

# Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent towards symbolic constitutionalism

Charles Manga Fombad\*

Professor of Law, Institute for International and Comparative Law in Africa,  
Faculty of Law, University of Pretoria, South Africa

## Summary

*This article examines some of the challenges that have arisen as part of attempts during the past two decades to entrench a culture of constitutionalism and respect for law in Central Africa. It shows how, from a background of constitutions that did not promote any constitutionalism, the countries in this region generally adopted constitutions which contained most of the core elements of constitutionalism and the rule of law. It is shown that in the last few years there has been a steady slide towards what can be referred to as tokenistic and symbolic constitutionalism in the region. The objective of the article is to see how this decline could be arrested to ensure a return to substantive and effective constitutionalism. The approach adopted is essentially comparative. The contribution starts with an overview of the state of constitutionalism and the rule of law in the 11 countries located in the region. This is preceded by a brief explanation of the three critical concepts: constitution, constitutionalism and the rule of law. It then uses a number of key indicators of good governance and the rule of law to assess the governance situation in the region. This is followed by an overarching analysis of the constitutions of these countries to identify trends and tendencies and to show the nature and extent of the widening gap between the constitutional texts and actual practice. A number of measures are suggested which, it is argued, need to be taken to make constitutionalism in the region meaningful and effective.*

---

\* Licence en Droit (Yaounde), LL.M PhD (London); charles.fombad@up.ac.za. Paper presented at the 2nd Annual High Level Dialogue on Governance and Democracy in Africa: Trends, Challenges and Prospects, on the theme 'Enhancing constitutional order and rule of law in Africa' held in Dakar, Senegal, 25-27 November 2013.

**Key words:** *accountability; constitutionalism; constitutional stability; rule of law; symbolic constitutionalism*

## 1 Introduction

The last two decades have seen significant efforts to entrench constitutionalism and the rule of law in Africa. After several years of military dictatorships and authoritarian rule that triggered political instability and economic decline, African governments under internal and external pressure started from the 1990s to adopt new or revised constitutions which began to entrench democratic principles, values and practices rooted in constitutionalism and the rule of law. For the first time, African rulers and the ruling elites have come under pressure to submit themselves to the dictates of the rule of law.

However, in the last few years, efforts to entrench an ethos of constitutionalism and the rule of law have come under serious threat as the forces of authoritarianism appear to have regrouped and are staging a comeback. The challenges have come in diverse forms. The article attempts to assess, using several well-established and generally-accepted indicators of good governance, how a process of constitutional transformation that started very promisingly in the 1990s, with constitutional reforms that provided some elements of formal and pragmatic constitutionalism, is now being undermined by changes that will result in nothing more than tokenistic and symbolic constitutionalism.

The focus of the article is on the countries in Central Africa that have seldom been discussed in the English literature on this topic. The analysis is comparative in nature and the scope of the countries discussed as falling within the Central African region are Angola, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of the Congo (DRC), Congo, Equatorial Guinea, Gabon, Rwanda and São Tomé and Príncipe. On account of the number of countries covered, the article can do no more than provide a general indication of trends and emerging tendencies.

The discussion that follows is divided into three parts. It starts with an overview of the state of constitutionalism in the 11 countries studied in the article. This part will be preceded by a brief explanation of the terms 'constitution', 'constitutionalism' and 'rule of law' as used in this context. Since the assumption is that the constitutional developments of the last two decades were designed to establish a solid basis for the promotion of constitutionalism and the rule of law, the second part of this section will review the progress that has been made. The strides made towards good governance in the region will be assessed based on a number of widely-accepted governance indicators. It is shown that since the 1990s, the Central African region has been the region that has made the least progress compared to other regions in entrenching constitutionalism and the rule of law in Africa. The next part of the article provides an overview of the actual

constitutional developments that have taken place since 1990, to see whether or not this is a reflection of the conclusions suggested by the indicators of good governance and, if so, what corrective measures need to be undertaken. The last part contains concluding remarks. It is argued that the early signs of progress towards constitutional democracy in Africa, generally, and the Central African region, in particular, are now being systematically undermined by authoritarian tendencies that combine intransigence with strategic and symbolic adaptability to the modern paraphernalia of constitutionalism and respect for the rule of law. There is a need to reverse the trend in which several elements and aspects of democracy, good governance, constitutionalism and the rule of law are used merely as a cloak by leaders and their cronies to gain international respect and acceptance amongst Western donors and international institutions.

## **2 Overview of the state of constitutionalism and the rule of law**

### **2.1 Some preliminary thoughts on the concepts of constitution, constitutionalism and the rule of law**

The credibility, viability and effectiveness of any modern constitutional order depend fundamentally on the nature of the polity's constitution and whether this provides a solid basis for the promotion of constitutionalism and other things such as the rule of law. The terms constitution, constitutionalism and rule of law have been discussed widely in the literature. There is no need to revisit these debates beyond simply explaining the sense in which these terms are used in this context.

The definitions and conceptualisations of the term 'constitution' are so diverse that Tushnet considers that it is one of those words which 'are more used than defined', but rightly adds that 'understanding them means knowing how they are used'.<sup>1</sup> From the variety of definitions, one can say that a constitution could be used in at least four senses: the minimalist or material sense; the formal sense; the modern sense; and the functionalist sense.<sup>2</sup> The most frequent use refers to the document, written or unwritten, which governs, regulates and allocates powers, functions and duties amongst the different agencies within the state and between the governed and the government. The main purpose of a constitution is to limit the use of governmental powers in a manner that will prevent the twin dangers of anarchy and authoritarianism. Although the constitution is universally accepted as the best method of legitimation and

---

1 M Tushnet 'Constitution' in M Rosenfeld & A Sajó (eds) *The Oxford handbook of comparative constitutional law* (2012) 218.

2 See A Dyèvre 'The constitutionalisation of the European Union: Discourse, present, future and facts' (2005) 30 *European Law Review* 165-169.

organisation of powers that prevents these twin evils, it is often clear that some constitutions fail to achieve this balance effectively, either in the text or in practice or even in both instances. It is therefore no surprise that scholars sometimes distinguish between certain constitutional types to reflect the extent of their effectiveness or ineffectiveness. For example, some constitutions can be described as symbolic or sham when they are not worth the paper on which they are written. They merely serve as window-dressing and are routinely ignored or arbitrarily changed and only implemented at the convenience of the government. Some normal constitutions occasionally contain sham or symbolic elements, such as directive principles of state policy, which are expressly stated not to be legally enforceable. Lowenstein has distinguished between normative, nominal and semantic constitutions based on the degree to which the political reality conforms to the norms of the constitution.<sup>3</sup> He describes normative constitutions as effective constitutions in the sense that the political actors and the processes that they follow are within the framework of the constitution. A nominal constitution, according to him, exists where the existing socio-economic conditions prevailing in the country, regardless of the interests of the power-holders, prevent the constitutional norms from being faithfully complied with. The third category, semantic constitutions, refers to constitutions which, although reflecting the prevailing political reality, do not impose any binding rules. The constitutions of dictatorial or totalitarian regimes usually fall within this category. Grimm notes that others characterise semantic constitutions as instrumentalistic or ritualistic.<sup>4</sup> These constitutions are instrumentalistic to indicate that they are used exclusively in the interest of the government or power-holders and ritualistic because the rules of the constitution are often applied while the substantive processes take place elsewhere and are complete when the 'ritual' starts.<sup>5</sup>

The word 'constitution', in its diverse senses, is clearly distinguishable from the concept of constitutionalism. The latter, however, defies any easy and simple definition and has often been defined differently by jurists and other writers in the social sciences, especially political scientists.<sup>6</sup> Generally speaking, constitutionalism is a much broader concept than the notion of a constitution. In essence, a constitution focuses on the attempts to limit governmental arbitrariness, which attempt may fail, as has happened several times in Africa. Modern constitutionalism, for its part, encompasses the idea that a government should not only be sufficiently limited in a way

---

3 K Lowenstein *Political power and the governmental process* (1957) 147-170.

4 D Grimm 'Types of constitutions' in Rosenfeld & Sajó (n 1 above) 107.

5 Grimm (n 4 above) 39.

6 See the discussion of this in CM Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *American Journal of Comparative Law* 6-8.

that protects its citizens from arbitrary rule, but also that it should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations. Constitutionalism thus combines the idea of a government limited in its actions and accountable to its citizens for its actions. It rests on two main pillars: first, the existence of certain limitations imposed on the state, particularly in its relations with citizens, based on a certain clearly-defined set of core values; second, the existence of a clearly-defined mechanism for ensuring that the limitations on the government are legally enforceable. In this broad sense, constitutionalism has certain core, irreducible and possibly minimum content of values with a well-defined process and procedural mechanisms to hold government accountable. The core elements of constitutionalism can be listed as follows:<sup>7</sup>

- (i) the recognition and protection of fundamental rights and freedoms;
- (ii) the separation of powers;
- (iii) an independent judiciary;
- (iv) the review of the constitutionality of laws;
- (v) the control of the amendment of the constitution; and
- (vi) institutions supporting constitutional democracy and accountability.

What is clearly emerging from recent constitutions as the central theme of constitutionalism, especially in Africa, such as the Kenyan Constitution of 2010 and the Zimbabwean Constitution of 2013, is the emphasis on principles and values that recognise and protect human worth and dignity. Constitutionalism is therefore not a fixed and static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens.<sup>8</sup> It is the institutionalisation of these core elements that matters. The philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic shams or ornamental documents that could be easily manipulated by politicians, but rather documents that can promote respect for the rule of law and democracy. Nevertheless, constitutionalism can be distinguished from the rule of law.

7 See L Henkin 'Elements of constitutionalism' (1998) 60 *The Review* 11-22, who identifies nine 'essential elements'; S Giovanni *The theory of democracy revisited* (1987), who lists five elements of what he terms liberal constitutionalism, although he lays emphasis on the rule of law; B Li 'What is constitutionalism' [http://www.oycf.org/Perspectives/6\\_063000/what\\_is\\_constitutionalism.htm](http://www.oycf.org/Perspectives/6_063000/what_is_constitutionalism.htm) (accessed 31 August 2014); B Li 'Constitutionalism and the rule of law' [http://www.oycf.org/Perspectives/7\\_083100/constitutionalism\\_and\\_the\\_rule\\_o.htm](http://www.oycf.org/Perspectives/7_083100/constitutionalism_and_the_rule_o.htm) (accessed 31 August 2014); WF Murphy 'Constitutions, constitutionalism and democracy' in D Greenberg *et al* (eds) *Constitutionalism and democracy. Transitions in the contemporary world* (1993) 3-25.

8 In this regard, one is bound to agree with Klug who, in H Klug 'Constitutional law' (1995) *Annual Survey of South African Law* 1-11, states that ch 9 of the South African Constitution, which covers the 'state institutions supporting democracy', is probably South Africa's most 'important contribution to the history of constitutionalism'.

The much-revered doctrine of the rule of law has an ancient lineage and was popularised by Dicey, the most eminent British constitutional scholar of the nineteenth century, who viewed it as one of the crucial elements of English constitutionalism.<sup>9</sup> According to him, the rule of law in the context of the British Constitution had 'three meanings'<sup>10</sup> or included 'at least three distinct kindred conceptions':<sup>11</sup> first, the principle of legality, according to which nobody may be deprived of their rights and freedoms through the arbitrary exercise of wide discretionary powers by the executive. This could only be done by the ordinary courts of law. Second, the principle of equality states that nobody, regardless of their status, is above the law and everybody is subject to the jurisdiction of the ordinary courts. Third, the general principle is that in Britain the rights of individuals are effectively protected by the action and decisions of ordinary courts rather than by guarantees contained in a constitution. Although Dicey's formulation of the doctrine, especially his third point, proved to be acutely controversial and has been regularly criticised, the underlying concepts of this doctrine as formulated by him still constitute the root of most of the modern conception of the doctrine.

The modern conception of the rule of law has drawn from its rich history and diverse understandings of it at both national and international levels. What is now widely accepted as a modern conceptualisation of the rule of law was formulated by the UN Secretary-General in 2004. He defines the rule of law as<sup>12</sup>

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.

He also points out that, as a principle,<sup>13</sup>

[i]t requires, as well, 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.

9 See AV Dicey *Introduction to the study of the law of the constitution* (1968).

10 Dicey (n 9 above) 202.

11 Dicey 187-188.

12 See Report of the Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' para 6 [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.ipu.org%2Fsplz-e%2Funga07%2Flaw.pdf&ei=IHODUri\\_NM-QhQfv04HoBQ&usq=AFQjCNH4tfk4EZdh3JZfjalOMTyIL777RA&sig2=\\_51SuV7GbBdRzWVgX16iNg&bvm=bv.56343320,d.ZG4](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.ipu.org%2Fsplz-e%2Funga07%2Flaw.pdf&ei=IHODUri_NM-QhQfv04HoBQ&usq=AFQjCNH4tfk4EZdh3JZfjalOMTyIL777RA&sig2=_51SuV7GbBdRzWVgX16iNg&bvm=bv.56343320,d.ZG4) (accessed 31 August 2014).

13 As above.

The possible scope of the rule of law thus defined is accurately captured in the four universal principles of the rule of law formulated by the World Justice Project. These state as follows:<sup>14</sup>

- (i) The government and its officials and agents as well as individuals and private entities are accountable under the law.
- (ii) The laws are clear, publicised, stable, and just, are applied evenly, and protect fundamental rights, including the security of persons and property.
- (iii) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
- (iv) Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

These principles have the merit of incorporating and emphasising both the procedural or formal (sometimes also referred to as thin or minimalist) conception as well as the substantive (thick or maximalist) conception of the rule of law. They also incorporate most of the cluster of ideas which over the centuries have traditionally been associated with the rule. From this perspective, it is clear that many of the core elements of constitutionalism listed above are also necessary for the rule of law to exist, but the latter concept is slightly narrower in scope. Respect for the rule of law on its own may not necessarily lead to the existence of constitutionalism. Nevertheless, constitutionalism is safeguarded by the rule of law and without the rule of law there can be no constitutionalism.

With this brief understanding of these concepts, it is now necessary to see how far the countries in the Central African region have gone in establishing governance systems that promote constitutionalism and the rule of law.

## **2.2 Assessment of the efforts towards entrenching constitutionalism and the rule of law**

Every year a number of organisations have carried out surveys and other investigations to see how countries perform with regard to some of the crucial indicators of constitutionalism and good governance. These surveys have covered governance issues as broad as respect for civil and political rights, respect for freedom of the press, corruption and, perhaps more pertinently, respect for the rule of law. In order to have a general overview of the state of constitutional governance and respect for the rule of law in the countries covered in this article, their performances was briefly reviewed using the annual reports, particularly for 2012/2013, from some of these organisations. Although there are numerous reports by different international organisations, this analysis was limited to five

---

<sup>14</sup> See M Agrast *et al* 'The world justice/Rule of law index 2012-2013' 3 <http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2012-2013-report> (accessed 31 August 2014).

reports, two from Africa and three from global international non-governmental organisations (NGOs).<sup>15</sup>

The first two are based on the African Development Bank's Governance Rating and the 2013 Ibrahim Index of African Governance. Table 1 below is based on the African Development Bank Country Governance Rating for 2012 and extracts information dealing with the 11 Central African countries covered in the study.

**Table 1: African Development Bank Country Governance Rating for 2012<sup>16</sup>**

Country	Rating for property and rule based governance	Transparency, accountability and corruption in public sector	Governance rating**	Country performance assessment rating***
Angola	N/A	N/A*	N/A	N/A
Burundi	3.1	2.7	3.18	3.54
Cameroon	3.1	3.5	3.63	3.75
Central African Republic	2.6	3.3	2.89	3.19
Chad	2.8	2.8	2.97	3.39
DRC	2.4	3.3	2.89	3.14
Congo	3.1	3.5	3.43	3.59
Equatorial Guinea	N/A	N/A	N/A	
Gabon	N/A	N/A	N/A	N/A
Rwanda	4.8	4.0	4.44	4.54
São Tomé and Príncipe	3.4	4.0	3.48	3.56
<b>Average for Africa****</b>	3.1	3.2	3.31	3.54

\* N/A indicates that no information was provided.

\*\* The figures range from 1, being the poorest performance, and 10, being the highest performance. The governance average is obtained from five governance indicators, three of which (quality of budgetary and financial management; efficiency of revenue mobilisation and quality of public administration) have not

<sup>15</sup> The study is based mainly on the 2013 reports but where these were not available, the 2012 reports were used. In certain cases where this was considered useful and informative, reports for the last five years were reviewed.

<sup>16</sup> This information is obtained from the African Development Bank country governance rating at <http://www.afdb.org/en/documents/project-operations/country-performance-assessment-cpa/country-governance-rating/> and country performance assessment at <http://www.afdb.org/en/documents/project-operations/country-performance-assessment-cpa/> (accessed 31 August 2014).

been included in this table.

\*\*\* This provides an overall performance that is based on several other indicators besides those provided in the preceding columns.

\*\*\*\* This is the general average for each sector for all the countries surveyed.

From the table, it can be seen that half of the eight countries surveyed (Burundi, Central African Republic, Chad and DRC) have governance ratings below the general average for all the African countries surveyed. The general country performance assessment is slightly better, where only three of these eight countries (Central African Republic, Chad and DRC) perform below the general African average.

Table 2 is based on the 2013 Ibrahim Index of African Governance. The focus is on the regional performances in just two of the five sectors that were surveyed, namely, safety and the rule of law and participation and human rights. The overall average shown in the last column includes the other sectors that are not included here.<sup>17</sup> It should, however, be noted that the Ibrahim Index also groups Africa into eight rather than the traditional five regions.

**Table 2: 2013 Ibrahim Index of African Governance (regional averages)<sup>18</sup>**

Region	Safety and rule of law				Participation and human rights			Overall average
	Rule of law	Accountability	Personal safety	National security	Participation	Rights	Gender	
Central Africa	34.4	26.4	31.8	66.3	31.0	30.9	43.1	40.1
East Africa	40.5	38.4	44.4	67.9	37.4	34.2	58.6	47.9
North Africa	43.3	42.6	37.3	76.8	32.2	42.2	50.0	54.0
Southern Africa	63.4	51.4	47.3	89.8	55.1	52.8	64.9	59.2
West Africa	48.0	42.4	46.0	83.0	57.2	54.6	48.4	52.5

<sup>17</sup> The excluded sectors are sustainable economic opportunity and human development.

<sup>18</sup> See generally '2013 Ibrahim index of African governance' <http://www.moibrahimfoundation.org/interact/> (accessed 31 August 2014).

Island countries	59.1	58.6	61.1	94.1	68.9	62.0	62.0	64.7
Landlocked countries	51.9	43.4	43.6	72.3	47.2	44.6	56.3	51.1
Coastal countries	43.3	37.3	39.3	78.4	41.2	42.4	51.1	49.3
Average score over 100	47.6	41.5	43.1	78.4	46.1	45.3	53.8	51.6

In understanding this table, it is necessary to point out that the number of countries listed as falling under Central Africa only includes seven countries covered by our classification of countries in this region. It excludes Angola, Burundi, Rwanda and São Tomé and Príncipe. From a purely regional perspective, what is remarkable about the Ibrahim Index of African Governance for 2013 is that it shows that the Central African region was the lowest performer. This is so, not only on the overall regional average, where it obtained 47,6 per cent compared to the regional average of 51,6 per cent, but also on all the sub-categories in each of the two main performance areas. Even if the performances of the other four countries not included in arriving at these averages are taken into account, this position is unlikely to change.<sup>19</sup> It is also noteworthy that the performances in the areas of the rule of law and accountability are significantly low in the region.

We now turn to the reports compiled by three highly-respected international organisations. The first of these is the Freedom House annual reports on the state of freedom in the world. Table 3 below is extracted from Freedom House's Freedom in the World reports for the period 2009-2013.<sup>20</sup>

19 The overall performances of these countries are as follows: Angola 44,5%; Burundi 43,8%; Rwanda 57,8%; and São Tomé and Príncipe 59,9%.

20 See 'Freedom in the world 2013' <http://www.freedomhouse.org/report/freedom-world/freedom-world-2013?gclid=CJ3hvKbp47oCFfSWtAodFAwA2g> (accessed 31 August 2014).

**Table 3: Freedom status of countries in Central Africa 2009-2013**

	2009			2010			2011			2012			2013		
	PR	CL	FR												
Angola	6	5	NF												
Burundi	5	4	PF	5	5	PF									
Cameroon	6	6	NF												
Central African Republic	5	5	PF												
Chad	7	6	NF												
DRC	6	5	NF	6	6	NF									
Congo	6	5	NF												
Equatorial Guinea	7	7	NF												
Gabon	6	4	PF	6	5	NF									
Rwanda	6	5	NF	6	6	NF									
São Tomé and Príncipe	2	2	F	2	2	F	2	2	F	2	2	F	2	2	F

PR and CL stand for political rights and civil rights, respectively, whilst 1 represents the most free and 7 the least free rating. NF stands for not free, PF for partly free and F for free.

In their 2013 report, Freedom House points out that 'sub-Saharan Africa has ranked as the world's most politically volatile region' and identifies Equatorial Guinea, which it describes as a 'highly corrupt regime with one of the worst human rights records in Africa', as one of the worst rated countries in the world. The report shows that in 2013, 22 per cent of African countries were rated as free, 37 per cent as partly free and 41 per cent as not free. It is again significant that of all the 11 countries covered in this article, only one (São Tomé and Príncipe) is rated as free, two (Burundi and Central African Republic) as partly free and the rest as not free. For the other eight countries, their status as 'not free' does not only go back to the last five years; in fact most of these have never attained the 'free' rating since this survey was started in 1972, in spite of the wave of liberalisation in the 1990s. The Freedom House rule of law survey also shows that, apart from São Tomé and Príncipe rated as free and Burundi as partly free, all seven of the other countries in the region (excluding DRC and

Congo that are not covered in the report) were again rated as not free.<sup>21</sup>

Finally, in its latest report, Corruption Perceptions Index 2012, Transparency International points out that 'corruption is a major threat facing humanity', not only because it destroys lives and undermines countries and institutions, but also because it operates as a dirty tax with the poor and most vulnerable as its primary victims. The position of the countries in Central Africa has been extracted and is presented in Table 4 below.

**Table 4: Corruption perception ranking for Central African countries in 2012**

Country	CPI score	Ranking in the world
Angola	22	157
Burundi	19	165
Cameroon	26	144
Central African Republic	26	144
Chad	19	165
DRC	21	160
Congo	26	144
Equatorial Guinea	20	163
Gabon	35	102
Rwanda	53	50
São Tomé and Príncipe	42	72

<sup>21</sup> See Freedom House 'Rule of law' <http://www.freedomhouse.org/issues/rule-law> (accessed 31 August 2014).

The corruption perception index (CPI) score indicates the perceived level of public sector corruption on a scale of 0-100, where 0 indicates a country that is highly corrupt and 100 indicates one that is perceived to be very clean.

Although out of the 176 countries surveyed, Somalia with a score of 8 is ranked as the most corrupt country in the world, and as it has been like this for most of this decade, the Central African region is not only the most corrupt region in Africa, but also possibly in the world. In fact, five of the 11 countries covered in this study (Angola, DRC, Equatorial Guinea, Burundi and Chad) are ranked amongst the ten most corrupt countries in the world.

Mention should be made of the World Justice Project/Rule of Law Index 2012-2013.<sup>22</sup> The report is potentially very useful because of the elaborate index that it uses to investigate adherence to the rule of law and identifies each country's strengths and weaknesses in comparison to similarly-situated countries. However, its major limitation is that the number of countries covered in Africa is too few. In fact, in the Central African region, it only covers Cameroon. Nevertheless, some of its conclusions are quite useful. For example, in discussing sub-Saharan Africa, it states:<sup>23</sup>

When examined holistically as a region, sub-Saharan Africa (AFR) lags behind other regions around the world in nearly all dimensions of the rule of law. Despite ongoing reforms, many countries lack adequate checks on executive authority, and government accountability is also weak. Many public institutions and courts throughout the region are inefficient and vulnerable to undue influence.

Some of its conclusions on the situation in Cameroon are worth quoting:<sup>24</sup>

Cameroon lags behind its regional and income peers in most categories. The country faces challenges in terms of accountability and the functioning of public institutions. Checks and balances are poor (ranking ninety-fourth overall and second to last within the region), and corruption is pervasive (ranking last in the world [for the 97 countries that were surveyed]). The civil court system is slow and subject to political influence. The country scores poorly on respect for fundamental rights (ranking ninetyeth), including freedom of assembly, opinion, and expression, as well as labour rights.

The overall picture that emerges from this brief overview of some of the important governance indicators that can enable one to gauge the level of constitutional governance, constitutionalism and respect for the rule of law in the region is therefore not positive. Having examined some of the indicators that could determine the degree of progress towards constitutionalism and the rule of law, it is now

---

22 See 'The world justice project/Rule of law index 2012-2013' <http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2012-2013-report> (accessed 31 August 2014).

23 n 22 above, 49.

24 n 22 above, 49-50.

necessary to see to what extent these conclusions are a reflection of the actual constitutional developments that have taken place within these countries since the 1990s.

### **3 Reconciling textual constitutionalism and the rule of law with practical reality**

In the preceding discussion, we saw that most of the countries in Central Africa, if not actually all, face huge challenges of constitutional governance, not only generally, but even when compared with other African countries. The question that this poses is whether or not these weaknesses are a reflection of or can be attributable to the failure of the revised or new constitutions to fully incorporate the basic principles of constitutionalism and the rule of law discussed above.

This brief overview will show that, in spite of the fact that all these countries have in diverse ways followed the wave of post-1990 constitutionalism, good governance and respect for the rule of law, there are many parts of these constitutions which make a lot of these changes symbolic and tokenistic rather than substantive and effective. The first part of this section will show that one of the main problems today has been caused by a sort of contagious and never-ending fever of frequent making, unmaking and remaking of constitutions. Apart from the dramatic changes in the 1990s which were designed to pave the way for a return to multiparty democracy, most subsequent changes have been made by what could be termed 'born-again' democrats who survived the removal of some of the old guards caught off guard in the 1990s. They have now conspired with the new generation of post-1990 democrats to tame the beast of democracy and use it as a cloak to perpetuate the pre-1990 authoritarian practices. It is clear from this that the changes that were introduced do not seem to have gone far enough to exorcise the ghost of dictatorship.

#### **3.1 Instability caused by making, unmaking and remaking constitutions**

Constitutional stability and the certainty and predictability that go with this are important elements of constitutionalism and respect for the rule of law. In fact, a constitution will lose its value as the supreme law if it is frequently and arbitrarily changed to suit the political convenience of the ruling elites. However, from the point of view of form and content, there is no ideal or perfect constitutional design that is irreproachable and unimpeachable such that it can solve any country's problems permanently. Nor are constitutions designed to endure unchanged forever, although their durability is crucial to ensure peace and stability within the polity. In other words, a constitution is not a contract struck once and for all, but rather an important part of a continuous process of careful maintenance and

step-by-step incremental accommodation to take account of changing needs, aspirations and challenges that a polity faces.

As Table 5 below shows, one of the major challenges that countries in the Central African region have faced is the problem of frequent and arbitrary changes of constitutions.

**Table 5: Frequency of changing and amending constitutions<sup>25</sup>**

Country	Year of adoption of new Constitution	Year of amendment of Constitution	Other changes
Angola	New Const 1975 New Const 2010	Amendment of Const 1978 Amendment of Const 1980 Amendment of Const 1991 Amendment of Const 1992	
Burundi	New Const 1962 New Const 1974 New Const 1981 New Const 1992 New Const 2005	Amendment of Const 1970 Amendment of Const 1996	Suspension of Const 1968 Suspension of Const 1976 Suspension of Const 1987 Interim Const 1998 Interim Const 2004
Cameroon	New Const 1960 New Const 1961 New Const 1972 New Const 1996 <sup>a</sup>	Amendment of Const 1969 Amendment of Const 1975 Amendment of Const 1984 Amendment of Const 2008	

<sup>25</sup> This information is compiled from data made available at 'Comparative constitutions project: Chronology' <http://comparativeconstitutionsproject.org/chronology/> (accessed 31 August 2014). It has, however, been corrected and updated with information from other sources.

Chad	New Const 1960 New Const 1962 New Const 1978 New Const 1989 New Const 1996	Amendment of Const 1965 Amendment of Const 1967 Amendment of Const 1991 Amendment of Const 1995 Amendment of Const 2005	Suspension of Const 1975 Interim Const 1982 Suspension of Const 1990 Interim Const 1993
Central African Republic	New Const 1959 New Const 1964 New Const 1976 New Const 1981 New Const 1986 New Const 1994 New Const 2004	Amendment of Const 1960 Amendment of Const 1961 Amendment of Const 1962 Amendment of Const 1966 Amendment of Const 2010	Interim Const 1979 Suspension of Const 2003
DRC	New Const 1960 New Const 1964 New Const 1967 New Const 1978 New Const 1997 New Const 2003 New Const 2005	Amendment of Const 1970 Amendment of Const 1971 Amendment of Const 1974 Amendment of Const 1980 Amendment of Const 1982 Amendment of Const 1988 Amendment of Const 2011	Interim Const 1961
Congo	New Const 1961 New Const 1963 New Const 1969 New Const 1973 New Const 1979 New Const 1992 New Const 2002	Amendment of Const 1984 Amendment of Const 1989 Amendment of Const 1990	Suspension of Const 1977 Interim Const 1991
Equatorial Guinea	New Const 1968 New Const 1973 New Const 1982 New Const 1991	Amendment of Const 1995 Amendment of Const 1998	

Gabon	New Const 1960 New Const 1961 New Const 1975 New Const 1991	Amendment of Const 1967 Amendment of Const 1968 Amendment of Const 1981 Amendment of Const 1994 Amendment of Const 1995 Amendment of Const 1997 Amendment of Const 2000 Amendment of Const 2003	
Rwanda	New Const 1962 New Const 1978 New Const 1991 <sup>b</sup> New Const 1995 New Const 2003	Amendment of Const 1973 Amendment of Const 2003 Amendment of Const 2005 Amendment of Const 2008 Amendment of Const 2010	
São Tomé and Príncipe	New Const 1975	Amendment of Const 1980 Amendment of Const 1982 Amendment of Const 1987 Amendment of Const 1990 Amendment of Const 2003	

- a. Although what we refer to here as the Cameroon Constitution of 1996 is officially referred to as 'an amendment to the 1972 Constitution', the reality is that the extensive nature and scope of the changes (replacement of the earlier Constitution which had 39 articles with one that has 69 articles) goes well beyond anything that can be referred to merely as an amendment or revision of the previous Constitution.
- b. It is necessary to note here that between 1994 and 2003, Rwanda was governed by a set of documents that included President Habyarimana's 1991 Constitution, the Arusha Peace Accords and some additional Protocols.

Apart from the two Lusophone countries, Angola and São Tomé and Príncipe, which gained their independence in the 1970s, all the others that gained their independence in the 1960s have adopted new constitutions on several occasions. The rest of the countries have rewritten and adopted new constitutions on average every ten and a half years during the last 52 years, with Chad, Central African Republic and Congo doing this almost every seven years.

It is necessary to contextualise this. The US statesman Thomas Jefferson once proposed a constitutional lifespan of 19 years.<sup>26</sup> In a recent study, Ginsburg, Melton and Elkins have confirmed this as the average lifespan of modern constitutions.<sup>27</sup> Whilst it is clear in principle, there is nothing wrong with amending or completely rewriting a constitution. Where this is done so frequently and so arbitrarily as has been the case in the Central African region, it creates uncertainty and diminishes the prospects for entrenching the rule of law.<sup>28</sup> A number of observations can be made concerning the changes that have taken place since the 1990s and their impact on constitutional development and the rule of law.

As part of the measures to enhance constitutionalism, and unlike in most pre-1990 constitutions, provisions were crafted to regulate, control and check against arbitrary changes of constitutional provisions and thus ensure that any changes made are done with such deliberation and consultation that will prevent the will of the people from being subverted by the self-seeking interests of opportunistic majorities.<sup>29</sup> Table 5 suggests that, in spite of these constraints on the ability of political elites to easily and casually amend constitutions, the problem of changing and remaking constitutions remains. For example, Congo and Rwanda have adopted three new constitutions since 1990, although the record for frequent constitutional changes belongs to Niger which has had five new constitutions (the Constitutions of 1993, 1996, 1999, 2009 and 2010).

It is quite clear that the objective of preventing the abusive use of the powers to amend constitutions has not been attained in the Central African region. The effect has been that some of the progressive constitutional changes introduced under domestic and external pressure in the early 1990s have often been repealed with the frequent amendments or the introduction of new constitutions. One of the main reforms adopted to end the notorious practice of life presidencies in Africa in the 1990s was the introduction of two-term presidential limits. In the 1992 Constitution of Congo, article 178(5) expressly stated that the provision limiting the mandates of the

---

26 Cited in T Ginsburg *et al* 'The endurance of national constitutions' [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1536925](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536925) 1 (accessed 31 August 2014).

27 Ginsburg (n 26 above) 2.

28 One cannot help but see the close analogy between this and the man who planted a treasured flower. Each day, before watering it, he dug into the soil to see how well the roots were doing. Because of the frequent tampering with the roots, the flower withered and died.

29 For the provisions controlling and regulating the revision of the constitutions, see arts 233-237 of the Constitution of Angola; arts 297-300 of the Constitution of Burundi; arts 63-64 of the Constitution of Cameroon; arts 222-224 of the Constitution of Chad; arts 106-108 of the Constitution of the Central African Republic; arts 218-220 of the Constitution of DRC; arts 185-187 of the Constitution of Congo; arts 103-104 of the Constitution of Equatorial Guinea; arts 116-117 of the Constitution of Gabon; art 193 of the Constitution of Rwanda; and arts 122-123 of the Constitution of São Tomé and Príncipe.

President of the Republic shall not be the object of any amendment. In spite of this, and arguably because of this provision, a new Constitution was adopted in 2002 in which the two-term limit was removed. In Cameroon, Chad and Gabon, the Constitutions were all amended to remove the term limits, and in the case of Cameroon, over 200 people who were demonstrating against the changes were killed by security forces. It is therefore no surprise that most of Africa's longest-serving leaders come from the Central African region.<sup>30</sup> Although some of the constitutional amendments tried to enhance good governance, in most cases the impression given is that the dictators who were caught off guard in the 1990s have sufficiently recovered and are gradually recovering the grounds they lost. For example, in the 2008 constitutional amendments in Cameroon, article 53(3) grants the President absolute immunity for any acts committed whilst in office as well as after he leaves office. Since a new Gabonese Constitution with 120 articles was adopted in 1991, 125 of these articles have been amended, some more than once. It is therefore clear from this that if constitutions that are supposed to contain provisions protecting them from frequent and arbitrary amendments have nevertheless been revised with such frequency, then all the provisions designed to guard against dictatorship and other abuses of power are in jeopardy. We will now briefly consider some of these provisions and their practical effect.

### 3.2 Textual promises and practical realities

A casual examination of all the constitutions of the countries in Central Africa will clearly show that all of them, unlike the pre-1990 constitutions, now contain provisions which incorporate almost all the core elements of constitutionalism. One glaring omission in most of them, however, are provisions that are supposed to help support, strengthen and sustain the fledgling transition towards constitutional democracy. Be that as it may, the tentative strides to entrench a culture of constitutionalism and respect for the rule of law in the countries covered in this study have been progressively undermined by several factors. The main one is the fact that the sometimes lofty ideals expressed in the constitutions do not reflect or correspond with actual practice and there remains a wide gap between the constitutional text and practice.

This analysis will focus on five main issues: the recognition and protection of human rights; the attempts to prevent dictatorship through a separation of powers; the strengthening of the rule of law through independent judiciaries; and judicial review and the problem

---

30 Eg, the longest-serving leaders on the continent are Teodoro Obiang Nguema of Equatorial Guinea and José Eduardo dos Santos of Angola who have been in power since 1979. They are closely followed by Paul Biya of Cameroon, in power since 1982; Idriss Deby of Chad, in power since 1990; Denis Sassou Nguesso of Congo, in power since 1997; Paul Kagame of Rwanda, in power since 2000; and Joseph Kabila of DRC, in power since 2001.

of accountability, especially corruption. It is necessary to preface this by pointing out that, unlike other regions in Africa, most of the countries in this region are francophone, with the exception of Angola, Equatorial Guinea and São Tomé and Príncipe, which are lusophone. Their constitutional systems have therefore been largely influenced in many respects by the civil legal system within which they operate and therefore have many distinctive characteristics that distinguish them from other African countries, especially those influenced by the Anglo-American constitutional tradition. We will now examine how the constitutions deal with the five issues mentioned above and see what actually happens in practice. Besides the indicators summarised above, a useful indication of actual practice that is used in this analysis is the US Department of State Country Reports on Human Rights Practices in the past two decades, particularly the latest 2012 report.<sup>31</sup>

### 3.2.1 Nature and scope of human rights protection

All the constitutions, except that of Cameroon, have extensive provisions recognising and protecting the fundamental human rights of citizens.<sup>32</sup> In the case of Cameroon, many of the rights which normally appear in the Bill of Rights or provisions protecting fundamental rights only appear in the Preamble to the Constitution. Although article 65 of this Constitution states that 'the Preamble shall be part and parcel' of the Constitution, the loose, hortatory and obscure language in which these 'rights' are couched does not appear to create or impose any sense of legal obligation. This is reinforced by the fact that individual citizens have no powers to challenge any governmental actions or legislation which violate the Constitution.<sup>33</sup>

Perhaps one of the most significant constitutional developments in the 1990s was the re-introduction in all constitutions in the region of provisions recognising multipartyism. Some, in fact, have detailed provisions which attempt to regulate political parties. Article 7 of the Constitution of the DRC expressly prohibits the formation of a one-party system. Probably because of the conflicts between the two main ethnic groups, the Hutu and Tutsi that led to the 1994 genocide, the constitutional provisions dealing with political parties and elections in Burundi and Rwanda are fairly detailed. Nevertheless, in Burundi there

31 See generally <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014).

32 See arts 22-88 of the Constitution of Angola; arts 19-74 of the Constitution of Burundi; arts 1-17 of the Constitution of the Central African Republic; arts 12-58 of the Constitution of Chad; arts 11-67 of the Constitution of DRC, arts 7-55 of the Constitution of Congo, arts 5-19 of the Constitution of Equatorial Guinea; art 1 (secs 1-23) of the Constitution of Gabon; arts 9-59 of the Constitution of Rwanda; and arts 14-64 of the Constitution of São Tomé and Príncipe.

33 For a discussion of the constraints with respect to the control of constitutionality in Cameroon, see CM Fombad 'The new Cameroonian Constitutional Council in comparative perspective: Progress or retrogression?' (1998) 42 *Journal of African Law* 172-186.

is regular harassment of members belonging to certain political parties, and membership of a registered political party is often needed in order to obtain or retain employment in the civil service or to get other benefits such as free housing, electricity and water and interest-free loans.<sup>34</sup> The provisions in the Rwandan Constitution are even more elaborate. They expressly state that no person 'shall be subjected to discrimination by reason of membership of a given political organisation'.<sup>35</sup> This Constitution establishes a National Forum of Political Organisations for purposes of national political dialogue, consensus building and national cohesion.<sup>36</sup> The most significant provision is article 58, which provides for power sharing and states that '[t]he President of the Republic and the Speaker of the Chamber of Deputies shall belong to different political organisations'.<sup>37</sup> In spite of this, some opposition parties were not allowed to operate freely.<sup>38</sup> As Table 6 below shows, the majority of parties in the parliaments in the region are controlled by dominant parties.<sup>39</sup>

**Table 6: State of party dominance in parliaments in the Central African region<sup>40</sup>**

Country	Ruling party	Seats held in legislature	
		Date of last elections	No of seats held over total number of parliamentary seats
Angola	Popular Movement for the Liberation of Angola, and Labour Party	31 August 2012	175 of a possible 220 seats

34 See US Department of State, Country Report on Human Rights Practices in Burundi (2012) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014) 1-2 11.

35 See art 53 of the Constitution of Rwanda.

36 Art 56 Constitution of Rwanda.

37 Art 58 Constitution of Rwanda.

38 See US Department of State, Country Report on Human Rights Practices in Rwanda (2012) 27-30 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014).

39 The concept of dominant party is fairly complex. It will suffice to point out that in this context, it simply refers to a situation where the ruling party, either alone or with its allies, controls 66% and above of the seats in parliament. See generally H Brooks 'Realising effective and sustainable democratic governance in Southern Africa and beyond' *EISA Occasional Paper 25* 1-24 (October 2004); J van Eid 'Dominance and fluidity: Conceptualising and explaining party system characteristics in sub-Saharan Africa' [http://jonathanvaneerd.files.wordpress.com/2011/01/mpsa\\_vaneerd2010.pdf](http://jonathanvaneerd.files.wordpress.com/2011/01/mpsa_vaneerd2010.pdf) (accessed 31 August 2014); M Bogaards 'Counting parties and identifying dominant party systems in Africa' (2004) 43 *European Journal of Political Research* 173-197.

40 It should be noted that this table only covers the lower houses of parliaments, which usually have more powers and influence over the legislative process than the upper houses, for those countries that have both.

Burundi	National Council for the Defence of Democracy and Forces for the Defence of Democracy	28 July 2010	81 of a possible 106 seats
Cameroon	Cameroon Peoples' Democratic Party	30 September 2013 <sup>a</sup>	148 of a possible 180 seats
Central African Republic	Kwa Na Kwa and allies	23 February and 27 March 2011	61 of a possible 105 seats
Chad	Patriotic Salvation Movement	13 February 2013	118 of a possible 188 seats
DRC	Party for Reconstruction and Development and its allies	28 November 2011	260 of a possible 500 seats
Congo	Congolese Labour Party and allies	29 July 2012	117 of a possible 139 seats.
Gabon	Gabonese Democratic Party and allies	17 December 2011	114 of a possible 120 seats
Equatorial Guinea	Democratic Party of Equatorial Guinea and allies <sup>p</sup>	26 May 2013	99 of a possible 100 seats
Rwanda	Rwandan Patriotic Front and its allies	16 September 2013	41 of a possible 80 seats.
São Tomé and Príncipe	Independent Democratic Action Party	1 August 2010	26 of a possible 55 seats

- a. Parliamentary elections were originally scheduled for July 2012, and were postponed twice to February 2013 and July 2013 before being held on 30 September 2013.
- b. It is doubtful whether the ruling party really needed any allies. On its own, it won 89 seats and its so-called allies only brought in 10.

Apart from São Tomé and Príncipe, the foundation for a fully-fledged and effective multiparty system in which the opposition parties can play a role in checking governmental excesses and presenting an alternative view on the issues of the day is very weak in the region. The proliferation of parties, for example, 282 in Cameroon and 132 in Chad, most of which (100 in the case of Chad) have been created by or are directly affiliated to the ruling party, makes nonsense of potentially progressive constitutional provisions, such as those in Burundi and Rwanda which are designed to help the opposition parties.<sup>41</sup> In DRC, in the last elections, the ruling Party for Reconstruction and Democracy and its allies captured 260 of the 500 seats in the National Assembly and the main opposition 110 seats, whilst about 100 different parties got in with just one or two seats.

The absence of effective and credible opposition parties in these countries has been compounded by a history, since the 1990s, of routinised blatant electoral malpractices which ensure that the ruling parties always win. There is thus no surprise when Table 3 shows that insofar as civil and political rights are concerned, the only free country in the region is São Tomé and Príncipe. Political opposition is barely tolerated. As a result of electoral malpractices, opposition party representation is artificially kept to the plus-minus 20 per cent threshold. Grand coalitions, unity governments or so-called 'presidential majority' parties, have become the *modus operandi* for establishing and entrenching dominant parties. Through strategic alliances and manipulation of the election processes, ruling parties have ensured that their positions are never seriously threatened.

It is argued that the only way to improve the situation is to recognise a right to free and fair elections and a number of ancillary rights. First, the basic rights and duties of political parties should be constitutionalised by provisions included to ensure that there is internal democracy within these parties. Second, the constitution should guarantee a right to free and fair elections and a right to equal treatment of all political parties. This should ensure that no political party abuses its incumbency to secure an unfair advantage over its rivals or uses government resources to further its aims. The goal should be to provide a level playing field for all political parties.

### 3.2.2 Dispersal of powers through separation of powers

There seems to have been an attempt to address one of the problems that made dictatorship and abuses of power after independence inevitable – the excessive concentration and centralisation of powers in the President and in the capital. All the constitutions examined in this study expressly provide for a separation of powers. A number of measures were introduced to disperse powers. For example, most of the constitutions in the region provide for the position of prime minister, who will act as head of government and is answerable to both the President and parliament. Members of the executive are prohibited from holding other positions, especially elective positions in parliament. The decisions of the President, and sometimes even those of the prime minister, need to be countersigned by the minister with responsibility to implement them. Both the Constitutions of Chad and Congo provide, rather oddly, it must be said, that the functions of head of state are incompatible with the discharge of any functions within a political party.<sup>42</sup> It is difficult to see why a person who is elected as President on the basis of his leadership of a political party should, on assuming office, cease to hold any position in the

---

41 For information on political parties in Cameroon and Chad, see US Department of State, Country Report on Human Rights Practices of 2012 for both countries <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014).

42 See arts 71 & 72 of the Chad and Congo Constitutions respectively.

party and pretend to be apolitical. The Constitutions of Burundi and Rwanda also provide many other interesting attempts to deconcentrate and disperse powers.

In the case of Burundi, article 108 requires that the President, in appointing his cabinet, must consult his two Vice-Presidents. These Vice-Presidents, according to article 124, must be chosen from different ethnic groups and political parties. The powers of the President are further constrained by the requirement in article 129 that the cabinet must be made up of 60 per cent Hutu and 40 per cent Tutsi and that at least 30 per cent of cabinet positions should be occupied by women. This same ethnic representation is required to be reflected in the public service. As regards Rwanda, article 116 specifies that members of cabinet must be appointed from political parties which have seats in parliament in a manner that will ensure that no party will have more than 50 per cent of the positions in cabinet.

In spite of the elaborate provisions which purport to disperse powers between the three arms of government, the reality is that in all the countries in the region, the President not only continues to exercise exorbitant powers, but dominates and controls all the other two branches of government. This is manifested in several ways. Most of these constitutions still confer excessive powers to the President, especially in making appointments. It is only under the Burundian Constitution where the appointment of senior officials is subject to senate approval.<sup>43</sup> The requirement that the President's orders should be countersigned by the prime minister or minister responsible for implementing them is more symbolic than real because this requirement only applies to certain obscure powers, not the very important ones, especially those concerning appointments of the top officials in government, the judiciary, the military and in other government departments.<sup>44</sup> In all cases, the prime minister is only a nominal head of government because in almost all cases, it is expressly stated that he merely implements the policies decided upon by government.<sup>45</sup>

When the relationship between the executive and the other two branches of government is reviewed critically, even just on the basis of what the constitutional texts provide for, it becomes clear that these constitutions have done nothing more than pay lip service to the concept of separation of powers. As regards the legislature, these constitutions have in accordance with the civilian constitutional tradition usually shared the law-making powers in specified domains between the executive and the legislature. In addition, they usually provide that the executive could make laws by way of ordinances or

---

43 See arts 111 & 123 of the Constitution.

44 See, eg, art 22 of the Constitution of the Central African Republic; arts 91 & 103 of the Constitution of Chad; and art 27 of the Constitution of Gabon.

45 The only exception is São Tomé and Príncipe where the choice of Prime Minister is determined by the legislative elections and where the President has recently been forced to appoint a Prime Minister from the opposition party.

decrees in matters reserved for the legislative when so authorised and within the limits of such authorisation.<sup>46</sup> The loose manner in which the law-making powers are couched and the phenomenon of dominant ruling parties have effectively coalesced to leave the executive branch firmly in control of the legislative agenda as well as its content. Besides this, the President usually has the power, sometimes under obscurely specified circumstances, to dissolve parliament.<sup>47</sup> The various controls that have been provided to act as checks and balances, such as motion of censure on the government, oral and written questions, commissions of inquiry and committee hearings, have hardly been effective checks against abuses of power.<sup>48</sup> With a weak and ineffective legislature and, as we shall soon see, a judiciary that is compromised by political interference and corruption, it is clear that the attempts to limit the scope for arbitrary and dictatorial rule were bound to fail.

Leaving aside the position of the judiciary, which will be addressed in the next section, it is argued that some of the post-1990 reforms that have been reversed need to be restored. The most important of these is the restoration of strict term limits to ensure alternation of power. The wide-ranging presidential powers of appointment, which have regularly been used as a source of patronage and rewarding supporters, need to be reduced substantially. First, the criteria and qualifications for appointments and promotions should be clearly laid down. Second, independent commissions should be established to study all applications and make recommendations to the President. Finally, the constitutional right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair must now be entrenched in all constitutions to ensure that ordinary citizens can challenge perverse and arbitrary governmental action.<sup>49</sup> However, any measures designed to promote good governance and the rule of law will hardly yield any dividends in the absence of an efficient judiciary that has the independence and expertise to interpret and apply the law objectively, impartially and without fear or favour.

---

46 See generally arts 163-165 of the Constitution of Angola; art 187 of the Constitution of Burundi; arts 25-28 & arts 61-66 of the Constitution of the Central African Republic; arts 121-125 of the Constitution of Chad; arts 122-130 of the Constitution of DRC; arts 111-113 & 132 of the Constitution of Congo; art 64 of the Constitution of Equatorial Guinea; arts 47-53 of the Constitution of Gabon; arts 62-64 of the Constitution of Rwanda; and arts 86-89 of the Constitution of Equatorial Guinea.

47 See eg art 8(12) of the Constitution of Cameroon; art 83 of the Constitution of Chad; art 148 of the Constitution of DRC; and art 19 of the Constitution of Gabon.

48 One rare instance of the legislature occurred in São Tomé and Príncipe in December 2012 when the Prime Minister, an ally to the President, lost a vote of no confidence in the legislature and had to be replaced by the President. See 'São Tomé and Príncipe: Government defeated in censure motion' <http://www.semipresidentialism.com/?p=2714> (accessed 31 August 2014).

49 Examples of this are found in sec 33 of the South African Constitution of 1996 and art 47 of the Kenyan Constitution of 2010.

### 3.2.3 Overcoming challenges to judicial independence

As pointed out above, one of the ways in which the separation of powers and the checks and balances that go with it has been weakened is the excessive powers of interference that the executive, especially the Presidents, have been given over the judiciary. The attempt to separate the judiciary from the other two branches and make it independent in these constitutions is couched in fairly contradictory terms. They contain provisions which usually start by reiterating the independence of the judiciary from the other two branches, but then proceed to state that the President shall guarantee the independence of the judiciary. If the intention was to ensure the independence and, one will assume, equality of the three branches of government, why should it be deemed necessary to entrust one with guaranteeing the independence of the other? These constitutions go further to provide that judicial appointments must be made by the President with the 'assistance' or after the 'opinion' of the Supreme Council of Magistracy (SCM). It needs to be noted here that most of the members of the SCM are appointed by the President. He is the Chairperson and is assisted by his Minister of Justice and convenes its meetings as well as determines its agenda.<sup>50</sup> It is manifestly clear from this that in most of these countries, the President has a free hand to decide not only on judicial appointments, but also on disciplinary issues such as suspensions and dismissals, as well as transfers and promotion, since this body often has exclusive powers to deal with these matters. It is little wonder that the various US State Department Reports point out that the judiciary in these countries is often subject to political interference.<sup>51</sup> However, there have been some countries, like Rwanda, where the judiciary has operated without too much government interference and where in 2012 some judges were dismissed for corruption.<sup>52</sup> By way of contrast, in Equatorial Guinea, judges serve at the pleasure of the President.<sup>53</sup>

The overall picture that emerges on the state of the judiciary in Central Africa is that it is subject to much political influence, and is corrupt and inefficient. Amongst the several corrective measures that need to be undertaken, three are imperative. First, the so-called

---

50 See arts 209, 214 & 218-219 of the Constitution of Burundi; art 37(3) of the Constitution of Cameroon; arts 78-80 of the Constitution of the Central African Republic; arts 145-148 of the Constitution of Chad; arts 82 & 149-152 of the Constitution of DRC; arts 79 & 136-141 of the Constitution of Congo; arts 83-93 & 98 of the Constitution of Equatorial Guinea (in fact, art 86 describes the head of state as the 'first magistrate of the nation'); arts 68-72 of the Constitution of Gabon; and arts 140 & 157-158 of the Constitution of Rwanda.

51 See generally US Department of State, Country Report on Human Rights Practices of 2012.

52 See US Department of State, Country Report on Human Rights Practices in Rwanda, 2012 (n 38 above) 14-15.

53 See US Department of State, Country Report on Human Rights Practices in Equatorial Guinea 2012 5-6 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014).

powers given to presidents to guarantee the independence of the judiciary must be repealed. Second, there is a need to entrench what are now accepted as the core principles of judicial independence rather than leaving this to be regulated by ordinary legislation which is vulnerable to opportunistic majoritarian manipulation.<sup>54</sup> Finally, the SCM should indeed be required to make recommendations for judicial appointments as well as to deal with other issues of promotion, discipline and transfers. However, it should be constituted in such a manner that at least 50 per cent of its membership is made up of persons who have no links, direct or indirect, with any of the three branches of government and only persons with no such links should be elected to act as Chairperson and Deputy Chairperson. The fundamental importance of an independent judiciary to establishing and entrenching constitutionalism and the rule of law cannot be gainsaid. However, an independent judiciary will only be effective if there is a credible system of judicial review.

### 3.2.4 Enhancing judicial review

A critical bulwark of constitutionalism and respect for the rule of law is a credible and efficient system that ensures that all violations of the constitution can be sanctioned promptly and competently. With two exceptions, the Constitutions of Cameroon and São Tomé and Príncipe, all the constitutions examined here have tried to provide a system for controlling and sanctioning violations of the constitutions.

Cameroon took the retrograde step in 1996 of adopting the inefficient system of control of the constitutionality of law that was introduced in the 1958 French Fifth Republic Constitution.<sup>55</sup> It was flawed because it did not allow citizens the right to challenge any violations of the Constitution.<sup>56</sup> Only those who are responsible for introducing laws that may violate the Constitution, namely, the President of the Republic, the President of the National Assembly, the President of the Senate and one-third of the members of either the National Assembly or the Senate may challenge the constitutionality of any law and, even then, only before its promulgation. The centralised body with responsibility for dealing with these matters, the Constitutional Council, is a quasi-administrative and quasi-judicial

---

54 The core elements of judicial independence that seem to be internationally recognised can be summarised as follows: (i) institutional arrangements for judicial autonomy; (ii) financial arrangements for judicial autonomy; (iii) arrangements for the security of the judicial office; (iv) adequate remuneration of judicial officers; (v) transparent mechanisms for judicial appointments; and (vi) judicial accountability. These are fully discussed by L Dung 'Judicial Independence in Transitional Countries', <http://www.undp.org/oslocentre/dvcsjuly03/DungTienLuu-v2.pdf> (accessed 31 August 2014).

55 See further Fombad (n 33 above) 172-186.

56 This was corrected during the revision of the French Constitution in 2008. See further MA Rogoff 'Fifty years of constitutional evolution in France: The 2008 amendments and beyond' [http://mainelaw.maine.edu/academics/pdf/2010\\_franco\\_amer\\_1.pdf](http://mainelaw.maine.edu/academics/pdf/2010_franco_amer_1.pdf) (accessed 31 August 2014).

body whose composition is essentially determined by the President. The effect of this is that there is practically no means for challenging any law that violates the rather weak and outdated Cameroonian Constitution.<sup>57</sup> An equally unsatisfactory approach is adopted by the Constitution of São Tomé and Príncipe which provides in article 111 that all questions dealing with the infringement of the Constitution must be submitted to and dealt with exclusively by the National Assembly and that its decisions on the matter have binding force. There is scarcely any merit in reserving an issue of constitutional interpretation to a political body that is apt to pay more attention to political – rather than legal – considerations.

All the other countries in the region, with the exception of Rwanda, have improved on the ineffective French Constitutional Council model that was adopted in one form or another after independence.<sup>58</sup> Two main changes have been introduced. First, the new Constitutional Courts have the power of both abstract and concrete review – unlike in the past where this was limited to abstract review. For a constitutional system in which the executive has very extensive law-making powers, which previously were not reviewable for conformity to the Constitution, the power of concrete review which Constitutional Courts now have is a tremendous expansion in the scope for promotion of respect for the rule of law. Abusive executive orders, decisions and other executive rules can now be invalidated for non-conformity with the Constitution. Second, these Constitutional Courts are constituted in such a manner that they will be composed of legal experts (judges, legal practitioners or legal academics).<sup>59</sup> Although the *locus standi* in some matters is reserved, rather illogically, one should say, to the very politicians who are apt to make some of the bad laws, the most important development is that for the first time ordinary citizens can bring matters before these courts where an act or a law violates their constitutional rights.<sup>60</sup>

---

57 See generally arts 46-52 of the Constitution. With its 65 articles, with the exception of the Eritrean Constitution, it is one of the shortest and most illiberal of the post-1990 constitutions that have done more to perpetuate the pre-1990 dictatorial system in the country. It is no surprise that Cameroon is one of the very few African countries that, since the Freedom House survey of the state of freedom in the world started in 1972, has never gone outside the category of 'not free'. It is difficult to see how it could happen otherwise under such a regressive constitutional framework.

58 The Rwandan approach is, however, unique in two ways. First, the court that deals with constitutional matters, the Supreme Court, operates within and is the highest court in the hierarchy of ordinary courts. Second, the system of constitutional justice is not necessarily centralised and dealt with exclusively by the Supreme Court. This is because, according to art 149 of the Constitution, cases dealing with violations of arts 52, 53 and 54 of the Constitution as well as those involving political organisations and elections may be initiated at the level of the High Court.

59 Previously, it was not necessarily a requirement that the members of the Constitutional Council should have any legal training or expertise.

60 See generally arts 226-230 of the Constitution of Angola (but note the restrictions in arts 228(2) and 232(2)); arts 226-230 of the Constitution of Burundi; arts 72-77

In spite of the commendable expansion of access to constitutional justice in the past two decades in most countries in the region, it remains too remote and inaccessible. The constitutional courts are usually located in the national capitals, far removed from potential litigants, thus making access expensive and, because they usually have a huge backlog of cases, they do not deal with matters expeditiously. They often have exclusive jurisdiction to deal with electoral disputes but are usually required to render their decisions within very short and unreasonable deadlines. The absence of appeals, because these courts operate as courts of first and final instance, means that errors can never be corrected. It would certainly be desirable to decentralise the system of constitutional justice to bring it as close to the ordinary citizen as possible. This will make it cheaper, faster and probably more just because of the possibility of errors being corrected on appeal. One other problem which needs to be addressed is that of judicial corruption but, as we will now see, it is part of a more general societal problem of lack of accountability.

### 3.2.5 Corruption and strengthening mechanisms of accountability<sup>61</sup>

Apart from Rwanda and São Tomé and Príncipe, Table 4 shows that the other countries, particularly Burundi, Chad, DRC and Equatorial Guinea are amongst some of the most corrupt countries in the world. Corruption is probably one of the biggest threats to peace and stability in Africa. Worse still, it casts an ominous dark shadow over the future political, economic and social progress of the continent, given the deleterious effects it is having on the faltering efforts to establish a culture of constitutionalism, democracy, respect for the rule of law and good governance.

As Kofi Annan, the former Secretary-General of the United Nations (UN), in lamenting about the destructive effects of corruption in developing countries, said:<sup>62</sup>

Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a [g]overnment's ability to provide basic services, feeding inequality and injustice, and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.

---

of the Constitution of the Central African Republic; arts 160-166 of the Constitution of Chad; arts 157-160 of the Constitution of DRC; arts 133-149 of the Constitution of Congo; art 95 of the Constitution of Equatorial Guinea; and arts 83-93 of the Constitution of Gabon.

61 This is elaborately discussed in CM Fombad & MC Fombad 'Rethinking anti-corruption strategies in Africa: Constitutional entrenchment as a basis for credible and effective anti-corruption clean-ups' (forthcoming).

62 In "'Foreword" United Nations Convention Against Corruption' [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) (accessed 31 August 2014).

Corruption in Africa today has had a huge negative impact on the transition to genuine democracy, good governance and constitutionalism. The great optimism that followed the wave of democratisation, and the political and constitutional reforms that went with it in the early 1990s with the apparent opening up of political space for competitive elections, have now been neutralised by the corruption of the electoral process by African leaders.<sup>63</sup> Generally, it is the poor who are vulnerable to extortion of bribes by public officials, especially the police. Corruption also causes enormous damage by distorting national priorities and diverting public expenditures away from less lucrative but critically important sectors, such as health, education and other labour-intensive activities which traditionally employ the poor into capital-intensive projects which generate larger kickbacks.

The countries in the region have signed and ratified a number of international and regional anti-corruption treaties.<sup>64</sup> Most of them have provisions in their constitutions which require a declaration of assets, and some have established specialised institutions to deal with corruption. In all these countries, there are fairly comprehensive legal frameworks which identify and sanction different forms of corrupt activities that take place.<sup>65</sup> These anti-corruption measures have in most cases failed woefully for a variety of reasons.

In most cases, anti-corruption legislation, especially the declaration of asset requirements, has seldom been fully implemented<sup>66</sup> or, where

---

63 See JD Long 'Electoral fraud and the erosion of democratic gains in Kenya' [http://www.sscnet.ucla.edu/polisci/wgape/papers/18\\_Long.pdf](http://www.sscnet.ucla.edu/polisci/wgape/papers/18_Long.pdf) (accessed 31 August 2013); R Lopez-Pintor 'Assessing electoral fraud in new democracies: A basic conceptual framework' [http://www.ifes.org/~media/Files/Publications/White%20PaperReport/2010/RLP\\_Assessing\\_Electoral\\_Fraud\\_White\\_Paper\\_Dec2010.pdf](http://www.ifes.org/~media/Files/Publications/White%20PaperReport/2010/RLP_Assessing_Electoral_Fraud_White_Paper_Dec2010.pdf) (accessed 31 August 2014); UB Ikpe 'The impact of manipulated re-elections on accountability and legitimacy of democratic regimes in Africa: Observations from Nigeria, Zambia and Kenya' (2009) 3 *African Journal of Political Science and International Relations* 300-310.

64 At the global level, there is the UN Convention Against Corruption (UNCAC), which came into force on 14 December 2004 and has been ratified by 42 of the 54 African countries, and the UN Convention Against Transnational Organised Crime which entered into force on 29 September 2003 and has been ratified by 42 of the 54 African countries. At the regional level, there is the African Union Convention on Preventing and Combating Corruption which entered into force on 5 August 2006 and has been ratified by only 33 of the 54 African countries. At the sub-regional level, there is the Southern African Development Community (SADC) Protocol Against Corruption, in force since 2005 and which has been ratified by 8 countries, and the Economic Community of West African States (ECOWAS) Protocol for the Fight Against Corruption which was adopted on 21 December 2001 and has not yet come into force.

65 The Angolan Constitution provides for an ombudsman in art 192; the Burundian Constitution addresses the issue of corruption in art 141 and in art 146 provides for a general declaration of assets by public servants; art 66 of the Cameroonian Constitution also provides for a declaration of assets; art 44 of the Central African Republic Constitution provides for a declaration of assets; art 104 of the Constitution of Chad provides for a declaration of assets; art 99 of the Constitution of DRC provides for a declaration of assets and art 165 provides for as some of the grounds for trying the President and ministers for high treason,

implemented, it has targeted the small fry and left the big fish to swim away undisturbed. In some cases, the declaration of assets laws are vague<sup>67</sup> or exempt certain senior officials who, ironically, are the most vulnerable to corruption, such as the President, Vice-President and President of the National Assembly in Angola.<sup>68</sup> Some countries, such as Gabon, have established specialised anti-corruption agencies (ACAs).<sup>69</sup> These ACAs have failed in the region, as elsewhere in Africa. First, they have suffered from serious design faults that have limited their independence and therefore exposed them to manipulation by politicians. Second, their record of bringing those responsible for corruption to book has been less than impressive. Inevitably, because of the overbearing control exercised by the politicians, many of whom owe their positions to various forms of corrupt practices, the ACAs turn to avoid confrontation with their political masters by investigating only 'safe' cases. Finally, many of the ACAs do not have sufficient powers to target corrupt activities or even to instigate 'own motion' investigations. The scope of their powers is often narrowly defined and they can only investigate matters reported to them and can do no more than recommend that a particular person be prosecuted.

---

embezzlement, corruption and unlawful enrichment; in the Congo Constitution, art 47 prohibits corruption and unjust enrichment, while art 48 requires a declaration of assets; and arts 175 and 176 of the Constitution of Rwanda provides for the establishment of a number of special organs and national commissions which include the ombudsman and the office of Auditor-General of State Finances.

- 66 Eg, in Cameroon, neither the President nor parliament has enacted the law that is supposed to implement art 66 of the Constitution requiring a declaration of assets. This has also been the situation in Chad where no law has been enacted. Perhaps the most notorious instance of vulgar corruption reported in the last few years has been that involving the President of Equatorial Guinea, Obiang Nguema Mbasogo, and his son, Nguema Obiang Mangué. For details of this, see Fombad & Fombad (n 64 above), and US Department of State, Country Report on Human Rights Practices in Equatorial Guinea 2012 14-16 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014).
- 67 Eg, in Burundi, the law requires financial disclosure by elected officials and senior appointed officials once every five years, but it does not specify that such disclosure be made public. See US Department of State, Country Report on Human Rights Practices in Burundi 2012, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014) 19. In the Central African Republic, the law requires senior officials to declare their assets and income upon entry into government. It does not, however, require them to make any similar declarations upon departing from government, nor does it explicitly state what constitutes assets or income, nor specify whether children and spouses must also make similar disclosures. See US Department of State, Country Report on Human Rights Practices in Central African Republic 2012 25 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014). There is also no requirement that the declaration of assets be made public in Rwanda; US Department of State, Country Report on Human Rights Practices in Rwanda 2012 30 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014).
- 68 See US Department of State, Country Report on Human Rights Practices in Angola 2012 24 <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (accessed 31 August 2014).
- 69 In Gabon, it is called the National Commission Against Illegal Enrichment.

In many other African countries, attempts to fight corruption in the region have sometimes taken the form of periodic populist measures, such as purges or crack-downs.<sup>70</sup> However, these purges and crack-downs have not stopped the looting of public property in these countries. They have proven as ineffectual as a long-term and credible anti-corruption strategy as the others because most of the campaigns are simply a reaction either to a scandal or series of scandals or to strong external pressure from donors. This is often the case where the government itself is deeply involved in the corruption. Because these measures often aim at 'safe' targets, one cynic has compared corruption purges to an unusual fishing net which only catches small fish whilst the big fish swim free.<sup>71</sup> Perhaps the most serious problem with purges is that they often have been used by governments to carry out a witch-hunt of their opponents or to divert attention from more pressing problems. As a result, the exercise has barely diminished the level of all-pervasive endemic corruption that is destroying many countries in the region.

It is contended that entrenching a constitutional framework of principles, measures and institutions has the potential of bringing Africa's deeply troubling endemic corruption under control. The purpose of constitutional provisions that spell out the general principles underlying the fight against corruption is to ensure that the effective enforcement, whether in the form of enacting legislation or taking action against corrupt individuals, will not depend on the goodwill of certain individuals or institutions. In this respect, the general constitutional principles that are absolutely necessary can be succinctly summarised under a number of points which underscore the degree of revulsion against corruption and the need to severely punish those involved in it, and to discourage others from engaging in such activities.

The first of these principles is the need to criminalise all forms of corruption. No person or his relatives, friends or other associates should be allowed to benefit, whether directly or indirectly, from the proceeds of corruption or any corrupt activities. The second principle will require integrity and transparency from all public officers, whether occupying an elective political office or an appointive position in the civil service. For both positions, those who have been found guilty of corruption should be barred from holding any public office for a period of 10 to 15 years, depending on the gravity of the offence. Third is the principle that recognises a right of individual and collective action for the removal from office, and the trial and

---

70 See Cameroon's *L'Opération Epervier* and the analysis by L Luxner 'Former ambassador fights to prove innocence behind bars in Cameroon' (2010) 17 *The Washington Diplomat* (July 2010). This is further discussed in Fombad & Fombad (n 61 above).

71 See the novelist AK Armah, quoted in S Riley 'The political economy of anti-corruption strategies in Africa' in M Robinson (ed) *Corruption and development* (1998) 151.

prosecution of any public official alleged to have been involved in corruption or corrupt activities. This should also extend to a right to take action requesting the blacklisting of any person or business that has been associated with corrupt activities. Fourth is the principle that excludes all persons convicted of corruption or corrupt activities from the benefit of any pardons or amnesties and the principle that statutes of limitations shall not apply to any person alleged to have been involved in corruption or corrupt activities.<sup>72</sup> The fifth principle is that of reward and punishment. This will seek to encourage and protect those who report corruption and punish not only those who are engaged in it, but also those who negligently or deliberately refuse to report acts of corruption. In the sixth place there should be a duty to examine the assets of public officials who appear to be living beyond their means on grounds of suspicious wealth. Where the officials cannot satisfactorily explain such wealth, it should be confiscated by the state. Finally, members of the judiciary, the police service, the armed forces and custom services, from whom the highest standards of integrity are expected, must be given a higher penalty than ordinary offenders for any offence involving corruption and corrupt activities that they commit.

The main argument here is that the key to unlocking the stranglehold of endemic corruption lies in reconfiguring the present constitutions to make corruption a high-risk and no-gain activity for everybody, whether rich or poor. There is no better way for the constitution to protect the fundamental human rights of all citizens, to address the problems of underdevelopment, backwardness, illiteracy, lack of basic necessities such as water, food and healthcare, than to lay down in clear terms a strategy built around preventing, detecting, investigating and prosecuting those involved in corruption. Besides corruption, there are other issues that need to be mentioned, even though fairly briefly.

### **3.2.6 Other issues affecting constitutionalism and the rule of law**

Two further issues deserve mention here. The first one is the problem of impunity. We have noted that, with the exception of Cameroon, the scope of human rights recognised and protected since the 1990s is far more extensive than it has ever been. However, a careful analysis of some of the indicators of the state of human rights protection from the 1990s to date suggests that there has been a progressive reduction in the quality of human rights enjoyed. The best indicator of this trend is an analysis of Freedom House's Freedom of the World

---

<sup>72</sup> A proposed amendment to the 1991 Benin Constitution will, *inter alia*, make economic crimes imprescriptible.

from 1990.<sup>73</sup> This is partly because of the continuously deteriorating economic situation and the resulting unemployment and poverty that it has caused and the bitter conflicts provoked by the increasingly fractious, divisive and often tribalised nature of multiparty elections, most of which are a sham. Violence resulting in loss of life has become more frequent. What is becoming more and more problematic is the fact that many of those responsible for the violence get away with it. In many cases, this is due to incompetence in investigating and prosecuting cases, but fairly often this is because of a cover-up by powerful politicians who might have been behind the violence.<sup>74</sup> The new culture of impunity has not been helped by the numerous challenges that constrain the performance of the judicial institutions. These include poor infrastructure, a lack of adequate funds to cover running expenses, insufficient stationery and office equipment and limited working facilities such as courtrooms. In many countries, judges do not have access to sufficient legal information resources such as books, case reports, statute books and gazettes. This is particularly so in the rural areas where there are no libraries or where these have been neglected over the years. This is often aggravated by the lack of computer skills or a lack of motivation on the part of users. In some cases, there is no access to the internet or, where there is access, there are technical problems such as slow and erratic networks, unreliable power supplies and poor user support and maintenance systems. In addition to a more concerted effort being made to address these issues, serious consideration must now be given to investing in traditional courts. Given the general problem of access to justice and growing impunity, the *Gacaca* courts in Rwanda have shown that there is a potential role for traditional courts.<sup>75</sup> When considered as a part of the informal justice system, a recent study has indicated that they constitute a 'cornerstone of dispute resolution and access to justice for the majority of the populations in developing countries because they usually resolve from 80 to 90 per cent of disputes'.<sup>76</sup> For example, in Malawi, it is estimated that from 80 to 90 per cent of disputes are processed through traditional courts and, in the case of Burundi, the figure is about 80 per cent that go through

---

73 Some analysis of this is given in CM Fombad 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) *59 Buffalo Law Review* 1007-1108.

74 The current prosecution of President Uhuru Kenyatta and his deputy, William Ruto, for their part in the post-presidential election violence of 2008 in Kenya at the International Criminal Court and the support that they are getting from the AU to oppose the proceedings, show how deep-rooted the problem is in Africa as a whole.

75 The *Gacaca* courts are traditional community courts that were set up to prosecute the perpetrators of the 1994 Rwandan genocide. See further P Clark *The Gacaca courts, post-genocide justice and reconciliation in Rwanda. Justice without lawyers* (2010).

76 See E Wojkowska 'Doing justice: How informal justice systems can contribute' 5 <http://www.democraciaejustica.org/cienciapolitica3/sites/default/files/doingjusticeewojkowska130307.pdf> (accessed 31 August 2014).

its *Bashingantahe* institution as a first or sometimes only instance.<sup>77</sup> Although the traditional justice system is popular, more easily accessible (especially to the poor, uneducated and marginalised), is quicker and provides affordable remedies, justice sector reforms have devoted more attention and most of the funding to supporting the formal judicial system. A lot of material and human resources are needed to research and develop strategies that will improve the quality of justice that comes from the traditional courts.

A second issue that should be discussed here is that of non-implementation of constitutions. Many governments, under pressure from both internal and external sources, agreed to changes to their constitutions, which some had no desire to implement. An extreme example of this is the Cameroonian 1996 Constitution. It took more than a decade for most of the new changes that were introduced in that Constitution to be implemented. For example, it provided for decentralisation (articles 55 to 60), only part of which was carried out in 2008, that is 12 years later. The changes from provinces to regions (article 61) only took place in 2012 (14 years later) and the Senate (articles 20 to 24) was finally established in 2013 (15 years later). The Constitutional Council (articles 46 to 52) is yet to be established. For many years, it was uncertain whether it was the 1972 or 1996 Constitution that was in force. The story of non-implementation of constitutional provisions is the same in many other countries in the region. This explains why there is often this wide gap between the constitutional text and constitutional reality.

#### 4 Conclusion

In a very general sense, it can be said that the concept of the rule of law reinforces that of constitutionalism and provides certain norms, policies, institutions and processes that constitute the core values which every individual in a modern society needs to live peacefully. In advocating for certain basic but fundamental rights and entitlements and a system for peaceful and effective redress against any harm suffered in a manner that is fair to all regardless of their status, constitutionalism and the rule of law remain ideals. No society has attained or fully realised anything close to a perfect level of constitutionalism and respect for the rule of law. As an ideal, the most that can be said is that a society is making good progress towards these goals or that its constitutional framework provides it with either good or poor prospects to attain a high level of these goals.

---

77 The ancient institution of *Bashingantahe* in Burundi is made up of elders, and people of irreproachable morality and integrity who are responsible for settling conflicts at all levels. See further A Naniwe-Kaburahe 'The institution of *Bashingantahe* in Burundi' [http://www.idea.int/publications/traditional\\_justice/upload/Chapter\\_6\\_The\\_institution\\_of\\_bashingantahe\\_in\\_Burundi.pdf](http://www.idea.int/publications/traditional_justice/upload/Chapter_6_The_institution_of_bashingantahe_in_Burundi.pdf) (accessed 31 August 2014).

As Ogendo rightly pointed out, what we had in Africa before the 1990s were 'constitutions without constitutionalism' and, consequently, little basis for the respect of the rule of law.<sup>78</sup> The prospects soon after the fever of constitutional revisions started gave some reason for cautious optimism.<sup>79</sup> In reflecting carefully over the developments that have taken place over the last two decades in the 11 countries in Central Africa, particularly in light of the different governance survey indicators examined and discussed in this article, one cannot escape the rather pessimistic view that an authoritarian resurgence which combines intransigence with strategic adaptability is in progress. Constitutional developments on the continent have reached a point where we must go beyond the conventional Afro-pessimism or Afro-optimism into Afro-realism.

It is clear from our examination of the developments in these 11 central African countries that in many instances some of the changes that have been taking place under the guise of reforms are fast degenerating to sham, symbolic or token constitutionalism, devoid of the substantive values usually associated with the core elements of this concept, and therefore providing little foundation for the respect of the rule of law to take root. Whilst all countries will continuously face challenges in establishing, consolidating and sustaining the values, institutions and processes that make constitutionalism and respect for the rule of law real and effective, this article has shown that the current challenges faced by these countries are an impediment to their progress, be this social, political, economic or otherwise. In order to arrest the steady decline of good governance, constitutionalism and the rule of law in the countries in Central Africa, the main reforms that have been suggested in the article can be summarised into four main points.

First, the constitutional instability caused by the frequent making, unmaking and remaking of constitutions, whether by revision or re-crafting of new constitutions leading to abusive arbitrary changes, can be checked by restricting all constitutional changes to a permanent constitution review commission. This commission should be constituted in such a manner that no political party holds a majority and it should have exclusive powers to review and recommend amendments to the constitution.

Secondly, presidential term limits need to be restored, and the enormous presidential appointment powers should be limited by

---

78 O Ogendo 'Constitutions without constitutionalism' in I Shivji (ed) *State and constitutionalism in Africa* (1991) and, for a more general account, see GN Barrie 'Paradise lost: The history of constitutionalism in Africa post-independence' (2009) 2 *Journal for South African Law* 290-322.

79 See generally CM Fombad 'Post-1990 constitutional reforms in Africa. A preliminary assessment of the prospects for constitutional governance and constitutionalism' in A Nhema & T Zeleza (eds) *The resolution of African conflicts. The management of conflict resolution and post-conflict reconstruction* (2008) 179-199; HK Prempeh 'Africa's "constitutionalism revival": False start or new dawn?' (2007) 5 *International Journal of Constitutional Law* 469-606.

laying down strict criteria for appointments and promotions. This should be coupled with a constitutional right to expeditious, efficient, lawful, reasonable and procedurally-fair administrative action.

Third, because of the important role that the judiciary plays in ensuring respect for the rule of law, judicial appointments should be depoliticised by using appointment committees with less than half of their members having any links, whether directly or indirectly, to the executive and the legislature.

Finally, corruption is probably the worst cancer, not only destroying the economies of most of the countries in the region, but also undermining faith in constitutionalism, especially electoral democracy and respect for the rule of law. It has been suggested that radical anti-corruption measures should be constitutionalised, which will render corruption a business in which the risk totally outweighs the benefits.

The Central African region is seriously lagging behind the rest of the continent in progress towards constitutionalism and respect for the rule of law. Many of the present constitutions contain elements of what is needed to make progress. All that is needed is to stop the threats to undermine some of the important gains that have been made and to keep the pressure to improve on the others. In all this, the ordinary citizens hold the key rather than external forces and actors. With more education and awareness creation, more people will be able to fight for substantive and effective constitutionalism rather than to endure the hardship from the present tokenistic gestures.