

## PRIDE AND PREJUDICE IN AFRICAN CONSTITUTIONAL LAW: COHESION OR EXCLUSION FROM GLOBAL NORTH NARRATIVES

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### Abstract

*“It is a truth universally acknowledged that a single man in possession of a good fortune must be in want of a wife”.* Typical of our ancestors, who in the nineteenth century, having the destiny of Africa in their hands, married the colonial masters to meet their social needs. Upon marrying, the latter prioritized the application of Northern constitutional cultures and principles to the detriment of pre-colonial legal orders. Thus, I argue that mimicry of the legal order of the Global North has taken root in African constitutions and that it serves as a source of pride and prejudice for African states in the twenty-first century. By employing a theory of critical legal studies, a law and literature approach, a law and culture approach and a Third World approach to international law, I equate the constitutional principles of the Global North in the eighteenth century with the constitutional principles of the twenty-first century in Africa. This paper mainly analyzes constitutional principles like sovereignty, constitutionalism, democracy, and the rule of law as well as institutions such as constitutional courts in their role as arbiters in African constitutionalism. Furthermore, I will show that these principles originated in France, Great Britain, and the United States in the eighteenth century. Moreover, these principles have been beneficial for human development at the national level but have deprived African states of the power of choice; internationally. Therefore, I will propose strategic, institutional, and substantive changes in the African constitutional order and global power dynamics.

**Keywords:** Constitutional principles; Global North; Africa; Eighteenth Century.

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## Résumé

*«C'est une vérité universellement reconnue qu'un homme célibataire fortuné doit souhaiter avoir une épouse». Typique de nos ancêtres, qui au XIXe siècle ayant la destinée du continent Africain en leur possession, ont épousé les maîtres coloniaux pour combler leurs besoins sociaux. En revanche, ces maîtres ont priorisés application des cultures et principes constitutionnels du Nord au détriment des ordres juridiques précoloniaux. Ainsi, je soutiens qu'un mimétisme de l'ordre juridique des pays du Nord s'est installés dans les constitutions africaines et qu'il sert de source de fierté et de préjugés aux États africains du XXIe siècle. En employant la théorie des études juridiques critiques, une approche du droit et de la littérature, une approche du droit et de la culture, et une approche du tiers monde du droit international, j'assimile les principes constitutionnels du XVIIIe siècle dans les pays du Nord aux principes constitutionnels du XXIe siècle en Afrique. J'analyserai principalement les principes de souveraineté, de constitutionnalisme, de démocratie et d'État de droit ainsi que des institutions telles que les cours constitutionnelles dans leur rôle d'arbitres dans le constitutionnalisme africain. De même, je démontrerai que ces principes sont nés des pays du Nord notamment en France, en Grande-Bretagne et aux États-Unis au XVIIIe siècle. De plus, ces principes ont été bénéfiques pour le développement humain à l'échelle nationale, mais ont privé les États africains du pouvoir du choix ; internationalement. Par conséquent, je proposerai des changements stratégiques, institutionnels et substantiels dans l'ordre constitutionnel africain et la dynamique du pouvoir mondial.*

**Mots clés :** Principes constitutionnels ; pays du Nord ; l'Afrique ; XVIIIe siècle.

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## 1. Introduction

“As a child, I was taught what was *right*; but I was not taught to correct my temper. I was given good principles but left to follow them in pride and conceit...Such I was, from eight to eight-and-twenty; and such I might still have been but for you, dearest, loveliest Elizabeth! What do I not owe you ? You taught me a lesson, hard indeed at first, but most advantageous. By you I was properly humbled. I came to you without a doubt of my reception. You showed me how insufficient were all my pretensions to please a woman worthy of being pleased.” (Austen, 1950, p.303-304)

In these words of Mr. Fitzwilliam Darcy, Miss Elizabeth Bennet is appreciated for the transformative role she has played in his life since his first arrival at Netherfield Park months

ago. The novel “Pride and Prejudice” by Jane Austen<sup>1</sup>, begins with the arrival of three ‘gentlemen’ (Mr. Hurst, Mr. Darcy, and Mr. Bingley) alongside Mr. Bingley’s two sisters to the Meryton ball<sup>2</sup>. At the ball, Mr. Darcy’s abhorrence towards dancing with strangers establishes a reputation of pride, and disagreeableness in the Hertfordshire community. However, his possession of an annual income of ten thousand pounds<sup>3</sup> and his benign mastership of Pemberley estate<sup>4</sup>, eventually wins over the heart of Miss Elizabeth Bennet<sup>5</sup>. In addition, coupled with Mr. Darcy’s social stratifications, his power of choice expressed with ease in influencing major decisions in the lives of Mr. Bingley<sup>6</sup>, and Mr. Wickham<sup>7</sup> (husbands to Jane Bennet and Lydia Bennet respectively) determined Miss Elizabeth’s approval of his second marriage proposal. Hence, upon receiving this avowal, Mr. Darcy acknowledges his pride and reverts its origins to principles inculcated at childhood.

Besides, apart from Mr. Darcy, Lady Catherine de Bourgh (Darcy’s aunt) is another character who depicts pride, arrogance and dictatorship in the affairs of others<sup>8</sup>. Nonetheless, while Mr. Darcy’s pride leads him to protect and empower his subordinates, Lady Catherine’s pride bears prejudices to whoever contravenes her will<sup>9</sup>. Such virtue and vice, borne from the trait of ‘pride’ can only be explained by the upper class’s<sup>10</sup> ‘aristocratic’ privileges which both characters had in the eighteenth-century British society. In contrast, Elizabeth Bennet’s family as a middle class<sup>11</sup> ‘landed gentry’, were more vulnerable to be receptors of the prejudices

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<sup>1</sup>Jane Austen, *Pride and prejudice: Sense and sensibility*, The Modern library of the world’s best books (N.Y.: Modern library, 1950).

<sup>2</sup> *Ibid* at 9.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid* at 202.

<sup>5</sup> *Ibid* at 308.

<sup>6</sup> *Ibid* at 305.

<sup>7</sup> *Ibid* at 267.

<sup>8</sup> *Ibid* at 71.

<sup>9</sup> *Ibid* at 316.

<sup>10</sup> Robert Markley, “The economic context” in Janet Todd, ed, *The Cambridge Companion to “Pride and Prejudice”* Cambridge Companions to Literature (Cambridge: Cambridge University Press, 2013) 79 at 82.

<sup>11</sup> *Ibid* at 84.

emanating from the upper class because their father's estate was entailed<sup>12</sup> to his cousin Mr. Collins<sup>13</sup>. Plus, Mr. Bennet earned only two thousand pounds a year<sup>14</sup>. Hence, with five daughters to raise and 'no fortune' to will them, it was only profitable that Mrs. Bennet engaged in the business of getting them married<sup>15</sup>. The narrative above depicts that, in "Pride and Prejudice", 'social, personal behavior and even emotion depended on the economic framework of the society'<sup>16</sup>. Equally, a series of historic events surrounding the conception of "Pride and Prejudice" make it a 'perfect' literary work for discussing the instances of cohesion of African constitutional law to the constitutional principles in the Global North. As well as the positive or negative consequences which such cohesion has borne on African legal order at a national and international scale. Therefore, I argue that the mimicry of the Global North's legal order by African constitutions is both a source of pride and prejudice to African states in the twenty first century. As such, this paper seeks to investigate *how does this mimicry represent a source of pride and prejudice to African states in the 21<sup>st</sup> century?*

Historically, when "Pride and Prejudice" was written in 1813, Britain had just resumed fighting against France in the Napoleonic wars of 1812-1815. At the outbreak of the war, the United States (US) remained neutral until British troops began impressment. In retaliation, the US incurred heavy losses amidst the burning of the white house. Thus, on 23 December 1814 both states signed a peace accord (the Treaty of Ghent)<sup>17</sup> and resulted to look for a peaceful settlement for their weary combatants<sup>18</sup>. Consequently, Africa was among the territories explored for political concession. In turn, it witnessed a period of colonization from the mid-

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<sup>12</sup> *Ibid* at 85.

<sup>13</sup> Austen, *supra* note 1 at 52.

<sup>14</sup> *Ibid* at 23.

<sup>15</sup> *Ibid* at 5.

<sup>16</sup> *Ibid* at xix.

<sup>17</sup> The Napoleonic wars ended on 18 June 1815, with the defeat of France by Britain and her allies at the Battle of Waterloo.

<sup>18</sup> "Milestones: 1801–1829 - Office of the Historian", online: <<https://history.state.gov/milestones/1801-1829/napoleonic-wars>>.

eighteenth until the mid-to-late twentieth century.<sup>19</sup> In the eighteenth century, ‘constitutions’ served as an international law “standard of civilization”<sup>20</sup>. Hence, after colonization, these three Northern states ensured a transfer of their legal orders<sup>21</sup> to African constitutional law<sup>22</sup>. In fact, in our subsequent analysis, Britain, France and the US will represent the ‘Global North’<sup>23</sup>.

In a metaphoric way, below Lady Catherine de Bourgh’s character will be used to represent France, Mr. Darcy’s will represent Britain and finally, Mr. Bingley’s character will represent the USA in the era of the Napoleonic wars narrated above. Moreso, Miss Charlotte Lucas (Elizabeth’s intimate friend<sup>24</sup>) will represent Africa; who married the colonial masters (Mr. Collins) by force of circumstance<sup>25</sup> rather than by choice. Indeed, when faced with Lady Catherine de Bourgh’s pride, she will not muster the courage to override her decisions<sup>26</sup>, (unlike Miss. Elizabeth<sup>27</sup>) because of their economic dependence. Likewise, from colonization to the First and Second World War (trusteeship<sup>28</sup> periods) when France and Britain governed assigned territories<sup>29</sup> in Africa through assimilation policies<sup>30</sup> and indirect rule<sup>31</sup> respectively, to the

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<sup>19</sup> Martin S Shanguhya & Toyin Falola, *The Palgrave handbook of African colonial and postcolonial history* (New York, NY: Palgrave Macmillan, 2018) at 389.

<sup>20</sup> Vijayashri Sripathi, “United Nations Constitutional Assistance: Legitimation in the Post-Colonial Era” in Vijayashri Sripathi, ed, *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands* (Oxford University Press, 2020) 424 at 443.

<sup>21</sup> Bryan A Garner & Henry Campbell Black, *Black’s law dictionary*, tenth edition ed (St. Paul, MN: Thomson Reuters, 2014) at 1033. 1. Traditionally, a set of regulations governing a society and those responsible for enforcing them. 2. Modernly, these include regulations and officials plus the processes involved in creating, interpreting, and applying the regulations; Legal system.

<sup>22</sup> Andreas Auer, Giorgio Malinverni & Michel Hottelier, *Droit constitutionnel suisse : Volume 1, L’Etat* at 7. Constitutional law is defined as a branch of law which has as its object : rules, legal institutions and essential political practices concerning the state, plus the exercise of her public power. As well as relations between the state and society. In this paper, African constitutional law, hereby refers to the rules, legal institutions... operating in African states.

<sup>23</sup> Lara Braff & Katie Nelson, “Chapter 15: The Global North: Introducing the Region”, online: <<https://milnepublishing.geneseo.edu/genderedlives/chapter/chapter-15-the-global-north-introducing-the-region/>> Book Title: Gendered Lives.

<sup>24</sup> Austen, *supra* note 1 at 15.

<sup>25</sup> *Ibid* at 103–104.

<sup>26</sup> *Ibid* at 136.

<sup>27</sup> *Ibid* at 291–294.

<sup>28</sup> Vijayashri Sripathi, “United Nations Constitutional Assistance Continues Its Civilizing Role” in Vijayashri Sripathi, ed, *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands* (Oxford University Press, 2020) 397 at 404.

<sup>29</sup> Shanguhya & Falola, *supra* note 19 at 81.

<sup>30</sup> *Ibid* at 91–92.

<sup>31</sup> *Ibid* at 90.

1960's when most African states acceded to independence<sup>32</sup>, the constitutional values of France and Britain were imposed<sup>33</sup> on African states. Nonetheless, after independence, till present, the substantive and institutional framework of African Constitutional Law continues copying and enhancing their dispositions following Global North narratives of the 18<sup>th</sup> century.

Today, most North American and European constitutional law scholars plausibly limit their lectures of Constitutional law to their national legal order or engage in comparative studies among states with the same legal culture. Meanwhile, African, Asian or Caribbean constitutional law is less explored. Thus, for these scholars, this paper will endeavor to capture the similarities between North American, and European constitutional principles versus African constitutional law principles. More precisely, French principles will be deciphered in Cameroon, Senegal, Togo, Algeria, Benin, and Niger. Meanwhile, English and American principles will be outlined in Ghana, Zimbabwe and South Africa.

Theoretically, I will have recourse to a single theoretical framework namely: critical legal studies<sup>34</sup>. More precisely, external critiques<sup>35</sup> will be mobilized through 'law and literature'<sup>36</sup> by analyzing the interplay of the novel "Pride and Prejudice" and African

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<sup>32</sup> *Ibid* at 431.

<sup>33</sup> Sripati, *supra* note 20 at 443.

<sup>34</sup> Günter Frankenberg, *Comparative law as critique*, Elgar studies in legal theory (Cheltenham: UK); Edward Elgar Publishing, 2016) at 24–34. Critical legal theory began as a movement called Critical Legal Studies (CLS) in the early 1970's in US' legal academia. At the time, scholars affiliated with the CLS challenged the ideas of liberalism via the 'method of contradictions'. Particularly, they demystified Dworkin's theory that there is 'one right answer' to all legal conflicts. Overtime, the CLS underwent several metamorphoses that were signaled by shifting political agendas, theoretical orientations and methodological practices. Thus the fragmentation of the all-encompassing CLS into feminist legal theory, critical race theory, queer theory, New Approaches to International Law (NAIL), and Third World Approaches to International Law (TWAIL); seen below. Concretely, critical theory originated from 'Frankfurt school' under the leadership of Niklas Luhmann. To add, it qualified as critical, a theory which makes social life and law intelligibly better. Classical critical theory characterized the enterprise to identify and scandalize the mechanisms, structures and relationships of alienation and reification. The program was focused on the pathologies of modernity and industrial capitalism. It contained a *transformative vision* which resonated with the central themes of Marxist thought. Finally, it is not merely descriptive rather it considers the economic, cultural and political context to propel voluntary insubordination to dominant discourse. From this elaboration one may see how TWAIL, the theory of African constitutionalism and even law and literature relates to critical theory.

<sup>35</sup> *Ibid* at 23.

<sup>36</sup> Maria Aristodemou, *Law and literature: journeys from her to eternity* (Oxford: Oxford University Press, 2000) at 9–10. Regarding law and literature, Maria confirms the objectives of crits above by spelling out that literature contains its own ideology and expresses its own values and prejudices. Its ambivalent nature can resist dominant social practices and even transcend them. In addition, literature performs a *liberatory role*, in that it overflows institutions, breaks the

constitutional law in the twenty-first century. Again, availing the Third World Approaches to International Law (TWAAIL) of Makau Mutua<sup>37</sup> to contribute a means of contending the continuous subordination of African legal systems to the Global North in International law, TWAAIL aligns with the deconstructive opinions of critical legal thinkers<sup>38</sup>. Besides, the *twailian* approach aims ‘first to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions which subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Third, TWAAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World (also known as the Global South)’<sup>39</sup>. As a scholar, I will apply this approach to demonstrate the prejudices suffered by the African constitutional order ensuing the incorporation of Global North narratives like sovereignty, and democracy in relation to international investments. What’s more, I will highlight the inferior position of African legal systems in international law particularly in the domain of peace and international security. Lastly, the ‘law and culture’<sup>40</sup> approach of analyzing law reckons that law should reflect the political and cultural realities as well as the social practices of the governed<sup>41</sup>. In Africa, ethno-religious and linguistic disparities characterize power dynamics. Thus, it is almost impossible to not recognize the importance of culture in discussing African constitutional law. Anne-

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rules and invents new rules: ‘it allows one to *say everything, in every way*... Finally, “the law and literature project suggests that an understanding of legal institutions and principles cannot come from law itself, nor only from its social, economic, and historical contexts. Such an understanding must be accompanied with an understanding of the cultural sphere without which no meaningful social change can occur”. It is in this powerful phrase that my choice of a ‘law and culture’ approach to African constitutional law gains its place.

<sup>37</sup> Makau Mutua, “What is TWAAIL?” (2000) 94 Proceedings of the ASIL Annual Meeting 31–38, online: <<https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/what-is-twail/F6186DDA7E7CBFB50CC61A2D7836C5F0>>.

<sup>38</sup> Frankenberg, *supra* note 34 at 33.

<sup>39</sup> Mutua, *supra* note 37 at 31.

<sup>40</sup> Peter Fitzpatrick, “The Damned Word: Culture and Its (in)compatibility with Law Commentaries: What Does Culture Have to Do with It: Interrogating Culture in Law and the Humanities” (2005) 1:1 Law, Culture & Human 2–13, online: <<https://heinonline.org/HOL/P?h=hein.journals/lculh1&i=2>>.

<sup>41</sup> Anne-Sophie Chambost, *Approches culturelles des savoirs juridiques*, Contextes : culture du droit (Paris La Défense: LGDJ, un savoir-faire de Lextenso, 2020) at 291.



Sophie Chambost's "*Approches culturelles des savoirs juridiques*"<sup>42</sup> supports this claim. To sum, we have seen that mainly critical legal theory, with triple approaches of analyzing law shall underlie this paper's evolvment.

Accordingly, through a 'Greek oration structure'<sup>43</sup>, below will be seen the mimicry of the Global North's legal order by African constitutions, as a source of pride (2), the mimicry of the Global North's legal order by African constitutions, as a source of prejudice (3), proposed changes (4) and ultimately a conclusion (5). A national and an international context will be used successively to explore how 'pride and prejudice' resulted from Africa's mimicry of Global North constitutional principles and subtly its institutions.

## **2. The Mimicry of the Global North's Legal Order by African Constitutions: a Source of Pride at the National Level**

"Family pride, and *filial* pride\_ for he is very proud of what his father was \_ ...Not to appear to disgrace his family, to degenerate from the popular qualities, or lose the influence of the Pemberley House, is a powerful motive". (Austen, 1950, p.69)

As Mr. Wickham describes Mr. Darcy's character to Miss. Elizabeth Bennet, we may see that being an entail<sup>44</sup> means taking up the responsibility to guard, protect and pass on family reputation and legacy. Apart from the legacies of language, culture and religion derived from colonial presence in Africa, the inheritance of a constitutional order similar to that of the colonial masters bears the responsibility to uphold the key components of their legal tradition<sup>45</sup>.

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<sup>42</sup> Chambost, *supra* note 41.

<sup>43</sup> Wendy Laura Belcher, *Writing your journal article in twelve weeks: a guide to academic publishing success*, second edition ed, Chicago guides to writing, editing and publishing (Chicago: The University of Chicago Press, 2019) at 266.

<sup>44</sup> Garner & Black, *supra* note 21 at 648. Entail : 2. "To limit the inheritance of (an estate) to only the owner's issue or class of issue, so that none of the heirs can transfer the estate...".

<sup>45</sup> Thomas Duve, "Legal Traditions: A Dialogue between Comparative Law and Comparative Legal History" (2018) 6:1 Comparative Legal History 15–33, online: <<https://doi.org/10.1080/2049677X.2018.1469271>> at 21. According to Henry John Merryman's: *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, which was first published in 1969, Duve defines a legal tradition as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected, and taught".

Among which are constitutional concepts and principles like the principle of sovereignty and its corollaries; the principle of constitutionalism<sup>46</sup>, democracy<sup>47</sup> and the rule of law<sup>48</sup>, as well as the separation of power and constitutional justice. These concepts have become a source of pride to African states because, by adherence, these states became exposed to ‘civilized nations’<sup>49</sup> with whom were cultivated international relations spurring economic and socio-political development in Africa. The ‘Francophonie’ and the ‘Commonwealth’<sup>50</sup> are both testaments of such relations in continuum.

### **2.1. The Integration of the Principle of Sovereignty, Democracy, Rule of Law and Constitutionalism, to African Constitutional Law**

At the verge of independence, in the mid twentieth century, African states had centralized and codified legal systems imposed upon their unwritten, customary systems<sup>51</sup>. The codified law was called a ‘constitution’<sup>52</sup> whom by definition signifies: formally, an assembly of written norms characterized by their superiority on all other legal norms in the state. This superiority is attested by the special revision procedure which constitutions undergo<sup>53</sup>. Then, materially, the term ‘constitution’ includes an assembly of fundamental legal norms, written or unwritten, which determine the form of the state, its structure, its political regime, the modes of appointment, its composition, the competences and the functioning of the principal organs as

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<sup>46</sup> Dirk Ehlers, Henning Glaser & Kittisak Prokati, *Constitutionalism and good governance: Eastern and Western perspectives*, 1st edition ed, CPG series of comparative constitutional law, politics and governance vol. 1 (Baden-Baden: Nomos, 2014) at 23.

<sup>47</sup> André Cabanis & Michel Louis Martin, *Le constitutionnalisme de la troisième vague en Afrique francophone*, Collection Publications de l’Institut universitaire André Ryckmans no 4 (Louvain-la-Neuve: Academia-Bruylant, 2010) at 20.

<sup>48</sup> *Ibid* at 37.

<sup>49</sup> H C Gutteridge, “The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice” (1952) 38 *Transactions of the Grotius Society* 125–134, online: <<https://www.jstor.org/stable/743162>> at 129.

<sup>50</sup> Fenner Brockway, “Commonwealth et Pan-africanisme” (1962) 44 *Présence Africaine* 129–134, online: <<https://www.jstor.org/stable/24348135>>.

<sup>51</sup> Sally Engle Merry, “Legal Pluralism” (1988) 22:5 *Law & Society Review* 869–896, online: <<https://www.jstor.org/stable/3053638>> at 874.

<sup>52</sup> Auer, Malinverni & Hottelier, *supra* note 22 at 457–460.

<sup>53</sup> *Ibid* at 462.

well as the relations between the state and individuals<sup>54</sup>. The principles listed above are often part of the body of the constitution, and they guide the constitution's material framework. Hence, each principle will be analyzed consecutively.

### 2.1.1. The Principle of Sovereignty

The principle of sovereignty is the common basis for modern constitutional orders<sup>55</sup>. From its Northern conception in the sixteenth century to its African integration in the mid twentieth century, sovereignty remains an inherent notion to the state and its people. There are several definitions of sovereignty, but two main definitions will be elaborated below namely: external sovereignty (expressed in quantitative and qualitative sovereignty), and internal sovereignty.

On the one hand, external sovereignty is tied to the independence of states<sup>56</sup>. Quantitatively, in the sixteenth century, 'sovereignty' originated from Jean Bodin. In his book *«la République»*<sup>57</sup>, Bodin defined 'sovereignty' as an absolute and perpetual power<sup>58</sup>. Here, sovereignty also implies the autonomy and independence of a state's legal order in relation to other states' legal orders. Hence, this legal order is not limited by any norm and the state has the capacity 'to do all' on its territory<sup>59</sup>. Further, Carre de Malberg opined that 'sovereignty' is the sum of competences of the state<sup>60</sup>. These competences may be implored or renounced. Qualitatively, by the nineteenth century, the German school of Hänel added that the choice of a state to determine itself its scope of competences to be exercised is a "competence of competences" which can only be limited by rules of international law<sup>61</sup>. Effectively, for African

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<sup>54</sup> *Ibid* at 463–464.

<sup>55</sup> Bertrand Mathieu, Michel Verpeaux & Florence Chaltiel, *Droit constitutionnel*, Droit fondamental Classiques (Paris: PUF, 2004) at 201.

<sup>56</sup> Christian Philip et al, *La souveraineté au XXI<sup>e</sup> siècle: colloque du 26 juin 1987* (Lyon, France: Centre de documentation et de recherche européennes, 1988) at 13.

<sup>57</sup> *Ibid* at 24.

<sup>58</sup> Jean Bodin et al, *Les six livres de la République = De Republica libri sex*, Ars historia & politica, 1815-185X (Paris: Classiques Garnier, 2013). LIVRES 1, Chap. I. p.67-68.

<sup>59</sup> Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6e éd (Cowansville (Québec) Canada: Éditions Yvon Blais, 2014) at 67–68.

<sup>60</sup> Philip et al, *supra* note 56 at 14.

<sup>61</sup> *Ibid*.

states, their ‘competence of competences’ is strictly limited to their territory and does not transcend the national legal order since no veto power is attributed these states in the UN Charter.

On the other hand, internal sovereignty refers to the supremacy of constituent organs. That is, the supreme character of an independent public power whose authority is not bound by any other authority but his<sup>62</sup>. Actually, in the sixteenth century, Jean Bodin’s followers called *«l’école des légistes»* refuted the King of France’s subordination to the political and religious authority of the Emperor and the Pope respectively. They wanted the king’s power to reign in the state without limits. Consequently, Bodin’s followers adopted the slogan *«le Roi de France est empereur en son royaume»*<sup>63</sup>. This idea of monarchial absolutism succeeded in France throughout the sixteenth and the seventeenth century under King Louis XIV.<sup>64</sup>

However, in the eighteenth century, Montesquieu and Jean-Jacques Rousseau criticized absolute sovereignty per this internal perspective<sup>65</sup>. In fact, on the recommendation of these authors, political power was to be ceded from an individual’s command (the King) to the people. Therefore, with the advent of the French Revolution, the adopted 1789 Declaration clearly stated in its article 3 that *«Le principe de toute souveraineté réside essentiellement dans la nation...»*<sup>66</sup>. Mr. Maurice-René SIMONNET opined that: *«on attend “dans le peuple”, mais on lit “dans la Nation”»*. By this, the 1789 revolutionists assumed the posture that sovereignty no longer belonged to the King, nor the “people” in a strict sense, but to the ‘nation’. Hereby, allocating power to a moral person rather than the physical persons composing the ‘people’<sup>67</sup>. Nevertheless, Section 3 of the 1958 French constitution clarified this notion, and clearly vested

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid* at 24.

<sup>64</sup> *Ibid* at 25.

<sup>65</sup> *Ibid* at 25–26.

<sup>66</sup> Conseil constitutionnel, “Déclaration des Droits de l’Homme et du Citoyen de 1789”, online: <<https://www.conseil-constitutionnel.fr/node/3850/pdf>>.

<sup>67</sup> Philip et al, *supra* note 56 at 27.

sovereign power in the people. It disposes: “National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum”<sup>68</sup>.

Hence, by the twenty first century, this pattern was fast integrated to French African constitutions where several fundamental laws use the same or similar wording. For instance: the 1990 amended Benin Constitution (Section 3, para.1), 2023 Mali Constitution (Section 37, para.1)<sup>69</sup>, 2017 amended Niger Constitution (Section 4, para.1), 2016 amended Senegal Constitution (Section 3, para.1), 2019 amended Togo Constitution (Section 4, para.1), and the 2022 Tunisian constitution (Section 3) vests national sovereignty to the people. Equally, Ghana as a former British colony followed suit (Section 1, para.1 of the 1992 amended constitution). Remarkably, the 1996 Cameroon constitution (Section 2, para.1)<sup>70</sup> and the 2010 Kenyan constitution (Section 1) went beyond attributing sovereignty to the people, to delegate this responsibility to the President of the Republic, the parliament and exceptionally the Kenyan judiciary. In addition, like the French constitution, Cameroon envisaged a popular expression of sovereignty by referendum (Section 2, para.1).

In summary, the principle of sovereignty was instituted to entrust absolute power to the state (the King). Later, this power became vested in the people and their representatives. Indeed, it is by the principle of majority rule that the people entrust power to their representatives (usually the Government). This ideal is known as democracy<sup>71</sup>; without which sovereignty will not be exercised by the people. Therefore, we will analyze the Northern origins and imprints of the principle of democracy in African constitutional law.

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<sup>68</sup> “Constitution of 4 October 1958 | Conseil constitutionnel”, online: <<https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958>>.

<sup>69</sup> “La Constitution du 22 juillet 2023 – Koulouba”, online: <<https://koulouba.ml/la-presidence/histoire-symboles/les-textes-fondateurs/constitution-version-actuelle/>>.

<sup>70</sup> Cabanis & Martin, *supra* note 47 at 21–22. I have changed some articles to suit recent constitutional amendments.

<sup>71</sup> Johan van Zyl Steyn, *Democracy through law: selected speeches and judgments*, The collected essays in law series (Aldershot, Hampshire ; Ashgate/Dartmouth, 2004) at 130.

### 2.1.2. The Principle of Democracy

The term “democracy” emerged as far back as the fifth century BC<sup>72</sup> in Rome and Athens of old<sup>73</sup> before it infiltrated the US, Britain, and France in its various forms. Etymologically, the word ‘Demos’ signifies ‘people’ while ‘Kratos’ means power. According to the British *Encyclopedia Britannica*, in 1771, Democracy referred to a system of government wherein *supreme power* was lodged in ‘the hands of the people’<sup>74</sup>. Without mistaking this for sovereignty discussed above, democracy, is precisely ‘a means of exercise of this power’. Hence, in the twentieth century Bobbio completed the aforementioned definition when he stated that “democracy is a system in which supreme power is exerted in the name of and on behalf of the people by virtue of the procedure of elections...”<sup>75</sup>.

Consequently, in France, from 1845 till 1945, elections were done by a suffrage. Plus, this suffrage was reserved for men, who were capable of exercising this function. For example, military men were excluded from voting, only civilians<sup>76</sup>. Apart from such direct suffrage, suffrage could also be indirect, wherein chambers of elected representatives are instituted. Here, even if the people are the base of power, its exercise is confided to their representatives. This nineteenth century phenomenon is termed “representative democracy” and “parliamentary sovereignty”<sup>77</sup>. By the twentieth century, the notion of direct democracy emerged to complement the notion of representative democracy. A typical expression of the former is by referendums<sup>78</sup>. In fact, in the US, around 1912, the idea of democracy was booming because Alexis de Tocqueville<sup>79</sup> had associated it to ‘social equality’. Moreover, after the Versailles

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<sup>72</sup> Adam Przeworski, “A Conceptual History of Political Regimes : Challenges to Democracy in the 21st century” in *New Authoritarianism: Challenges to Democracy in the 21st century*, 1st ed (Verlag Barbara Budrich, 2019) 17 at 3.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid* at 7.

<sup>76</sup> Philip et al, *supra* note 56 at 27.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> “Alexis de Tocqueville | French Historian, Political Writer & Social Critic | Britannica”, (8 February 2024), online: <<https://www.britannica.com/biography/Alexis-de-Tocqueville>>.

Peace Congress of 1918, President Woodrow Wilson instigated the allied states to favorably view democracy as “the consent of the governed”<sup>80</sup>. Congruently, in Britain, a twenty first century perspective of democracy, first, acknowledged the people’s investiture of power upon the Government by the principle of majority rule. Then seconded, by demanding an effective and fair means of achieving practical justice through law between individuals or between the state and individuals. Therefore, where tension develops between the views of the majority and individual rights, a decision must be made, and a balance struck<sup>81</sup>. Definitely, the majoritarian, direct<sup>82</sup> or indirect forms of democracy were copied to African constitutional law<sup>83</sup> and practice, but this was not without Northern political and economic influence.

From the 1990’s, when democracy began spreading throughout Africa under the influence of the US<sup>84</sup> and France<sup>85</sup>, till date, principally Africa’s economic crisis<sup>86</sup> following the Cold War<sup>87</sup>, the need for development assistance<sup>88</sup> as ‘Third world’ states, and the need for electoral funds<sup>89</sup> dictated the effulgence or regression of democracy in Africa. With these

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<sup>80</sup> Przeworski, *supra* note 72 at 5.

<sup>81</sup> Steyn, *supra* note 71 at 130.

<sup>82</sup> Francis Alan Roscoe Bennion, *The constitutional law of Ghana*, Butterworth’s African law series no. 5 (London: Butterworths, 1962) at 476. Section 1, para.2 of the 1 July 1960 Constitution of Ghana stated : “That, without distinction of sex, race, religion or political belief, every person who, being by law a citizen of Ghana, has attained the age of twenty-one years and is not disqualified by law on grounds of absence, infirmity of mind or criminality, shall be entitled to one vote, to be cast in freedom and secrecy”. This is known as a universal suffrage.

<sup>83</sup> Jacques Benjamin, *Les Camerounais occidentaux: la minorité dans un état bicommunautaire* (Montréal: Presses de l’Université de Montréal, 1972) at 217. Article 1, para.1 of the 1961 Cameroon Federal Constitution stated that: «*La République fédérale du Cameroun est démocratique, laïque et sociale...*».

Article 2, para.2: «*Le vote est égal et secret; y participent tous les citoyens âgés d’au moins vingt et un ans*»,

Article 2, para.3: «*Les autorités chargées de diriger l’État tiennent leurs pouvoirs du peuple par la voie d’élections au suffrage universel direct ou indirect*».

<sup>84</sup> Ulf Engel & Gorm Rye Olsen, *Africa and the North: Between Globalization and Marginalization* (Abingdon, Oxon, United States: Taylor & Francis Group, 2005) at 64.

<sup>85</sup> *Ibid* at 37–39.

<sup>86</sup> *Ibid* at 18. After the cold war, beyond the financial or material electoral aid received from the US and French administrations, the Soviet Union supported some African personalized regimes with military support to counter domestic political opposition. Hence, a combination of military dependence to economic dependence resulting from dramatic oil price increases in the later 1970’s, rapidly increased African states’ indebtedness.

<sup>87</sup> Tatah Mentan, “Toward Liberation from Western Democracy’s Cognitive Imperialism” in *Decolonizing Democracy from Western Cognitive Imperialism* (Langaa RPCIG, 2015) 157 at 220–222.

<sup>88</sup> Darin Christensen & David D Laitin, “Democratization and the ‘Third Wave’” in *African States since Independence Order, Development, and Democracy* (Yale University Press, 2019) 271 at 275. International actors like the United Nations Economic Commission for Africa also pushed for political liberalization on a basis of ‘conditionality’.

<sup>89</sup> Engel & Olsen, *supra* note 84 at 37.

incentives, autocracy<sup>90</sup> became prevalent particularly in French African states, in detriment to peaceful power transitions. Hence, I will provide some examples from both French and British African states, which depict that democracy prevails in most former British colonies than the French. In addition, these examples illustrate that the electoral power held and to be exercised by the people is instead circumscribed to the will of a person, or a group of people. Thus, perverting effective democracy emanating from the respect of rights and freedoms per the British twenty-first century perspective of democracy stated above.

For the former British colonies, South Africa's peaceful transition from the apartheid state to a free, multicultural country<sup>91</sup>, and Ghana's move from a dictatorial system to majority rule, had earned for both states a polity score of 9 and 8 respectively<sup>92</sup>. However, from this 2014 index to 2022, both states' score have dropped to 7.05 and 6.43 respectively, leading to the connotation of a "flawed democracy"<sup>93</sup>. Regardless of the stagnation<sup>94</sup>, and an eventual drop in democracy levels since 1992, these states still bear the mantle of propelling democracy in Africa. Without further ado, it is important to briefly state how democracy arrived at each state. In South Africa, "following Britain's victory over Dutch settlers in the Second Boer War, in 1909, the territory constituting today's South Africa (SA) became a dominion of the British Empire. By the Union Act of 1934, SA became a sovereign independent state ruled by 20 percent of citizens with European roots. In 1948, the National Party (NP) officially instituted apartheid which denied blacks basic political rights and segregated public services". This state

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<sup>90</sup> Christensen & Laitin, *supra* note 88 at 272. "In determining the democratic nature of a state, 'polity' is an annualized country score ranging from - 10 (a full autocracy) to + 10 (a full democracy). The halfway house between democracy and autocracy, in the range from - 5 to + 5 on the Polity scale, has been dubbed "anocracy". See, Darin Christensen & David D Laitin, "Lag in Democracy" in *African States since Independence*, *supra*, p.53.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at 281.

<sup>93</sup> "Democracy Index 2022", online: *Economist Intelligence Unit* <<https://www.eiu.com/n/campaigns/democracy-index-2022/>>.

<sup>94</sup> Franklin Oduro, Lisa-Marie Selvik & Kendra Dupuy, "Ghana: A Stagnated Democratic Trajectory" in Leonardo R Arriola, Lise Rakner & Nicolas van de Walle, eds, *Democratic Backsliding in Africa?: Autocratization, Resilience, and Contention* (Oxford University Press, 2022) 112 at 112.



of affairs persisted until 1989, when Nelson Mandela was freed and his party the African National Congress (ANC) recognized. Side by side the NP, general elections were first held in 1994 following three years of bilateral negotiations. Consequently, a transition to majority rule was peacefully instituted. This practice has remained ever since, as 2018 witnessed the ANC deposing President Jacob Zuma, and the parliament replacing him with another anti-apartheid hero, Cyril Ramaphosa<sup>95</sup>. Equally, these winds blew in Ghana, in 1981, when flight lieutenant Jerry Rawlings took over from Kwame Nkrumah's dictatorial regime. Rawlings founded the Provisional National Defense Council (PNDC), which held multiparty elections in 1992, and again in 1996, where he won in landslides. "Yet, after reaching his two-term limit, Rawlings bowed out". Then, two successive peaceful democratic turnovers were effectuated from which an example was set for the rest of Africa<sup>96</sup>.

Regarding former French colonies, the most striking examples of democratic moves are the case of Benin and Niger, where French administrations implicitly imposed ultimatums for democracy on these state's leaders; prior to providing financial aid. In the early 1990's sixteen African countries experienced unprecedented protest movements among which were Benin and Niger. For the former, President Mathieu Kérékou, could not mollify civil society leaders when he faced calls for a general strike. Moreover, 'with his political budget running dangerously low, the President was withheld life support by the French president François Mitterand until he promised political and economic liberalization'. Hence, Kérékou was forced to convene a ten-day national conference, which saw a constitutional suspension, multiparty elections and his replacement by Nicéphore Soglo. Like Kérékou, in Niger, the military government of General Ali Saïbou faced a rebellion just ten days before Benin's general conference. Again, once Saïbou's political budget ran out due to a near collapse in world uranium prices, the

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<sup>95</sup> Christensen & Laitin, *supra* note 88 at 273–274.

<sup>96</sup> *Ibid* at 281.

French president Mitterand refused to offer support without political reforms. Consequently, a general conference was equally held after which multiparty elections in 1993 brought Mahamane Ousmane to the presidency. Nevertheless, it is worth noting that in both cases, the presidential terms of both elects were short lived; for the former because he was a neophyte politician and for the latter because he got assassinated. Finally, from the 2022 democracy index, Benin has a polity score of 4.28, while Niger has a polity score of 3.73. They are termed a hybrid and an authoritarian regime respectively<sup>97</sup>.

Having discussed the advent of democracy in the Global North and its transmission to Africa in the post-independence era, we see that, in practice, the mimicry of the principle of democracy in African constitutional law was rather ‘circumstantial’ than voluntary. In fact, in some cases where the law instated this principle, we may witness its outright violation through ‘undemocratic’ constitutional amendments or coups<sup>98</sup>. Therefore, it is important to interrogate the place of the principle of legality (rule of law) in African constitutional law. What is its significance, origins, and African replica?

### 2.1.3. The Principle of Legality (Rule of Law)

The principle of legality signifies the supremacy of the law or the reign of law in each society.<sup>99</sup> Just like the people who exercise their supreme power in a state by choosing their representatives through elections, both the chosen representatives and the people are bound to respect the laws of the state. More precisely, the rule of law first implies that the fundamental rights and liberties of individuals and collectivities are protected by law (elections inclusive), then, public power ought to be exercised in conformity with the law; not arbitrarily<sup>100</sup>. In general, the primacy of law is a legal and political principle which presides the organization

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<sup>97</sup> note 93.

<sup>98</sup> Christensen & Laitin, *supra* note 88 at 286.

<sup>99</sup> André Tremblay, *Droit constitutionnel: principes*, 2e ed (Montréal: Éditions Thémis, 2000) at 97.

<sup>100</sup> *Ibid.*

and the management of relations in the state<sup>101</sup>. Besides, it is an accessory element of parliamentary sovereignty<sup>102</sup>.

Essentially, the principle of legality is an administrative law principle, conceived by the British author Dicey. In 1885, through his book entitled “*Introduction to the Study of the Law of the Constitution*”, Dicey defined the content of this principle in these terms: “- *une limitation au pouvoir arbitraire ou discrétionnaire du monarque et de ses mandataires ou officiers; - l'égalité de tous devant la loi, et la subordination de l'administration aux tribunaux ordinaires*”<sup>103</sup>. However, a more supple definition has been given this principle whereby immunities are legally bestowed on the government. Plus, the judicial control of administrative activity may be submitted to an independent organ. Above all, the actions and competences exercised by the government ought to be in conformity with the law and the constitution<sup>104</sup>.

In the twenty first century, this principle is clearly envisaged in various African constitutions. Notably: the Constitution of Mali (Section 23: “*Tout citoyen, toute personne habitant le territoire malien a le devoir de respecter, en toutes circonstances, la Constitution*”), the preamble of the Constitution of Ghana, and the Constitution of South Africa (Section 1: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: ... c) Supremacy of the constitution and rule of law”).

Indeed, from the dispositions above, it is clear that after the legislator has established rights and obligations for every citizen of a state, some limitations on the government are indispensable to ensure that these constitutional principles, and values of a free, just and plural<sup>105</sup> society are adhered to. Hence, a corollary to the rule of law is constitutionalism<sup>106</sup>.

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid* at 100.

<sup>104</sup> *Ibid* at 100–101.

<sup>105</sup> Simon-Pierre Zogo Nkada, “Le nouveau constitutionnalisme africain et la garantie des droits socioculturels des citoyens : cas du Cameroun et du Sénégal” (2012) 92:4 *Revue française de droit constitutionnel* 1–17, online: <<https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2012-4-page-1.htm>> at 1.

<sup>106</sup> Mathieu, Verpeaux & Chaltiel, *supra* note 55 at 202.

#### 2.1.4. The Principle of Constitutionalism

According to Johan Steyn, ‘constitutionalism’ is neither a rule nor a principle of law, rather it is political theory<sup>107</sup>. However, given that this late eighteenth-century phenomenon associated with the development of the modern state in North America, and France participates in the project of constructing a state of law<sup>108</sup>, it is important to see if it was effectively copied to African constitutional law.

First and foremost, ‘Constitutionalism’ in two words, refers to ‘limited government’<sup>109</sup>. “Under constitutionalism, two types of limitations impinge on government. Power is *proscribed* and procedures *prescribed*. That is, there are libertarian and procedural aspects of constitutionalism. On one hand, authority to take certain actions regarding the members of the community is withheld. As such, the state is forbidden to trespass in areas reserved for private activity. On the other hand, directives are set forth determining the way policy shall be formulated and implemented within the area of jurisdiction of the state. Hence, governmental institutions are established, and their functions, powers, and interrelationships are defined. If these arrangements are contravened, the government’s action is not legitimate”<sup>110</sup>. Correspondingly, Britain, the US, and France integrated these ideas into their respective constitutional frameworks.

In Great Britain, both aspects of constitutionalism were highly developed in British political consciousness through the 1215 Magna Carta and the question period in the House of Commons. Thus, the English people were continuously able to defend their rights as subjects while holding the government accountable. Procedurally, even though British constitutional law was not focused on documenting procedural changes, the mechanism of ‘consensus’

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<sup>107</sup> Steyn, *supra* note 71 at 141.

<sup>108</sup> Kayamba Tshitshi Ndouba & Isaac Bazié, *Le néoconstitutionnalisme africain: tendances et trajectoires*, Études africaines Série Droit (Paris: L’Harmattan, 2019) at 46.

<sup>109</sup> William George Andrews, *Constitutions and constitutionalism*, 2nd ed, Van Nostrand political science series (Princeton, N.J.: D. Van Nostrand Co., 1963) at 13.

<sup>110</sup> *Ibid.*

between the political elite and the electorate determined the respect of the line between royal (governmental power) and private rights<sup>111</sup>. The United States (US) followed suit but in a less libertarian way<sup>112</sup>.

Although the first ten amendments to the US constitution restrained the national government from interfering in areas reserved for private activity<sup>113</sup>, “the effectiveness of the maintenance of the line between governmental power and private rights varied significantly over time and geography, by social group and ethnic groups, and from one aspect of liberty to another. In times of stress, the area of private right was constricted”<sup>114</sup>. For instance, legislation like Jim Crow laws<sup>115</sup> restricted the private rights of certain groups of persons (precisely negroes) more than others<sup>116</sup>. Procedurally, until 1963, only five constitutional changes affected constitutional procedures directly. Yet, remarkably, these changes saw a move from a parliamentary to a presidential regime<sup>117</sup>, as well as the three organs of power acting *ultra vires*<sup>118</sup>. Nonetheless, the libertarian and procedural limitations of the government in France were most problematic.

In France, since the 1789 revolution, the constituent developed a very keen sensitivity to the proscription of governmental power. Yet, the two Napoleonic empires and especially the Vichy interlude of the World War II attested conspicuous violations of these proscriptions by the concentration of effective authority in the hands of General Charles de Gaulle<sup>119</sup>. For instance, Article 16 of the 1958 French Constitution regulating the President’s exercise of “emergency powers”, entrusts virtually unlimited power over the fundamental liberties of

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<sup>111</sup> *Ibid* at 29–30.

<sup>112</sup> *Ibid* at 29.

<sup>113</sup> *Ibid* at 13.

<sup>114</sup> *Ibid* at 28.

<sup>115</sup> “Jim Crow Laws: Definition, Facts & Timeline”, (22 January 2024), online: *HISTORY* <<https://www.history.com/topics/early-20th-century-us/jim-crow-laws>>.

<sup>116</sup> Andrews, *supra* note 109 at 28.

<sup>117</sup> *Ibid* at 27. Following Hamilton’s effort to establish himself as President Washington’s “prime minister” (1789-1795).

<sup>118</sup> *Ibid* at 28.

<sup>119</sup> *Ibid* at 67–68.

Frenchmen to the President of the Republic. In fact, when de Gaulle faced the Algerian rightist resistance (1954-1962), he exceeded the powers enshrined in Article 16<sup>120</sup>. Further, on the procedural level, French constitutional law depicts a failure because even though France has experimented several constitutional systems since 1789, no constitution has prescribed procedural norms (Fifth Republic constitution inclusive). Rather, it refers to future “organic laws” in procedural matters<sup>121</sup>.

Unfortunately, these aspects of non-proscription of limits to the power of the President, and the absence of procedural laws; by referring to “organic laws” particularly in matters of criminal responsibility of the said authority, are glaring in the 1996 Cameroon constitution<sup>122</sup>. In contrast, the South African constitution<sup>123</sup> outrightly spells out these limits. Therefore, it may be said that these states mimicked their colonial constitutional order (French and British respectively).

To conclude, we have seen that constitutionalism is the profession of faith in liberal ideologies, based on “the belief in law as the promoter of universal legitimate order, and the constitution as a limit to arbitrary power”<sup>124</sup>. Consequently, if the constitution is breached by an individual or an authority through the violation of fundamental rights and liberties or procedural norms, it is indispensable that the judge serves as a legal “watchdog”. Hence, the vitality of the principle of constitutional justice in every legal system.

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<sup>120</sup> *Ibid* at 68.

<sup>121</sup> *Ibid*.

<sup>122</sup> “Law No. 96/6 of 18 January 1996 to amend the Constitution of 2 June 1972.”, online: <<https://www.prc.cm/en/cameroon/constitution>>. See Article 9, para.2 of the Cameroon constitution, and Article 53, para.4 of the Cameroon Constitution. Concerning the unlimited emergency powers of the President and the absence of legal procedures to engage his responsibility before the Court of impeachment.

<sup>123</sup> “The Constitution of the Republic of South Africa | South African Government”, online: <<https://www.gov.za/documents/constitution/constitution-republic-south-africa-04-feb-1997>>. In contrast, the South African Constitution clearly disposes in Section 7, para.3 that “The rights in the Bill of Rights are subject to the limitations contained . . . in Section 36, or elsewhere in the Bill”. Section 8, para 1 adds that “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state”. Noteworthy, that this bill is what enshrines the rights of all people in South Africa. Therefore, a free, dignified and equal exercise is obligatory.

<sup>124</sup> Tshitshi Ndouba & Bazié, *supra* note 108 at 46.

## 2.2. Constitutional Justice in Africa as a Mimicry of the Global North's Legal Order

Constitutional justice is a product of the rule of law, which bids the legislator's obligation to ensure the respect of the constitution in law making as well as the judge's sanctions for unconstitutionality<sup>125</sup>. In 1795, during the French revolution, a French political theorist called Sieyes founded the idea of control of constitutionality of laws. Eventually, two models of control emerged in the Global North which today traverse Africa: The American and the French model. These models differ depending on the timing when authorities are seized for violation of constitutional law. That is, either before the law's adoption or after. Moreover, most African states assign this power of seizure to their authorities. Accessorily, others include individuals; as will be seen in the 2019 Togo constitution, and the 1990 Benin constitution below.

Specifically, the United States' model emerged at the end of the eighteenth century and nested the eminent 1803 *Madison v. Marbury* case. Here, the judges at the Supreme Court of the USA installed the control of constitutionality *a posteriori*; during an ongoing proceeding<sup>126</sup>. Meanwhile the French model established a mechanism of control of constitutionality *a priori*. That is, before the law is adopted in parliament or before an international treaty is ratified. This innovation constituted an institutional reform of the Fifth Republic (1958)<sup>127</sup>. The “*Conseil Constitutionnel*” (CC) of France is the organ which hears matters of unconstitutionality. Moreover, according to Article 61 of the 1958 French Constitution, the Houses of Parliament, the President of the Republic, the Prime Minister, the President of the National Assembly or of the Senate, sixty members of the National Assembly

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<sup>125</sup> Claude Kayembe-Mbaya & Etienne Tshisekedi wa Mulumba, *Verrous et contrôles constitutionnels en Afrique: pour des mécanismes efficaces*, Études africaines Série Droit, 2425-5548 (Paris: l'Harmattan., 2018) at 74.

<sup>126</sup> *Ibid* at 77.

<sup>127</sup> *Ibid* at 82.

or sixty Senators can refer matters to the Constitutional council<sup>128</sup>. Definitely, some French African states have copied the French model of control of constitutionality, and some have gone as far as adopting the title of “*Conseil Constitutionnel*” for their constitutional court as well as the wordings of Article 61. Nevertheless, African constitutions are becoming more liberal with ‘who’ and ‘when’ the court can be seized.

Today, both the *a priori* and the *a posteriori* model of control of constitutionality are found in African constitutions. For the former, Section 47 of the 1996 Cameroon constitution designates the right to seize the *Conseil constitutionnel* to the President of the Republic, the President of the National Assembly, the President of the Senate, and one-third of the members of the National Assembly or one-third of the Senators. Meanwhile, in Togo<sup>129</sup>, both models are used. First, Section 104, para.4 of its 2019 revised Constitution envisages an *a priori* control of constitutionality, when the constitutional court is seized by the President of the Republic, the Prime Minister, the Presidents of the National Assembly or of the Senate, the President of the Higher Council of audiovisuals and communication, the President of the Economic and Social Council, the President of the National Commission of Human Rights, the President of the Higher Council of Magistrates, the mediator of the Republic, or one-fifth of the members of the National Assembly. Second, Section 104, para.8, adds that during a legal proceeding, all physical or moral persons can raise an exception of unconstitutionality of the law. Thus, suspending the court’s judgement until the law is revised. This highlights the effect of a control of constitutionality *a posteriori* to legal proceedings. For the latter (*a posteriori* control), the 1990 Benin Constitution<sup>130</sup> clearly outlines in Section 3, that “Any law, any statutory text and any administrative act contrary to these provisions shall be null and void. Consequently, any

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<sup>128</sup> note 68.

<sup>129</sup> “The Constitution of the IVth Republic (as amended up to the Law No. 2019-003 of May 15, 2019), Togo, WIPO Lex”, online: <<https://www.wipo.int/wipolex/en/legislation/details/21139>>. This disposition was revised in 2019.

<sup>130</sup> “Constitution of the Republic of Benin, Benin, WIPO Lex”, online: <<https://www.wipo.int/wipolex/en/legislation/details/7569>>.



citizen shall have the right to appeal to the Constitutional Court against the laws, texts, and acts presumed unconstitutional". Hence, this appeal intervenes after the law has been promulgated by the parliament.

In conclusion, in the process of control of constitutionality, we just saw the contribution of state organs (the legislative, executive and judiciary arms) to ensuring the conformity of legislative acts and court rulings to the fundamental rights and liberties of citizens<sup>131</sup>.

Overall, throughout section 2 above, several constitutional principles originating from the Global North were analyzed. As a result of colonization, and neo-colonization these principles have been absorbed into the African constitutional framework. As seen above, I argued that Africa has developed economically and socio-politically because of its exposure to these Northern principles and values. Thus, they constitute a source of pride to African states. Nevertheless, some harm has been braved internationally as a result of the juxtaposition of African legal systems.

### **3. The Mimicry of the Global North's Legal Order by African Constitutions: a Source of Prejudice at the International Level**

"Pray, my dear aunt, what is the difference in matrimonial affairs, between the mercenary and the prudent motive? Where does discretion end, and avarice begin?" (Austen, 1950, p.128)

In Miss. Elizabeth Bennet's words to Mrs. Gardiner (her aunt), Elizabeth wonders whether the choice of a spouse for their good qualities or for one's financial aggrandizement makes a difference. Similarly, African states will not be spared this posture because none of their choices of French, British, Italian, Portuguese, Belgian or Poland governance result from their

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<sup>131</sup> Zogo Nkada, "Le nouveau constitutionnalisme africain et la garantie des droits socioculturels des citoyens", *supra* note 105 at 10.

will. On the contrary, beyond their discretion, what seemed to be trade relations<sup>132</sup> with foreign powers would become a union based on the mercenary motives of the Anglo-European powers. After independence, the United Nations Constitutional Assistance (UNCA)<sup>133</sup> mission will continue intruding African constitutional law to ensure that the colonial narratives are not discontinued. What best explains this continuous interference and what could the exclusion of African states from crucial decision-making powers in the international order mean? Is it not a prejudice?

### **3.1. The United Nation's (UN) Continuous Interference in African Constitutional Law: a Symbol of Frivolous Sovereignities in Africa**

In the 1960's (independence era), the UN implicitly interfered in African constitutional law through the Northern colonial masters<sup>134</sup>, but since 1989-2019 it has been explicitly intervening as an institution.

First, for the former, France in particular used its constitutionalists to draft African constitutions which mimicked the substantial and institutional framework of the Fifth Republic constitution<sup>135</sup>. As we saw above, the principles in the 1958 French constitution are well engraved in French African constitutional law and practice. Second, for the latter, the UN through the UNCA has faithfully contributed in drafting and revising the constitutions of 'forty poor, sovereign states'<sup>136</sup>. Among which are the Constitutions of Côte d'Ivoire, Central African Republic, Libya, Guinea, Kenya, Mali, Tunisia, and Zimbabwe<sup>137</sup>. In fact, according to

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<sup>132</sup> Shanguhya & Falola, *supra* note 19 at 82.

<sup>133</sup> Vijayashri Sripati, "United Nations Constitutional Assistance: A Mechanism to Implement International Law and Policy" in Vijayashri Sripati, ed, *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands* (Oxford University Press, 2020) 371.

<sup>134</sup> Engel & Olsen, *supra* note 84 at 39.

<sup>135</sup> *Ibid* at 37.

<sup>136</sup> Vijayashri Sripati, "United Nations Constitutional Assistance: A Significant but Uncharted Field" in Vijayashri Sripati, ed, *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands* (Oxford University Press, 2020) 3 at 5.

<sup>137</sup> *Ibid*.

Vijayashri Sripati, this UN act of internationalizing constitution making in sovereign states, is aimed at producing in each state the Western (Northern) liberal constitution. Moreover, congruent to our analysis above, the UN's constitution making seeks to follow the eighteenth century international 'standard of civilization', as well as to promote four (market-oriented) civilized standards, namely the rule of law, free markets, good governance, and civilized social practices. Finally, the UN's constitution making seeks to maintain the Western (Northern) liberal constitution as the state's 'supreme law' which enshrines the legislature, executive, and judiciary while providing the basis for territorial administration (that is, law-making)<sup>138</sup>.

Having attested the frivolous nature of these African states' sovereignties by the continuous interference of the UN, after independence, it is plausible to ask that: do these states witness the same socio-political, cultural and economic reality nationally? If not, is this 'one size fits all' solution not harmful to the original "patriarchal" nature of African societies? Thirdly, does this internationalized system not disrupt the original civilization standards which existed in Africa prior to colonization? Lastly, if these states are truly sovereign, and independent, why are they not able to exercise their territorial and normative 'competence of competences' to enact their own laws, especially their fundamental law (the constitution)? An attempt to respond to some of these questions will be seen below in the proposed changes (section 4). Besides, apart from the UN's continuous interference in African constitutional law, these states are excluded from vital decision-making power in the international community.

### **3.2. The Exclusion of African States from Crucial Decision-Making Powers in the International Order**

"And if not able to please himself in the arrangement, he has at least great pleasure in the power of choice. I do not know anybody who seems more to enjoy the power of doing what he likes than Mr. Darcy. He likes to have his own way very well...But so we all do.

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<sup>138</sup> *Ibid.*

It is only that he has better means of having it than many others, because he is rich, and many others are poor...” (Austen, 1950, p.151)

As Colonel Fitzwilliam attests, the power of choice held by Mr. Darcy in “Pride and Prejudice” is presently enshrined “in the votes of the *nine* members of the Security Council, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute may abstain to vote” (Article 27, Charter of the United Nations)<sup>139</sup>. Further, in Chapter VII, Article 42, “the Security Council ...may take action by air, sea, or land forces as may be necessary to maintain or restore international peace and security...”<sup>140</sup>.

Yet, as important as these dispositions are in the international order, no African country is a permanent member of the UN’s security council. In addition, presently, most instances of political instability on the globe tend to be in Africa<sup>141</sup>. Still, the roots of such disputes seem to be ‘colonial’ quests to exploit natural resources<sup>142</sup>. Besides, with globalization, there are ‘emerging middle powers’ like South Africa (SA)<sup>143</sup> to whom grounds could be given to recognize her contribution to the International legal order. Remarkably, this state has not only shown resilience in the face of adversity (apartheid), but it has effectively integrated Northern principles, while considering core African cultural values like “Ubuntu”<sup>144</sup> in its Constitutional law. In fact, SA recently contributed to restoring international peace and security by seizing the ICJ against Israel, over its armed attack on Gaza<sup>145</sup>.

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<sup>139</sup> Ian Shapiro & Joseph Lampert, *Charter of the United Nations: together with scholarly commentaries and essential historical documents*, Basic documents in world politics (New Haven: Yale University Press, 2014) at 23.

<sup>140</sup> *Ibid* at 26.

<sup>141</sup> Sripati, *supra* note 136 at 6.

<sup>142</sup> Sripati, *supra* note 133 at 380.

<sup>143</sup> Pier Giuseppe Monateri, *Advanced introduction to comparative legal methods*, Elgar advanced introductions (Cheltenham, UK ; Edward Elgar Publishing, 2021) at 20.

<sup>144</sup> Gedion Timothewos Hessebon, *Contextualizing constitutionalism: multiparty democracy in the African political matrix* (The Hague: Eleven international publishing., 2017) at 27. Literally, Ubuntu means ‘I am what I am because of who we all are’.

<sup>145</sup> “South Africa’s genocide case against Israel: The International Court of Justice explained | Chatham House – International Affairs Think Tank”, (26 January 2024), online: <<https://www.chathamhouse.org/2024/01/south-africas-genocide-case-against-israel-international-court-justice-explained>>.

In detail, South Africa (SA) successfully achieved economic and socio-political stability after the apartheid, despite heavy diplomatic and commercial sanctions incurred from the delegation of Afro-Asian states<sup>146</sup>, the Organization of African Unity (1963)<sup>147</sup>, and the specialized institutions of the UN (1965)<sup>148</sup>. Moreover, as seen above under democracy (*supra*, p.13-14), the rule of law (*supra*, p.16), and constitutionalism (*supra*, p.18), SA admirably promotes Northern constitutional principles. In fact, despite the wealth inequalities plaguing the SA society as a sequel of the apartheid, generally, SA's economic viability and its socio-political stability<sup>149</sup>, permits it to define independently its Constitutional norms and to adopt an intermestic framework<sup>150</sup>. It is on these grounds that I will propose changes which seek to make other African states free, equal and self-empowered like South Africa.

#### 4. Proposed Changes

Based on the argument posed by this paper, that 'the mimicry of the Global North's legal order by African constitutions is both a source of pride and prejudice to African states in the 21<sup>st</sup> century', we have seen how pride was derived nationally by imitating these Northern principles, as well as how prejudices were borne internationally. Now, I will propose substantive and institutional changes geared at reducing the constitutional acculturation in Africa, consolidating the sovereign nature of African states, and heightening the chances of effective democracy in African constitutional practice.

Substantially, the first proposition is to contextualize constitutional law in Africa, and to autonomize the constitution making process, so that fundamental norms reflect the social needs

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<sup>146</sup> Charles Cadoux, *L'Afrique du sud*, Comment ils sont gouvernés 14 (Paris: Librairie Generale de Droit et de Jurisprudence, 1966) at 307–309.

<sup>147</sup> *Ibid* at 310.

<sup>148</sup> *Ibid* at 303.

<sup>149</sup> "South Africa", online: *World Bank* <<https://www.worldbank.org/en/country/southafrica>>.

<sup>150</sup> Kevin L Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation* (Rochester, NY, 2012).

of their societies, while permitting regional organizations (AU) rather than the UN partake in constitution making.

On one hand, according to Gedion Timothewos Hessebon's "*Contextualizing Constitutionalism – Multiparty Democracy in the African Political Matrix*", the author acknowledges that the liberal democratic imperative, which is established normatively in African constitutions, is not practically feasible<sup>151</sup>. He accounts this to the ethnic identity, poverty, and the legacy of brutal atrocities that plagues the African political matrix<sup>152</sup>. Further, he states that there has been a consensus for contextualization to be done. Yet, various views have emerged on 'how' such an adaptation is to be done. Some authors demand that cultural values be infused to African constitutionalism; others request that it should be adapted such that it protects Africans from the effects of neoliberal economic policies and the institutions that promote such policies. Still, others have argued that the contextualization of constitutionalism in Africa be focused on how the excessive hegemony of the executive branch of government could be undone; and lastly, there are those who hold that constitutionalism in Africa should be tailored to neutralize antagonistic ethnic relations and manage peaceful ethnic diversity<sup>153</sup>. In my opinion, all these schools of thought are right; but they will apply differently given the socio-economic and political reality of each African state<sup>154</sup>. Therefore, it would be inaccurate to say that a unique African constitutional model is possible<sup>155</sup>. To add, apart from *Ubuntu* in South Africa<sup>156</sup>, other African cultures and values have been integrated to African

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<sup>151</sup> Hessebon, *supra* note 144 at 44.

<sup>152</sup> *Ibid* at 45.

<sup>153</sup> *Ibid*.

<sup>154</sup> *Ibid* at 188. Hessebon defines 'contextualization of constitutionalism' as a process of ensuring the compatibility of a constitution with the political circumstances of a country so that the constitution can optimize the survival and consolidation of constitutional democracy. Hence, this opinion induces from this definition.

<sup>155</sup> *Ibid* at 181.

<sup>156</sup> *Ibid* at 31.

constitutional law precisely for dispute settlement, like the *Gacaca*. Which involves a broad-based consultation toward building consensus in Rwanda<sup>157</sup>.

On the other hand, the African Union (AU) can intervene to autonomize African constitutional law by ensuring the peace and political stability of its member states<sup>158</sup>, by adopting legal instruments which oblige member states to respect the constitution<sup>159</sup>, and most importantly, by providing technical assistance to African states in the constitution making process. Here, I will dwell on the second and the third. According to Micha Wiebusch, the concept of “thick constitutionalism” is raised to refer to the establishment of ‘supra-constitutional’ values to assess and ascertain any illegitimate constitution maneuvering. More precisely, before the AU intervenes with technical assistance (on ground), formally, the AU’s normative regime first pushes for a formal commitment to constitutionalism. In this respect, the Lomé Declaration, which states that all AU member states should adopt, respect, and adhere to constitutions, alongside the ACDEG, prescribe common values and principles for democratic governance<sup>160</sup>. Nevertheless, these normative instruments may be deemed limited since they cannot override the sovereign power vested in some state officials. Consequently, on a more personal basis, I will propose the institutional adoption of monarchial systems of government in Africa.

Institutionally, adopting monarchial systems of government in Africa should be encouraged, because this system can co-exist with liberal democracy, and it will remain cognizant of the patriarchal nature of African governance. From the indices provided above on democratic practice in French African states, it is more or less clear that liberal democracy is

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<sup>157</sup> *Ibid* at 27.

<sup>158</sup> Micha Wiebusch, “Africanization of constitutional law” in *Comparative Constitutional Law in Africa* (Edward Elgar Publishing, 2022) 361 at 364–365, 366. The AU has established the African Peace and Security Architecture (APSA), characterized by a proliferation of AU security mechanisms with the Peace and Security Council (PSC).

<sup>159</sup> *Ibid* at 366. Normatively, the AU has adopted the African Charter on Democracy and Governance (ACDEG), and an amended protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

<sup>160</sup> *Ibid* at 388.

an anathema to political leaders. Therefore, like Canada<sup>161</sup>, Belgium<sup>162</sup>, and Morocco<sup>163</sup>, a constitutional monarchy can be enshrined in African constitutions. The reason for this perspective is that first, the powers, immunities, and the privileges of the President in Cameroon (Sections 6, 8, 9, 10, and 53) and in Congo Brazzaville<sup>164</sup> (Sections 67, 76, 77, 78, 79, 83, and 84) equates them to a King. However, the 1992 Congo constitution is more democratic because it previews procedures and institutions to which the president is held accountable regarding the exercise of his functions (Section 127).

## 5. Conclusion

In this paper, I argued that a visible mimicry of Global North principles exists in African Constitutions since the imposition of British, French, and American norms to African states at independence, and following the Cold War. However, the findings also showed that this narrative of mimicry continues till date. In addition, it could be attested that Anglophone countries in Africa generally expressed affinity for British and American principles while Francophone countries swayed in favour of French constitutional principles.

More precisely, primarily through the Critical Legal Theory, a law and literature approach, and TWAIL, this paper mobilized the novel ‘Pride and Prejudice’ to demonstrate the relationship between eighteenth century Global North principles and twenty-first century African constitutional law principles. Notably, the principle of sovereignty and its corollaries; constitutionalism, rule of law, and democracy. To add, this paper illustrated that at a national level, the assimilation of these principles into African legal systems served as a favorable

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<sup>161</sup> Tremblay, *supra* note 99 at 53–61.

<sup>162</sup> Francis Delpérée, *Le droit constitutionnel de la Belgique* (Bruxelles: Bruylant, 2000) at 515–517.

<sup>163</sup> “Morocco | History, Map, Flag, Capital, People, & Facts | Britannica”, (3 March 2024), online: <<https://www.britannica.com/place/Morocco>>.

<sup>164</sup> Congo (Brazzaville), ed, *Constitution de la République du Congo: examinée par le Conseil Supérieur de la République le 20 décembre 1991 et soumise au référendum du 15 mars 1992*, HeinOnline world constitutions illustrated (Law library catalog: University of California, Berkeley, 1992).



foundation for the socio-economic and political development of African states, thus a source of African pride. Meanwhile, at the international level, this paper conveyed that though these principles propel the African continent in international relations, African states endure a posture of subordination by the continuous interference of the United Nations Constitutional Assistance (UNCA) in constitution making processes. Likewise, the non-attribution of veto powers to African states in the international community excludes them from influencing decision-making processes in Peace and Security matters. Hence, these impede the effective and equal recognition of the sovereignty of African states in the international community.

Consequently, this paper proposed the admission of South Africa to the circle of permanent members of the United Nations Security Council so that it may represent Africa, and lead constitution making processes in Africa. Equally, this paper proposed the contextualization of African constitutionalism as well as the move to regional institutions (the AU) in constitution making, instead of the UN. Finally, this paper expressed the need to adopt monarchial systems of government in Africa, as a mechanism of enhancing democracy. At the end of this paper, an impending question may be raised: today, what makes African constitutional law unique?