unmanageable population growth; political violence and destructive ethnic conflict; dependence on the industrial West for development assistance, food aid and loans; political and bureaucratic corruption; and excessive exploitation of the continent's environmental resources."[573] In addition, it has also been argued that pervasive poverty in the continent can be blamed on "policy mistakes made by well-meaning but incompetent and ill-informed policymakers."[574]

Over the years, many development economists and other scholars of African political economy have suggested that the most effective way to eradicate poverty in Africa and improve human development is for each country to bring into its governance system "more competent, better trained, honest, highly ethical and disciplined individuals" in an effort to "reduce public malfeasance and venality, increase bureaucratic efficiency, and improve governance and the allocation of resources."[575] Nevertheless, many of these recommendations were considered questionable because even countries that had made a concerted effort to significantly improve their civil services remain pervaded with corruption and were still unable to create the wealth that they need to fight poverty.

However, in 1996, economist Mancur Olson published a seminal paper in which he argued that natural resource endowments, as well as the availability of a highly-educated and skilled workforce, were not a necessary precondition for development.[576] Olson went on to argue that it is the quality of a country's institutions and its public policies that are critical to economic growth and development.[577] As has been determined by other scholars, the poor economic performance and the failure of many African countries to deal fully and

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[571] *See, e.g.*, UNDP, *supra* note 456, at 24–25; *see also* Bukola Adebayo, *Nigeria Overtakes India in Extreme Poverty Ranking*, CNN (June 26, 2018), https://www.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html.

[572] Peter Beaumont & Isaac Abrak, *Oil-Rich Nigeria Outstrips India as Country with Most People in Poverty*, GUARDIAN (July 16, 2018), https://www.theguardian.com/global-development/2018/jul/16/oil-rich-nigeria-outstrips-india-most-people-in-poverty.

[573] MBAKU, *supra* note 17, at 2.

[574] *Id.*

[575] *Id.*

[576] *See* Mancur Olson, *Big Bills Left on the Sidewalk: Why Some Nations Are Rich, and Others Are Poor*, 10 J. ECON. PERSP. 3 (1996).

[577] *Id.* at 6.

effectively with poverty is due to the existence, in these countries, of extremely weak and dysfunctional institutions.[578]

It is true that African policymakers and civil servants have made their share of mistakes. However, all available evidence points to political opportunism on the part of civil servants and political elites as the most important explanation for continued poverty in the continent.[579] In fact, many of Africa's post-independence leaders have actually promoted policies that have enriched them but have impoverished their fellow citizens.[580] In research published in 2004, Rod Alence determined that "democratic institutions systematically enhance African states' performance as agents of development."[581] In a recent study on the relationship between the rule of law and development in Africa, Joseph Isanga argues that "Africa's economic growth needs to be premised on the intrinsic and inseparable relationship and synergy between rule of law and sustainable economic growth, a proposition that African law and judicial institutions are not properly recognizing."[582] He concludes that in order for African countries to achieve sustainable economic and human development, it is necessary that each country "continue to develop institutions dedicated to good governance and the rule of law."[583] N. A. Curott argues that:

> The Rule of Law, by providing the framework for protecting private property and individual freedom, creates the stability and predictability in economic affairs necessary to promote entrepreneurship, saving and investment, and capital formation. It is nonsensical to expect . . . economic development in Africa without addressing the institutional factors, such as *the lack of Rule of Law*, which are responsible for Africa's failure to develop in the first place.[584]

A 2012 declaration by the High-level Meeting of the [UN] General Assembly on the Rule of Law at the National and International Levels (UNGA Declaration) stated that:

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[578] *See* MBAKU, *supra* note 17, at 5.

[579] *Id.*

[580] *Id.*; *see also* ALI A. MAZRUI & FRANCIS WIAFE-AMOAKO, AFRICAN INSTITUTION: CHALLENGES TO POLITICAL, SOCIAL, AND ECONOMIC FOUNDATIONS OF AFRICA'S DEVELOPMENT (2016) (providing a series of essays that examines the impact of institutions on development in Africa).

[581] *See* Rod Alence, *Political Institutions and Developmental Governance in Sub-Saharan Africa*, 42 J. MOD. AFR. STUD. 163, 163 (2004).

[582] Joseph M. Isanga, *Rule of Law and African Development*, 42 N.C. J. INT'L L. 729, 731 (2017).

[583] *Id.* at 785.

[584] N. A. Curott, *Foreign Aid, the Rule of Law, and Economic Development in Africa*, 11 U. BOTS. L.J. 3, 14 (2010) (emphasis added).

> [T]he rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.[585]

The UNGA Declaration went on to state that "[w]e recognize the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship."[586] It is now generally agreed by many scholars of development that it is very difficult and virtually impossible to advance inclusive economic growth and development in a country in which the majority of citizens do not voluntarily accept and respect the law. It has been argued that the failure to effectively manage ethnocultural diversity is a major threat to peace and security in Africa.[587] The solution lies in providing each African country with governing processes that deal effectively with the challenges posed by ethnocultural diversity—such a governing process would prevent majoritarian tyranny and allow each subculture to maximize its values without preventing others from acting similarly. Such a governing process is one that is undergirded by the rule of law. Hence, making certain that the rule of law functions effectively in each African country is the key to peaceful coexistence and sustainable development in the continent.[588]

Although the rule of law "is a critical catalyst to Africa's effort to deal effectively with poverty,"[589] many countries on the continent are presently unable to provide themselves with an effective rule-of-law regime. This is due to several challenges, some of which have been examined in this article. These challenges include, but are not limited to, government impunity, military intervention in governance, manipulation of national constitutions by presidents in order to remain in power indefinitely, political interference with the judiciary or lack of judicial independence, failure of the majority of citizens in each

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[585] G.A. Res. 67/1, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Level, ¶ 7 (Nov. 30, 2012).

[586] *Id.* at ¶ 8.

[587] *See, e.g.*, MBAKU, *supra* note 61, at 1 (arguing that the failure to fully and effectively manage ethnocultural diversity is a major constraint to economic growth and development in Africa).

[588] *Id.* at 290–296.

[589] Mbaku, *supra* note 60, at 1051.

African country to understand and appreciate the constitution and its role in their lives, failure to domesticate international human rights instruments, and extreme poverty and political and economic exclusion. These threats to the rule of law can only be eliminated through democratic (inclusive, participatory, bottom-up, and people-driven) constitution-making that produces constitutions and governing processes undergirded by separation of powers with checks and balances. The latter must include a truly independent judiciary, a bicameral legislature, with each chamber empowered to exercise an absolute veto over legislation passed by the other; and an independent and competent executive. Considering the important role played by civil society and its organizations in checking the exercise of government power, the governing process must be one that guarantees openness and transparency in government communication so that civil society and its organizations (e.g., a free and independent press) can have relatively easy access to the information that they need to check the government.