



Transformative Constitutionalism in African Fledgling Democracy

Konstitusionalisme Transformatif dalam Demokrasi yang Baru Berkembang di Afrika

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ABSTRACT

This study critically examines constitutionalism in Africa, addressing challenges posed by fragile democratic institutions and the imperative for transformative constitutionalism. Although democratic legitimacy relies on legality and popular sovereignty, transformative constitutionalism demands proactive efforts beyond legal formalism to drive social change. Employing normative legal analysis of secondary data, the research reveals that legal pluralism and entrenched constitutional principles significantly impede transformative progress in post-colonial African states. The study highlights the necessity of adopting transformative constitutionalism to reinforce democratic resilience and establish coherent legal and political frameworks tailored to Africa's distinct socio-political realities.

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1. Introduction

The African continent is at crossroads in terms of its geopolitical orientation and critics have argued that the continent has made less progress in its constitutional development in the past six decades compared to its counterparts in Global South. For example, over the past ten years, China's interests in the Global South have increased rapidly, particularly in terms of obtaining infrastructure agreements and access to

resources. This is not only geopolitics but also geoeconomics.¹ Currently, one of the top agendas in Africa is to reshape and consolidate its fragile democracy. This is animated by a quest for transformative constitutional governance in which many constitutional changes in the continent have been witnessed. Notwithstanding the current direction towards transformative constitutionalism in the continent, the bait of fledgling democratic orientation of the people depicts the complexity of the African society that needs to be realigned.

African post-colonial states are an amalgam of many nations and the quest of these nations for self-realisation including self-determination and sovereignty among others have left the continent in a shambolic state. Over the past six decades, it has been clear that the legal statehood that resulted from the decolonisation of colonial states was insufficient. It is looking more like these ideas and precepts are straightjackets with timebombs waiting to explode, and that they might have put Africa in a harmful time capsule. Africa was forcefully drawn into the Age of Europe and split into ahistorical divisions by the imposition of the nation-state through colonisation thereby perennially disarranging it.² Writing about Africa in 1830–1831, Georg Hegel, the German philosopher, had to say: “The peculiarly African character is difficult to comprehend, for the very reason that in reference to it, we must give up the principle which naturally accompany all our ideas – as for example, God, or Law – in which the interest of man’s violation is involved and in which he realizes his own being.”³ A society’s ability to define its term of reference in relation to its social, economic cultural underpinning determines significantly its political development.

One common belief is that the rule of law, the foundation of transformative constitutionalism, is the magic bullet that will guarantee a prosperous, just, and contemporary democracy that promotes sustainable development. But African states have not successfully freed themselves from colonial authority and become a really just nation-state, despite the fact that several of them have made the rule of law a central tenet of their constitutions. The rule of law cannot just be ‘imported’ from the West to Africa. The idea needs to be modified appropriately to account for the unique economic, geographic, and cultural characteristics of every African state.⁴ Transformative constitutionalism is increasingly presented as a new, distinctively paradigm of constitutionalism in Africa. The comparative viewpoint that emerges from broadening our understanding of transformative constitutionalism is one of its benefits.

¹ Giles Mohan and May Tan-Mullins, ‘The Geopolitics of South–South Infrastructure Development: Chinese-Financed Energy Projects in the Global South’. *Urban Studies* 57 no. 7 (2019): 1368

² Makau w. Mutua, ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’ *Michigan Journal of International Law* 16 (1995): 1114

³ Achille Mbembe, ‘Africa in the New Century’. *The Massachusetts Review* 57 no.1 (2016): 91

⁴ Makau Mutua, ‘Africa and the Rule of Law’. *Sur Revista Internacional de Direitos Human* 13 no. 23 (2016): 159

According to recent assessments, authoritarianism is on the rise globally and democracy is declining. This is followed by state capture, a return to autocracy, and an increase in patrimonial authority. Other elements connected to this purported democratic recession include the erosion of the political institutions that support the entire democratic system, election tampering, and the diminution of liberties.

The research gap is the existential threat and failure of the African states to create a democratic system that aligns to the aspirations of the African people in the midst of a progressive world. The objective of this research is to examine transformative constitutionalism in Africa in relation to its fragile democracy and how this fragile system can be consolidated to create a governance system that is not just idealistic but it also addresses the plight of the people within the continent towards progressive democracy and democratisation.

2. Legal Material and Methods

This study employs an analytical descriptive method from a normative legal perspective to explore constitutionalism and democratization issues in Africa. The research examines the African legal framework, including matters related to African women, to assess the state of constitutionalism across the continent.

Data are drawn from primary legal sources—such as binding judicial precedents, statutes, and treaties—and secondary materials, including scholarly books, peer-reviewed journal articles, and legal commentaries. The doctrinal research approach guides data collection through systematic desk review and legal document analysis.

Using this method, the study interprets existing legal norms and applies them to relevant issues, generating findings on African democracy. The analysis focuses on the applicability of constitutionalism and democracy within Africa's complex and often fragmented governance systems.

3. Result and Discussion

3.1. Legal Pluralism in African Constitutional Development

Legal pluralism can be defined as the coexistence of multiple legal system in one geographical place. The development of legal framework in the post-colonial Africa is occupied with legal pluralism through an amalgam of precolonial laws with legal systems to give meaning to the continent's aspiration. According to Berihun A. Gebeye, legal pluralism preserves colonial laws while transforming them into post-colonial legal frameworks. Legal pluralism does not require the coexistence of state and customary legal systems, nor does it split legal systems in two. Nonetheless, regional and international rules become a part of state legal systems under the new definition of legal

pluralism. It creates room for development initiatives and the rule of law to combine traditional and new forms of legal diversity.⁵ The idea of legal pluralism is intriguing. It is particularly fascinating in sub-Saharan Africa where native African norms coexist with colonial rules that were enforced and passed into state law, leading to behavioural modifications.

Legal pluralism is obviously top down because of the ways in which state laws gradually force indigenous norms to conform to its universalistic legal underpinning. South Africa's liberal constitution, with its divine status, is largely responsible for the submission of indigenous laws to globalist principles of non-discrimination, equality, and human dignity. The trajectory of legal history in the Global North means that communication between state law and indigenous laws must be sensitive; otherwise, indigenous systems will not have a place of honour in the eventual common law of South Africa.⁶ Consensus democracy served as the foundation for similar constitutional concepts in ancient African politics. Complex legal systems combined politics, law, morality, ethics, and spirituality into a way of life within a socio-cultural framework.⁷ Similar to how *Ubuntu* – a South African coined term to mean indivisibility – is applied as an underlying constitutional principle, it is stated that *Ubuntu* can also be utilised to address legal pluralism in the South African legal system, and that this could lead to a better application of the open standard of good faith in addressing contractual unfairness.⁸ We might be able to not only comprehend our history but even influence it if we know what is wrong and proceed to deconstruct it.

In Nigeria, the implementation of 'full sharia' by the northern states in 1999 widened the gulf between Muslims and Christians and increased tension and conflict between them. The accommodation of many religious and ethnic groups has been one of the primary issues in the establishment of legal institutions in Nigeria following independence. Since independence, every constitution has included clauses recognising sharia and customary law, in addition to the English common law that was brought about by colonisation.⁹ However, with the current understanding and application of complementarity, the distinct historical development of English common law alongside Islamic Shari'a criminal law in northern Nigeria has resulted in the creation of a

⁵ Berihun A. Gebeye, 'Decoding Legal Pluralism in Africa'. *The Journal of Legal Pluralism and Unofficial Law* 49 no. 2 (2017): 228

⁶ Anthony Diala, 'Our Laws Are Better Than Yours: The Future of Legal Pluralism in South Africa'. *Revista General de Derecho Público Comparado* (2019): 1

⁷ Fayth Ruffin, 'Indigenisation and Africanisation of Legal Education: Advantaging Legal Pluralism in South Africa'. *Alternation: Interdisciplinary Journal for the Study of the Arts and Humanities in Southern Africa* 27 (2019): 112

⁸ Hanri du Plessis, 'Legal Pluralism, UBuntu and the Use of Open Norms in the South African Common Law of Contract'. *Potchefstroom Electronic Law Journal* 22 (2019): 1-2

⁹ Abdul Raufu Mustapha and Aminu Gamawa, 'Challenges of Legal Pluralism'. In *Creed and Grievance: Muslim-Christian Relations & Conflict Resolution in Northern Nigeria*, (edited by Abdul Raufu Mustapha and David Ehrhardt, Woodbridge: James Currey, 2018), 139

hybridised criminal legal system. This could ultimately prove to be preferable in encouraging the Shari'a courts to exercise criminal justice over the radical insurgents in Northern Nigeria.¹⁰ These courts would have the previously unheard-of capacity to integrate legally enforceable rulings with religious interpretation and direction, directly countering the largely uncontested area of ideology used by extremist actors.

In Senegal, customary law in the Casamance, as elsewhere emerged from particular historical conditions during the time when pre-capitalist social connections were changing, and the colonial state was being more firmly established. Legal pluralism develops theories on the nexus between several legal sectors in addition to supposing their existence. Colonialism created “dual” legal systems, with “customary courts” that were meant to dispense justice in accordance with precolonial standards and courts serving Europeans and Africans deemed suitably “Europeanised.” This created an additional layer of complication.¹¹ Linking this country to France, its former coloniser, after the revolution in the monistic nation of France, laws are enforced from the top down and, in theory, apply to everyone in a unified and equal manner. As a result, French law would serve as a countermodel to pluralism, which is defined by the plurality of the legal ordinances that are in place and the makers of law.¹² The international intellectual agenda is now again dominated by questions of political form and jurisdiction.¹³ This is partly because of the rise in and politicisation of plurality within societies.

Furthermore, it is because of the difficulties presented by globalisation of politics and law, the growth of transnational legal regimes, and the increased movement of people across borders in both legal and artificial capacities. This nation may rightfully be considered as one of the few instances of a reasonably successful democratization process in Africa, as demonstrated, among other things, by the three democratic transfers of power (in 2000–2001, 2012, and 2024) in which the major opposition parties won the majority of parliamentary seats and the presidency following the absence of military coups that overthrew civilian governments.¹⁴ The adoption of the current 2001 Constitution or the constitutional changes of 2016 and 2019 are two examples of significant constitutional changes resulting from these two fundamental

¹⁰ Tina Lorizzo, ‘Introduction’. In *Community Courts and Postcolonial Legal Pluralism* (London: Routledge, 2024), 1

¹¹ Erin Accampo Hern, ‘When Do Women Win in Legally Plural Systems? Evidence from Ghana and Senegal’. *The Journal of Modern African Studies* 60 no. 4 (2022): 529

¹² Florence Renucci, ‘Legal Pluralism at the Heart of a Unitary Law. French Colonial and Post-Colonial Situations (19th-20th Century)’. *Quaderni Fiorentini per La Storia Del Pensiero Giuridico Moderno* 50 (2021): 631

¹³ Andrew Arato and Jean L. Cohen, ‘Introduction: Forms of Pluralism and Democratic Constitutionalism’. In *Forms of Pluralism and Democratic Constitutionalism*, edited by Andrew Arato and Astrid von Busekist, (New York: Columbia University Press, 2018), 1

¹⁴ Łukasz Jakubiak, ‘Presidential Politics of Constitutional Amendment in Francophone Africa: The Case of Senegal’. *Hungarian Journal of Legal Studies* 61 no. 4 (2022): 286

political transformations that have had an impact on Senegalese political systems, albeit to varying degrees, on the role of the presidency.

From 1990 to 2010, 49 African countries passed term restriction clauses in their constitutions. Over the course of those two decades, the average length of time in office fell from thirteen to seven years, and the number of presidents who left office by electoral means rose by four, albeit many of them have since been reversed.¹⁵ Even with the slow-moving tradition of constitutionalism, over ten African states have changed their constitutions significantly since 2011.¹⁶ In the unstable democratic phase that France has caused in francophone Africa, constitutional stability is widely regarded as a measure of a nation's level of democracy. Regular changes to the constitution are sometimes seen with suspicion because they cast doubt on the commitment to democratic values.¹⁷

While the 2004 Constitution of Mozambique, home of the Maputo Protocol or Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, formally acknowledges the value of local knowledge and legal pluralism, the state's criminal justice system has not fully adopted these ideals. As long as they are consistent with the fundamental principles and values of the Constitution, various normative and dispute resolution systems can coexist in Mozambican society, according to Article 4 of the document. However, the actual application and acceptance of non-state mechanisms, like community courts, are undercut.¹⁸ Following a fifteen-year civil war, the Mozambican government established Community Courts as a means of resolving disputes that arose during the conflict using customary justice. The Community Courts aimed to provide justice to the people, via the people, in the same successful grassroots model. However, the Mozambican government enacted the Law on the Organisation of the judiciary a year before to the establishment of the Community Courts, which removed grassroots courts from the official legal system and restricted formal authority to the district level.¹⁹ This undermined the pluralistic nature of what a society can build.

¹⁵ Julia Leininger and Daniel Nowack, 'Protection against Autocratisation: How International Democracy Promotion Helped Preserve Presidential Term Limits in Malawi and Senegal'. *Third World Quarterly* 43 no. 2 (2022): 312

¹⁶ Nick Huls, 'African Constitutions'. Constitutional Texts (Including Amendments, Versions, Drafts and Revisions) Selected Publications on African Constitutions. 15 April 2024. <https://www.ascleiden.nl/content/webdossiers/african-constitutions>

¹⁷ Bagnini Kohoun, Josephine Etowa, and John C. Kilwein, 'Non-Consolidating Constitutional Amendments and the Rule of Law in Democratizing Francophone West Africa: Case Study of Benin, Burkina Faso, and Senegal'. *Humanities and Social Sciences Review* 7 no. 2 (2017): 256

¹⁸ Tina Lorizzo, 'Introduction'. In *Community Courts and Postcolonial Legal Pluralism* (London: Routledge, 2024), 2

¹⁹ Molly Utter, 'New Rules of the Game: The Politization of Community Courts in Mozambique'. *Washington International Law Journal* 31 no. 1 (2021): 150

Since gaining independence, the Island of Comoros has been plagued by ongoing political instability brought on by disputes amongst the islands regarding the composition of the executive branch and the islands' autonomy over their economy, finances, and politics. Following the 1989 assassination of President Ahmed Abdallah and the approval of a constitutional referendum extending the presidential term and restoring the Prime Minister's position, discussions about political liberalization began.²⁰

In contemporary political analyses, the 'Global South' is an omnipresent yet curiously elusive category. However, divergent paths of economic development, myriad institutional arrangements, and a multiplicity of normative orders seem to immediately undermine any plausible subsumption under a single, overarching category.²¹ The much-heralded freedom from colonialism was, for the most part, an abortive endeavour across most parts of Africa. Africa's post-colonial era, particularly in the early years of independence, was marked by political instability, military coups and countercoups, dictatorship, civil unrest, corruption, massive violations of human rights, and misery, instead of the freedom, democracy, and prosperity that many colonised people had hoped independence would bring.²² This spurs on many transitional agendas over the decades to free the country from the malaise it was expecting to free itself during the independence struggle.

While legal pluralism caters for divergent views, the nature in which African states approach them is demeaning to the people. Legal pluralism definitely poses enormous problems because of the multiplicity of laws and the needs to not only accommodate those laws but also their implementation to prove to the comity of nations that the society is progressing along 'civilised' manner.²³ This is due to the fact that most African customary laws are unwritten and introduction of foreign laws through legal pluralism undermines their role in legal matters. It ends with states that are sectional rather than ecumenical.

3.2. How far has legal pluralism delivered in Africa?

Legal pluralism has significant effects on governance and policy. Non-state legal systems, for example, frequently settle most conflicts and maintain a high degree of autonomy and authority in developing nations. Nonetheless, the significance of legal

²⁰ Edalina Rodrigues Sanches, 'Transitions to Democracy, Institutional Choices and Party System Stability: Lessons from Small African Islands'. *Journal of Contemporary African Studies* 38 no. 2 (2020): 194

²¹ Tobias Berger, 'The "Global South" as a Relational Category – Global Hierarchies in the Production of Law and Legal Pluralism'. *Third World Quarterly* 42 no. 9 (2021): 2001

²² Eric Kibet, 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa'. *African Human Rights Law Journal* 17 no. 2 (2017): 341

²³ Rhoda Asikia Ige, 'Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village' *Journal of Law, Policy and Globalization* 34 (2015): 64

plurality is drastically undertheorized and little acknowledged.²⁴ After the amalgamation of different legal systems in African states, much is yet to be realised politically and economically. This is due to the fact that the Africa is characterised with political instability and weak legal institutions that are required to ensure that, in the midst of emerging and fledgling democracy, transformative agenda of the culture of constitutionalism is realised.

Constitutionalism influences how governments handle their citizens, how states operate in the international order, how communities organize themselves, how individuals relate to groups, and how citizens engage with one another. We frequently fail to recognize the full extent to which constitutionalism forces and restricts all facets of our daily life, maybe because constitutions come in a variety of forms that are not typically associated with constitutionalism.²⁵ Cultural diversity of an African state and the proclivity of the people to commit to their cultural identity make legal pluralism an ideology that continues to struggle to fit into the African political narratives. With its so-called fragile (or weak) states, where formal state institutions must contend for jurisdiction with strong, informal normative norms based in religion and culture, legal pluralism is especially prevalent in Africa.²⁶ Many African nations provide significant de jure authority upon traditional chiefs or implicitly ensure that these leaders will not interfere within their sphere of influence.

In many African societies, legal pluralism is a misnomer because of the lack of appreciation for the need for transformative constitutionalism and strong democracy. This is because legal pluralism does not build a theory that is both critical of the epistemological and ontological presuppositions of law, as well as discursive in engaging a dialogue between legal traditions, aspects of legal discourse, and processes like sovereignty.

African Charter on Democracy, Election and Governance provides that state parties shall endeavour to establish good political governance through eight principles. They must be, inter alia, “accountable, efficient and effective public administration; strengthening the functioning and effectiveness of parliaments; an independent judiciary; relevant reforms of public institutions including the security sector; and entrenching and respecting the principle of the rule of law”. Good governance denotes an administration that rigorously upholds and puts into practice democratic values, is attentive to the demands of the people, and is successful in addressing new social

²⁴ Geoffrey Swenson, ‘Legal Pluralism in Theory and Practice’. *International Studies Review* 20 no.3 (2018): 438

²⁵ Richard Albert, ‘The Cult of Constitutionalism’. *Florida State University Law Review* 39 no. 2 (2012): 374

²⁶ Egor Lazarev, ‘Laws in Conflict: Legacies of War, Gender, and Legal Pluralism in Chechnya’. *World Politics* 71 no. 4 (2019): 667

issues.²⁷ In spite of legal pluralism, the continent still finds it inimical to certain African values.

3.3. African Women in Politics of Self Realisation

Transformative constitutionalism cannot be precluded from the strive for self-realisation and actualisation based on promotion of constitutional values that respond to socio-legal issues of equality before the law. In Africa, women's rights in politics are not widely appreciated. The colonial heritage and the severe economic difficulties are to be blamed for the current murky circumstances in the majority of African nations. The fact that several of these African nations have had difficulty in achieving political stability in recent decades is not surprising. Even though a lot of research has gone into finding answers for "Africa's democracy problem," I argued that if more women were involved in politics in these nations, democracy would eventually spread over the continent and the gender gap would be reduced.²⁸ The African's inclination to patriarchal governance reflects the gender imbalance that its constitutions are yet to eliminate, notwithstanding the Maputo Protocol on the rights of women in the continent.

If Africa keeps failing to minimise the gender disparity in the orientation of the majority of its population, it will never be able to succeed politically. The Maputo Protocol expands upon the breadth of women's rights contained in earlier international treaties by explicitly enumerating governmental commitments to protect African women from discrimination.²⁹ The Protocol is very advanced and comprehensive in its protections, notwithstanding its imperfections. One strength of the Protocol is its capacity to reconcile culture and greater ideals of gender equality, particularly with regard to the junction of global standards and local traditions. However, family members and fellow party members may undermine women's political campaigns in the name of upholding traditional gender norms; feminist activists may be the focus of online harassment, mockery, and threats of rape or murder from anonymous sources; and women may be prohibited from voting or forced to vote a certain way by traditional or religious leaders, or even by their own husbands.

Threats and physical acts of violence, including murder, are frequently combined with these dynamics of intimidation and harassment. It is intended to convey a clear and broad message that women should not participate in politics as a group by restricting their engagement in these ways.³⁰ The African liberation movement battled against colonisation and colonialism, two interwoven powers. While the former signifies the physical occupancy and seizure of African territory the latter suggests the

²⁷ Ousu Mendy, 'A Constitution without Constitutionalism: A Gambian Paradox' *International Journal of Law and Public Policy* 6 no.1 (2024): 20

²⁸ Enaifoghe Osehi Andrew, 'Women's Struggle for Representation in African Political Structure'. *Gender and Behaviour* 16 no. 2 (2018): 11219

²⁹ Jing Geng, 'The Maputo Protocol and the Reconciliation of Gender and Culture in Africa'. In *Research Handbook on Feminist Engagement with International Law*, edited by Susan Harris Rimmer and Kate Ogg, (Edward Elgar, 2019), 413

³⁰ Mona Lena Krook, 'Violence Against Women in Politics'. *Journal of Democracy* 28 no. 1 (2017): 75

eradication of African culture. African women enjoyed a respectable space in pre-colonial Africa, and while “political independence” achieved in an artificial and superficial sense in providing room for African cultural reclaiming, this victory offered little to no joy in that regard.³¹ Even after being granted “independence” and “freedom,” African women are still denied their freedom and treated as second-class citizens in their communities.

For example, the criminalisation of Female Genital Mutilation (FGM) in 2015 and the current attempt to abrogate this law questions the compatibility of this criminalization with the cultural values of certain indigenous people.³²

3.4. Reconstructing African Ideological Spectrum

The long-standing goal of creating a united Africa has been irreversibly weakened by the colonial enterprise’s unwavering, widespread, and malevolent influence and impact on state creation in post-colonial Africa.³³ One of the tragedies of Africa’s ideological orientation is its proclivity to disregard its unique sociological orientation and the different “breeds” of people who are unique to it. What Africa knows and how it knows it has great influence in how it governs itself. The inheritance of foreign ideals with a view to transforming constitutional status quo is a dream that is inimical to progressive constitutionalism in Africa’s sociological extrusion.

The aim of this research is not to support Western ideologies such as socialism, nationalism, state capitalism, or populism because these ideas are not consistent with how the world is constantly changing. It changes throughout time. There are no complete revolutions in which the old polity is abolished, and a new one is established with a blank slate. Social ties, institutions, traditions, and practices will endure and change over time.³⁴ In a state of fledgling democracy as it is in Africa, the way that its socio-economic transformation processes have been influenced by an ideational paradigm based on neoliberal ideals since the 1980s and by ideas inspired by Keynesian modernization ideas in the early postcolonial era (the 1950s to 1970s) is one way that it has positioned itself within the evolving global order.³⁵

3.5. Unconstitutional Change of Governments in Africa and its implications for Democracy

³¹ Simphiwe Sesanti, ‘African Philosophy in Pursuit of an African Renaissance for the True Liberation of African Women’. *Journal of Black Studies* 47 no. 6 (2016): 479

³² Ousu Mendy, ‘Impact of Common Law on the Gambian Legal System’ *Journal of Humanities and Social Sciences* 7 no. 1 (2025): 30

³³ A. Alade Fawole, *The Illusion of the Post-Colonial State: Governance and Security Challenges in Africa*. (Lanham: Lexington Books, 2018), 25

³⁴ Alex Thomson, *An Introduction to African Politics*. 3rd ed. (Oxon: Routledge, 2010), 8

³⁵ Michael Kpessa-Whyte and Kafui Tsekpo, ‘Global Public Policy Paradigms and the Socio-Economic Transformation Trajectories of Africa’. In *The Palgrave Handbook of Africa and the Changing Global Order*, (Cham: Springer International Publishing, 2022), 515

A politically stable environment where the rule of law serves as the ultimate arbitrator is conducive to democracy. Many cultures, particularly those in the Third World, have experienced the political phenomena of military engagement in politics, whether through military rule, also known as military government or military dictatorship. Even though it is seen as a political anomaly worldwide, it has persisted in endangering the development of democracy in numerous African states. It was pervasive throughout the feudal era and frequently occurred during breaks in the constitutional disputes of many cultures, particularly those in Africa and other Third World nations, particularly after their attainment of political freedom.³⁶

Democracy in Africa is the fusion of two traditions – one particularly African and one originating in the West. Except for Eritrea, every state on this continent has implemented a pluralist election system featuring candidate rivalry since the 1990s. But again, there were more coups during this age than previously. The organisations behind the coups swiftly took control of the administrative, decision-making, and command structures, substituting individuals of their choosing for the outgoing chief executives and top officials. In the end, they held all of the state's power. In Africa, reality does not change despite the continent's immensity or the variety of circumstances that exist there. Even now, coups continue to occur.³⁷ African militaries have attempted coups in almost every country in the continent recently, including Egypt, Lesotho, Guinea, and Madagascar.

They have targeted well-established democracies, nascent democratic trials, administrations that are becoming more authoritarian, power voids left by the passing of leaders, and, most recently in Burundi, leaders who are trying to get around constitutional restrictions on their term. These ongoing activities against regimes with such diverse histories imply that coups continue to affect a wide variety of governments and pose a persistent threat to the term of leaders. The African Union, on the other hand, places a greater focus on encouraging only constitutional changes to governments.³⁸ In today's discourse, democracy is arguably the most widely accepted political norm. Nonetheless, democratisation and its associated obstacles have long been unattainable for the majority of African sovereign governments. Despite being called a “false start,” independence gave the majority of African governments the chance to convert colonial rule into democratic predominance. Unfortunately, post-independence initiatives to do this have mostly fallen short of expectations.³⁹ To date, it is safe to say that the most

³⁶ Igiebor God'stime Osariyekemwen and Iyase Ambrose Osariyekemwen, 'The Resurgence of Military Dictatorship in African Politics: Implication for Democratic Consolidation'. *East African Journal of Social Sciences and Humanities* 6 no. 1 (2021): 124

³⁷ Jacques Kabano and Adem Özer, 'revisiting democracy as a right protected by international law: challenges brought by African military coups.' *Cankiri Karatekin Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi* 13 no. 3 (2023): 1245

³⁸ Jonathan Powell, Trace Lasley, and Rebecca Schiel, 'Combating Coups d'état in Africa, 1950–2014'. *Studies in Comparative International Development* 51 no. 4 (2016): 482

³⁹ Lere Amusan, Ademola Jegede, and Luqman SAKA, 'The Challenges of Democratisation in Africa: Evidence and the Way Forward for Nigeria'. *Journal of Administrative Sciences* 15 no. 29 (2017):43

endangered political endeavour in Africa is democratization, especially when considering the current aspirations of the majority of African states.

The current surge in coups in the African region highlights the urgent need for a thorough and unique assessment and identification of the underlying causes in order to effectively combat the epidemic of coups and comprehend the intricate nature of their impact on regional stability in order to develop countercoup mechanisms. Because these coups are so complicated, it is crucial to consider a range of historical, political, geographic, and socioeconomic elements. The enduring problems that Africans face from existing governments and leadership, economic disparities, poverty, and general discontent with living conditions are important factors that must be considered in order to comprehend the rise of coups.⁴⁰

3.6 Designing a Transformative Constitutional Framework for Africa

Key issues in some African constitutions remain unentrenched and therefore, they are exposed to political manipulations. Strong state institutions will always overcome unsatiable hunger of continued occupation of public institutions. The office of the president is the most attacked constitutional institution in Africa ranging from coup d'états to constitutional amendment to create unlimited term of presidency. Eritrea, Ethiopia, Lesotho, Morocco, Somalia, South Sudan, Swaziland and The Gambia are the African states with no presidential term limit while Togo, Gabon, Uganda, Chad, Cameroon, Djibouti, Rwanda, Burundi Republic of Congo and Democratic Republic of Congo have eliminated two-term limit in their constitutions.⁴¹ Only Burkina Faso, Malawi, Niger, Nigeria, Senegal and Zambia retain term limit in their constitutions.

I align with the philosophy among constitutional theorists that entrenchment – the strengthening of broad principles against future change – is to certain extent a destructive mean against transformative constitutionalism. I base my argument on observations from democratic national and state constitutions. The practical fact is that most modern democratic constitutions are vulnerable to frequent revisions, making them inadequate in their ability to promote the entrenchment of their contents.⁴² Constitutional clauses that address key issues like human rights and values of the people as a state, institutions like the presidency ought to be entrenched as “eternity clauses”.

Constitutional entrenchment clauses are relevant; in the great majority of cases under review, both the claimants and the courts made reference to them. The majority of instances end in the invalidation of a constitutional amendment, and the most extreme

⁴⁰ Chinta Sai Surya, ‘Unraveling the surge: Analyzing the recent wave of coups in Africa and their implication for regional stability’. *International Development Planning Review* 22 no. 2 (2023): 230

⁴¹ African centre for Strategic Studies, *Constitutional Term Limits for African Leaders*, <https://africacenter.org/wp-content/uploads/2018/02/Constitutional-Term-Limits-for-African-Leaders-February-2018.pdf>

⁴² Mila Versteeg and Emily Zackin, ‘Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design’. *American Political Science Review* 110 no. 4 (2016): 657

kind of entrenchment clauses, known as “eternity clauses,” are the basis for most of these cases.⁴³ Nonetheless, the majority of these invalidations might be evaluated as examples of judicial activism that is hostile to democracy. There are two categories of constitutional amendments: elaborative and remedial. A constitutional amendment, when properly defined, is a change made to better fulfil the aims of the current constitution,⁴⁴ the organization of government serves not only to control and limit the power of those who exercise it; as sovereignty has passed from monarchs to the people, the aim increasingly becomes to channel that power so that the values and interests represented by rights are promoted and identified with as well as safeguarded. Constitutional entrenchment and judicial review play an important part in this scheme, but a subordinate rather than the dominant one of today’s largely legalistic conceptions of the constitution. However, it requires a purposive interpretation to ensure that the act does not return the people to any form of governance that is antagonistic to the ideals of constitutional theory that it intends to propagate.

In order to build an African continent based on transformative constitutionalism and progressive democracy, the continent needs robust constitutional protections against democratic and constitutional regression. Therefore, the immediate prospects of constitutional liberal democracy rely more on the traits of political leadership, public opposition, and the peculiarities of party coalition politics than they do on our institutions.⁴⁵ A constitution is both a censor and a liberator. While the constitution is the litmus test of democracy and transformative constitutionalism, it must also be within the pretext of limited government, republicanism, separation of powers, checks and balances, federalism, and popular sovereignty.

4. Conclusion

Constitutionalism influences how governments handle their citizens, how states operate in the international order, how communities organize themselves, how individuals relate to groups, and how citizens engage with one another. The antinomy of transformative constitutionalism in a fragile democracy is at the centre of foreign governance ideologies that are inimical to African social and cultural diversities. For Africa to reconstruct transformative constitutionalism, the organisation of government should serve not only to control and limit the power of those who exercise it as sovereignty is passed from monarchs to the people. Values and interests represented by rights are promoted and identified and safeguarded.

Amidst fledgling and fragile democracy, consensus democracy will serve as a foundation for similar constitutional concepts in African politics. Complex legal

⁴³ Michael Hein, ‘Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe’. *International Journal of Constitutional Law* 18 (2020): 78

⁴⁴ Richard Albert, ‘Constitutional Amendment and Dismemberment’. *Yale Journal of International Law* 43 no. 1 (2018): 3

⁴⁵ Aziz Huq and Tom Ginsburg, ‘How to Lose Your Constitutional Democracy’. *UCLA Law Review* 65 (2018): 78

systems combined politics, law, morality, ethics, and spirituality into a way of life within a socio-cultural framework of African whose values are derived from ethics. Thus, in order to recreate an African continent based on transformative constitutionalism and consolidated democracy, the continent needs robust constitutional protections against democratic and constitutional regression. Therefore, the immediate prospects of constitutional liberal democracy rely more on the traits of political will, public scrutiny, and peculiarities of party coalition politics.

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