




Rolling the Boulder Uphill: The African Union, Constitutional Amendments, and the Struggle for Democracy and Rule of Law

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Abstract

Constitutional amendments in Africa often challenge the principles of constitutionalism, democracy, good governance, and the rule of law. While constitutions are designed to be stable and reflect a nation's enduring values, amendments frequently focus on extending presidential terms, weakening the separation of powers, and undermining judicial independence. Domestic mechanisms to safeguard against such changes are often insufficient, with constitutional provisions and referenda susceptible to manipulation. This paper examines the African Union (AU) and Regional Economic Communities (RECs) in addressing these challenges. Both institutions claim a commitment to upholding constitutionalism and democracy, yet their normative frameworks inadequately address the risks of constitutional amendments. Despite the AU's pronounced opposition to unconstitutional government changes, its response to constitutional amendments that erode governance principles has been inconsistent and undermined by uncertainties regarding subsidiarity with RECs. The paper argues that these shortcomings render the AU's efforts akin to a Sisyphean struggle, where progress toward promoting the rule of law and democracy is undone by its inaction on amendments that subvert these values. The AU and RECs must adopt a more coordinated and decisive approach to constitutional changes to prevent further erosion of constitutionalism in Africa.

Keywords: African Union, Constitutional Amendments; Democracy; Good Governance; Rule of Law.



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Introduction

Constitutions reflect the soul of a country. They serve as a mirror through which a country views itself.¹ Recorded in constitutions are people's collective memories, values and hopes, as well as their fears and scars.² They are the *grundnorm* (basic norm) of any given country.³ However, constitutions may appear to inhere a paradox. On the one hand, constitutions are generally drafted to be stable and enjoy relative certainty and longevity.⁴ On the other hand, constitutions must also be dynamic and capable of changing to meet society's evolving standards.⁵ Constitutions are generally bound to be amended over time to reflect the hopes and aspirations of the country at that given time.⁶ While constitutions are of paramount importance, they are not 'too sacred to be touched'.⁷ Aguda JA recognised that a constitution is not a 'lifeless museum piece'.⁸ To treat constitutions as unchangeable documents would lead to undesirable circumstances where the current and future generations are governed by the dead hands of their past ancestors without the power to change them.⁹ Thus, the apparent paradox rests on the commitment and dedication to upholding specific values while simultaneously making provisions for change.¹⁰ This is the nature of constitutionalism.¹¹

¹ Hatchard J, 'Some Lessons on Constitution-making from Zimbabwe' 45(1) *Journal of African Law*, 2001, 210 Selassie BH, 'Framing the State in Times of Transition: Focus on Five Core Values' 28(1) *Journal of Third World Studies*, 2011, 18, and Ebrahim H, *The Soul of a Nation*, Oxford University Press, Oxford, 1998.

² Fombad C, 'Some perspectives on durability and change under modern African constitutions' 11(2) *International Journal of Constitutional Law*, 2013, 385.

³ Thilakaranthna KAA and Madhushan GPD, 'Revolutionary forces and the Grundnorm: A Critical Review of the Legality and the Recognition of New Constitutional Order' (2)(3) *International Journal of Social, Policy and Law*, 2021, 102 and 104-105.

⁴ Elkins Z, Ginsburg T and Melton J, *The Endurance of National Constitutions*, Cambridge University Press, Cambridge, 2009, 12-35.

⁵ Noss J, 'It's the Procedure, Stupid!': Amendment Procedures and Their Effects on Constitutional Stability' Unpublished BA Thesis, Claremont Colleges, Claremont, 2020, 3 and Hatchard J, "'Perfecting Imperfections": Developing Procedures for Amending in Commonwealth Africa' 36(3) *Journal of Modern African Studies*, 1998, 383-384.

⁶ Chang W, Thio L, Tan KYL and Yeh J, 'Constitutional Change and Amendments' in *Constitutionalism in Asia: Cases and Materials*, Hart Publishing, Oxford, 2014, 219.

⁷ Elkins *et al*, *The Endurance of National Constitutions*, 1.

⁸ *Attorney-General v Dow* (1992), High Court of Botswana, 166.

⁹ McConnell MW, 'Textualism and the Dead Hand of the Past' 66 *George Washington Law Review*, 1998, 1127-1128.

¹⁰ Some literature refers to constitutional revisions and constitutional amendments, with the former referring to major changes and the latter to minor changes. In this paper, I deploy the

Regulating and constraining constitutional amendments and changes¹² is vital for the welfare of a country.¹³ There are two forms of constitutional change: formal and informal.¹⁴ A formal amendment refers to a process where the text and wording of a provision are explicitly amended through a constitutionally prescribed manner.¹⁵ An example of a formal constitutional change is the seventeenth constitutional amendment of the South African Constitution. This amendment expanded the jurisdiction of the Constitutional Court to adjudicate any other matters outside of constitutional issues on the ground that the matter raises an arguable point of law of general public importance.¹⁶ Another example is the constitutional amendment in Comoros, following a referendum where 92.74 per cent of Comorians voted yes to constitutional changes.¹⁷ This constitutional

word amendments to refer to both major and minor changes. See Lutz DS, 'Toward a Theory of Constitutional Amendment' 88(2) *American Political Science Review*, 1994, 356 and Willoughby WF, *An Introduction to the Study of the Government of Modern States*, The Century Co., New York, 1921, 128.

¹¹ Chang *et al*, 'Constitutional Change and Amendments' 220.

¹² Constitutional amendments may possibly bear two meanings. It may refer to changes that are constitutional, in that they adhere to the fundamental law of a country. In other words, the amendments are made in manner that are compliant with the constitution. The second possible meaning refers to changes to the constitution itself – either through the text, language or meaning of particular provision. I embrace both these meanings and consolidate them into this: by constitutional changes, I am specifically referring to changes that pertain to the constitution itself, which are procedurally correct and lawful.

¹³ Rasch BE and Congleton RD, 'Amendment Procedures and Constitutional Stability' in Roger D. Congleton RD and Swedenborg B (eds) *Democratic Constitutional Design and Public Policy*, Massachusetts University Press, Massachusetts, 2006, 537.

¹⁴ Ginsburg T and Melton J, 'Does the Constitutional Amendment Rule Matter at all? Amendment cultures and the challenges of measuring amendment difficulty' 13(3) *International Journal of Constitutional Law*, 2015, 686, 688. See also Bernal C, 'Informal Constitutional Change: A Critical Introduction and Appraisal' 62(3) *American Journal of Comparative Law*, 2014, 493.

¹⁵ Whicker ML, Strickland RA and Moore RA, 'The Constitution Under Pressure: The Amendment Process' 15(1) *Journal of Political Science*, 1987, 60 and Sellers MNS, 'Formal and Informal Constitutional Amendment' *General Reports of the XXth General Congress of the International Academy of Comparative Law*, 2020, 493-495.

¹⁶ Section 167(3)(b)(ii), *Constitution of South Africa* (1996). See *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* (2015), Constitutional Court of South Africa, paras. 13-15.

¹⁷ The Editors, 'Why Comoros' Constitutional Referendum Could Herald a New Era of Instability' *World Politics Review*, 12 September 2018 – <<https://www.worldpoliticsreview.com/trend-lines/25874/why-comoros-constitutional-referendum-could-herald-a-new-era-of-instability>> on 7 May 2022 and Reuters Staff, 'Comoros to hold referendum on presidential term limits on July 30' *Reuters*, 30 April 2018 – <<https://www.reuters.com/article/us-comoros-referendum-idUSKBN1I11FQ>> on 7 May 2022.

amendment related to, *inter alia*, extending the presidential terms from a single five-year term to two five-year terms.¹⁸

An informal amendment is an amendment that alters the meaning of the constitution without altering the text of the constitution.¹⁹ Such amendments can occur in various ways, such as through judicial interpretation of a constitutional provision.²⁰ This is where a court interprets a provision in such a manner that it differs from the express text of the provision.²¹ *New Nation Movement NPC v President of the Republic of South Africa* is a possible example of this. In that decision, the South African Constitutional Court held that the South African Constitution prescribed that individuals be permitted to contend in elections as independent candidates without being members of a political party.²² This was even though the Constitution does not explicitly provide for the right of individuals to run for political office as independent candidates.²³

Constitutional amendments, formal or informal, affect good governance, constitutionalism, and respect for the rule of law. If such amendments are adequately catered for, they can uphold the rule of law, constitutionalism, and good governance. Alternatively, by providing sufficient mechanisms and normative frameworks for dealing with constitutional amendments, the rule of law, constitutionalism and good governance will undoubtedly flourish. Such mechanisms would confront and stifle any abuses of constitutional changes contrary to these principles.²⁴

¹⁸ Article 52, *Constitution of Comoros* (2018).

¹⁹ Albert R, 'How unwritten constitutional norms change written constitutions' 43(2) *Dublin University Law Journal*, 2015, 388-389.

²⁰ This should be distinguished from interpreting an express provision of the constitution and giving content to it. See Macfarlane E, 'Judicial Amendment of the Constitution' 19(5) *International Journal of Constitutional Law*, 2021, 1894.

²¹ Macfarlane E, 'Judicial Amendment of the Constitution', 1895.

²² *New Nation Movement NPC v President of the Republic of South Africa* (2020), Constitutional Court of South Africa. For a broader discussion on this case, see Pretorius JL, 'Independent Candidacy and Electoral Reform: *New Nation Movement NPC v President of the Republic of South Africa*' 25(1) *Potchefstroom Electronic Law Journal*, 2022, 1-34.

²³ Section 19, *Constitution of South Africa* (1996).

²⁴ This argument has broadly been raised in: Gardos-Orosz F, 'Why Does a Constitutional Change Emerge and Who Has a Say in It? Constitution Making, Constitutional Amendment and their Constitutional Review in Hungary between 2010 and 2018' in Belov M and Ninet AA (eds) *Revolution, Transition, Memory and Oblivion*, Edward Elgar, Cheltenham, 2020, 183-187; Chambers S, 'Democracy and Constitutional Reform: Deliberative Versus Populist Constitutionalism' 45(9-10) *Philosophy and Social Criticism*, 2019, 1116; Wachira GM, 'The

In Africa, for example, there is an increasing practice of constitutional amendments by those in power to consolidate their power by extending the presidential term by adding further terms of office or expanding the years in which an incumbent can hold office and by weakening the principle of separation of powers, for instance, through the centralisation of power and giving the president unbridled power to appoint judges and also permitting the president to renew the terms of office of judges.²⁵ Wiebusch and Murray note that several African states have amended their constitutions, changing presidential terms. In a study they conducted, they note that from April 2000 to July 2018, presidential terms were amended 47 times in 28 countries.²⁶ Fombad also notes that constitutional changes in Africa are frequent and radical.²⁷ Indeed, it has been argued that Africa has become a continent of constitutional coups.²⁸ This refers to the process where the executive consolidates their power through constitutional amendments rather than warfare or military coups.²⁹ While several examples will be analysed throughout this paper, consider the case of Uganda: President Yoweri Museveni, through his ruling party, adopted constitutional amendments that removed age limits on the office, withdrawing the age limit of 75 years for presidential candidates and restrictions on the presidential term of office.³⁰

Role of the African Union in Strengthening the Rule of Law and Constitutional Order in Africa' in Cordenillo R and Sample K (eds), *Rule of Law and Constitution Building: The Role of Regional Organizations* International IDEA, Strömsborg, 2014 <<https://www.idea.int/sites/default/files/publications/rule-of-law-and-constitution-building.pdf>> on 20 March 2023, 9-24; and Roznai Y, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* Published PhD Thesis, London School of Economics, London, 2014, 193-194.

²⁵ See Wiebusch M and Murray C, 'Presidential Term Limits and the African Union' 63 *Journal of African Law*, 2019, 131 and Fombad C and Inegbedion NA, 'Presidential term limits and their impact on constitutionalism in Africa' in Fombad C and Murray M (eds) *Fostering Constitutionalism in Africa*, Pretoria University Law Press, Pretoria, 2010, 18-21.

²⁶ Wiebusch and Murray, 'Presidential Term Limits', 136.

²⁷ Fombad CM, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' 55(1) *American Journal of Comparative Law*, 2007, 1-3.

²⁸ Mbaku JM, 'Threats to democracy in Africa: The rise of the constitutional coup' *Brookings*, 30 October 2020 – <<https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/>> on 1 February 2023.

²⁹ Bjarnesen J, 'Constitutional Coups have often preceded military ones' The Nordic Africa Institute, 7 October 2021 – <<https://nai.uu.se/news-and-events/news/2021-10-07-constitutional-coups-have-often-preceded-military-ones.html>> on 1 February 2023.

³⁰ Biryabarema E, 'Uganda's top court upholds ruling on extending president's rule' *Reuters*, 18 April 2019 – <<https://www.reuters.com/article/us-uganda-politics->

Museveni had been president for over three decades at that point.³¹ The only obstacle that would have compelled him to step down was the upper age limit, which he then caused to be removed via a constitutional amendment.

Most African constitutions contain provisions for the amendment of the said constitution.³² These special procedures will generally require a legislative supermajority³³ or a referendum³⁴ to amend a constitution formally.³⁵ However, these special procedures could be more efficient and feeble as most countries have a single dominant political party, which can easily overcome the supermajority requirement.³⁶ And although some of these amendments come after holding public referenda, there is evidence of vote-rigging and inadequate (or

idUSKCN1RU26V>, on 15 April 2022 and Editorial Board, 'Uganda's President has become what he once fought against' *The Washington Post*, 16 January 2021 - <https://www.washingtonpost.com/opinions/global-opinions/ugandas-president-has-become-what-he-once-fought-against/2021/01/15/4c3e1444-575b-11eb-a931-5b162d0d033d_story.html>, on 15 April 2022. A recent constitutional court decision validated the constitutional amendment that removes the age limit. See *Kyagulanyi Ssentamu v Yoweri Museveni Tibuhaburwa and 2 Others* (Civil Miscellaneous Application 1 of 2021) (2021), Constitutional Court of Uganda.

³¹ Biryabarema E, 'Uganda's top court upholds ruling on extending president's rule' and Semajambi J, 'Inside the long presidency of Yoweri Kaguta Museveni of Uganda' *Amjambo Africa*, 3 March 2021 - <<https://www.amjambofrica.com/inside-the-long-presidency-of-yoweri-kaguta-museveni-of-uganda/>>, on 28 May 2023.

³² For instance: Article 174, *Constitution of Algeria* (1989); Articles 233 and 234, *Constitution of Angola* (2010); Title XI, *Constitution of Benin* (1990); Part XI, *Constitution of Cameroon* (1996); Title XV, *Constitution of Chad* (1996); Article 226, *Constitution of Egypt* (2014); Fifth Title, *Constitution of Equatorial Guinea* (1991); Article 59, *Constitution of Eritrea* (1997); Articles 104 and 105, *Constitution of Ethiopia* (1996); Title XII, *Constitution of Gabon* (1991); Chapter 25, *Constitution of Ghana* (1992); Chapter Sixteen, *Constitution of Kenya* (2010); Article 47, *Constitution of Mauritius* (1968); Title XIII, *Constitution of Morocco* (2011); Article 103, *Constitution of Senegal* (2001); Section 74, *Constitution of South Africa* (1996); Article 144, *Constitution of Togo* (1992); Chapter Eighteen, *Constitution of Uganda* (1995); Article 79, *Constitution of Zambia* (1991); and Article 328, *Constitution of Zimbabwe* (2013).

³³ Supermajorities should be contrasted with a bare majority (which is essentially 50%+1) in that supermajority requires a higher threshold of votes (for instance, two-thirds or 75%) in order to pass or approval a bill by the legislature. Consider section 74 of the South African Constitution imposes a supermajority for the amendment of the constitutional values enshrined in section 1.

³⁴ A referendum is a direct vote by the entire electorate in which a proposal, a political issue, a law is resolved by putting it to a public vote. For instance, Rwanda held a constitutional referendum in December 2015 to allow a constitutional amendment that would allow the incumbent president, Paul Kagame. See Seburanga JL and Gatesire T, 'The 2003 and 2015 Constitutional Referenda in Rwanda' 12(3) *Democracy and Security*, 2016, 162.

³⁵ Abebe AK, 'Taming Regressive Constitutional Amendments: The African Court as a Continental (super) Constitutional Court' (2019) 17(1) *International Journal of Constitutional Law*, 2019, 96-97 and Hatchard J, 'Undermining the constitutional means; some thoughts on the new constitutions of Southern Africa' 28(1) *Comparative and International Law Journal of Southern Africa*, 1995, 27.

³⁶ Abebe, 'Taming Regressive Constitutional Amendment', 91.

incompetent) bodies that combat vote-rigging and corruption.³⁷ Furthermore, these referenda are employed to avoid parliamentary and judicial accountability, thus avoiding judicial scrutiny and parliamentary processes.³⁸

Seeing that domestic mechanisms can be defeated and abused to amend constitutions, there is a need for the African Union and Regional Economic Committees ('RECs') to fill in the gap, significantly since these amendments may affect the values that the African Union and the RECs purport to espouse, namely the rule of law, democracy, constitutionalism, and good governance. For instance, these values underpin the Africa Agenda 2063, a long-term ambitious pan-African vision and strategic action plan for transforming Africa in the next 50 years.³⁹ Aspiration 3 of the Agenda 2063 calls for an 'Africa of good governance, democracy, respect of human rights, justice and the rule of law.'⁴⁰

Given the importance and frequency of constitutional amendments in Africa, it is crucial to consider the role of the African Union in curbing the abuse of constitutional amendments. This central investigation raises further questions: does the African Union have sufficient frameworks and mechanisms to regulate and constrain the abuse of constitutional amendments? Put differently, has the African Union found a way to address constitutional changes that undercut the rule of law, constitutionalism, democracy and good governance? This paper explores the African Union's efforts towards formal and informal constitutional

³⁷ Abebe, 'Taming Regressive Constitutional Amendment', 91.

³⁸ Abebe, 'Taming Regressive Constitutional Amendment', 91.

³⁹ African Union, *Africa Agenda 2063: The Africa We Want* – <https://au.int/sites/default/files/documents/33126-doc-06_the_vision.pdf> on 30 April 2022. See also Ufomba H, 'The African Union Development Agenda 2063: Can Africa Get It Right?' 6(8) *Brazilian Journal of Development*, 2020, 62626.

⁴⁰ Aspiration 3 of *Africa Agenda 2063: The Africa We Want* provides:

'Aspiration 3: An Africa of good governance, democracy, respect for human rights, justice and the rule of law

An Africa of good governance, democracy, respect for human rights, justice and the rule of law.

Africa shall have a universal culture of good governance, democratic values, gender equality, and respect for human rights, justice and the rule of law.

Goals:

1. Democratic values, practices, universal principles for human rights, justice and rule of law entrenched consolidating democratic gains and improving the quality of governance, respect for human rights and the rule of law;
2. Capable institutions and transformed leadership in place at all levels building strong institutions for a development state; and facilitating the emergence of development-oriented and visionary leadership in all spheres and at all levels.'

amendments. The argument is that the African Union and RECs have engaged in a Sisyphean struggle⁴¹ and have been unsuccessful in developing robust mechanisms to curb the abuse of constitutional changes that subvert the rule of law, democracy, constitutionalism, and good governance.

To advance the central argument that the African Union (as well as RECs) has failed to robustly safeguard against constitutional amendments that undermine the rule of law, constitutionalism, democracy and good governance, this paper will present the following contentions. *First*, it posits that the rule of law, good governance, constitutionalism, and democracy are crucial to the mission of the African Union as it purports to be committed to these values. *Second*, there are types of constitutional amendments which, though ostensibly legal, subvert and undermine the rule of law, constitutionalism, democracy and good governance. Despite the lack of violence and the perceived compliance with the law, these constitutional amendments are not innocuous, as their effects are at odds with these values. Here, the relevant constitutional amendments imperil judicial independence, which is aimed at eradicating presidential terms to allow individuals to hold office for longer and those that consolidate executive power. *Third*, while the African Union has made some attempts to regulate amendments that affect democracy, these attempts are concerned with unconstitutional amendments. Thus, it falls short when it comes to regulating constitutional changes that affect these values, including democracy. There is a blind spot in its normative frameworks, which either do not address constitutional amendments that pervert the rule of law, constitutionalism, democracy, and good governance or do not go far enough in addressing these amendments in the context of democracy. *Fourth*, the relationship between the African Union and RECs worsens the situation, which is plainly incoherent, inconsistent and confusing. Rather than using the principle of subsidiarity to ensure that an immediate (or

⁴¹ There is a story in Greek mythology about Sisyphus. As a king, he was ruthless, sly, and deceitful. Sisyphus' actions angered the gods, and he was cursed to roll a massive boulder up a hill. He would wrestle with this boulder and labour as he pushed it towards the top of the hill, but each time, as he was about to send it toppling over the crest, the boulder would roll back down due to its weight. He was condemned to repeat this futile task *ad infinitum*. Camus A, *The Myth of Sisyphus*, Vintage International, New York, 1942, 119-123 and *Mwelase v Director-General for the Department of Rural Development and Land Reform* (2019), Constitutional Court of South Africa, para. 45.

reasonably expeditious) and effective response is prioritised, the two entities have used this principle to avert responsibility and not intervene when questionable conduct occurs in a particular country. The African Union and RECs have been filibustered and harbingered, leaving scholars and practitioners needing clarification about the relationship between the African Union and RECs.

Several previous studies relevant to this research include that of Nsongurua Udombana, who examines the challenges faced by constitutionalism and democratic governance in Africa, highlighting issues such as political corruption and the manipulation of constitutional reforms by political elites to maintain power. Fombad emphasizes that these practices undermine the rule of law and democratic principles across the continent. Similarly, Adem Kassie Abebe discusses how certain constitutional amendments in Africa, while legally valid, may lack democratic legitimacy and contribute to democratic erosion.

This research differs from the aforementioned studies by specifically focusing on the normative and institutional role of the African Union (AU) in preventing the abuse of constitutional amendments by ruling regimes in Africa—an area that has received limited scholarly attention. Unlike previous research, which primarily highlights the phenomenon of constitutional coups or critiques the AU's weak commitment to addressing violations of democratic principles, this study offers a legal analysis of the AU's normative frameworks and evaluates the effectiveness of its institutional mechanisms in responding to such abuses. Consequently, this research provides a novel contribution by proposing alternative legal and institutional strategies to strengthen the AU's role in upholding constitutional democracy across the African continent.

To advance these contentions, this paper will take the following structure: Part I introduces the paper and briefly outlines the problem that this paper is concerned with. Part II demonstrates that the African Union has committed to the rule of law, constitutionalism, democracy, and good governance. This will entail looking at the frameworks of the African Union and what they demand from the African Union and its member states. Part III demonstrates how certain constitutional amendments may undermine the rule of law, constitutionalism, democracy and good governance. Part IV explores the African Union's

frameworks and how they address constitutional amendments. Part V examines how the African Union has engaged in the Sisyphean struggle dealing with judicial independence and formal constitutional amendments. This part also analyses the principle of subsidiary, which underpins the relationship between the African Union and the RECs, and what role it has served in dealing with constitutional amendments in Africa. Part VI then offers the recommendations on the way forward, and concludes the paper.

Research Method

The research method used in this paper is normative legal research with a constitutional approach and conceptual approach. Normative legal research focuses on the analysis and interpretation of legal norms that apply in a legal system with the aim of understanding and explaining the content and meaning of these legal norms. The data used is secondary data by analyzing the constitutional laws of AU countries and also analyzing the relationship between AU and RECs. Apart from that, this paper is also critical legal research, namely a legal research method that looks at how norms and legal systems influence society and vice versa, in this context analyzing the topic of this paper. In the discussion paper regarding the development of a culture that promotes and adheres to the supremacy of law, constitutionalism, democracy and good governance are things that need to be looked at critically.

The African Union's Commitment to constitutionalism, the rule of law, democracy, and good governance through its Normative Frameworks

As a starting point, it is crucial to demonstrate that the African Union has committed itself to constitutionalism, the rule of law, democracy and good governance. Across its normative frameworks, it enunciates a sundry of values that are core to the configuration of the African Charter and its ambitions. As per its Constitutive Act,⁴² the African Union is determined to protect and promote human rights, facilitate and enhance good governance,⁴³ democracy,⁴⁴

⁴² *Constitutive Act of the African Union* (2000).

⁴³ Articles 3(g) and 4(m), *Constitutive Act*.

⁴⁴ Articles 3(g) and 4(m), *Constitutive Act*.

constitutionalism,⁴⁵ the rule of law,⁴⁶ and popular participation.⁴⁷ The Constitutive Act is the constitution and founding document, setting out the shared values of the African region.⁴⁸ Thus, by including constitutionalism, democracy, the rule of law, and popular participation, it illustrates that these values go the heartland of the African Union's vision and ambitions. They are not immaterial values that exist in the abstract but have been embedded into its founding document.

Beyond the Constitutive Act, the African Union has developed and adopted numerous frameworks to foster a continent founded on democracy, good governance, respect for human rights, accountability and constitutionalism, which the African Union deems critical pillars of sustainable development and continental integration. One such normative framework is the African Union's Agenda 2063.⁴⁹ Agenda 2063, adopted in 2013, is the 'continent's shared strategic framework', which aims to 'deliver on [Africa's] goals for inclusive and sustainable development'. Agenda 2063 comprises 20 goals, which are collectively delineated into 7 Aspirations.⁵⁰ Of importance, Aspiration 3 of the Agenda 2063 aspires to create Africa underpinned by a universal culture of gender equality, good governance, democracy, justice, the rule of law, and respect for human rights. This further affirms that these values are fundamental precepts of the African Union.

The African Union has also adopted the African Charter on Democracy, Elections and Governance ('ACDEG')⁵¹ to promote, enhance and reinforce good governance and democracy by institutionalising accountability, transparency and

⁴⁵ While the Constitutive Act does not explicitly mention constitutionalism as a value, it espouses constitutionalism through various articles such as provisions that prohibit unconstitutional changes of government (Articles 4(p) and 30); that advance the promotion of social justice (Article 4(n)); and that call for the respect of human rights (Article 4(m)).

⁴⁶ Preamble and Article 4(m), *Constitutive Act*.

⁴⁷ Articles 3(g) and 4(m), *Constitutive Act*.

⁴⁸ Lubbe WD and Spijkers O, 'Taking Stock of United Nations and African Union Constitutionalism' 29(1) *African Journal of International and Comparative Law*, 2021, 73.

⁴⁹ African Union, 'Agenda 2063: the Africa we want', September 2015..

⁵⁰ African Union, 'Agenda 2063'. See also Royo MG, Diep L, Mulligan J, Mukanga P, and Parikh P, 'Linking the UN Sustainable Development Goals and African Agenda 2063: Understanding overlaps and gaps between the global goals and continental priorities for Africa' 1 *World Development Sustainability*, 2020, 2.

⁵¹ African Union, *African Charter on Democracy, Elections and Governance*, 30 January 2007, preamble.

participatory democracy.⁵² Its Preamble reiterates the centrality and significance of democracy, good governance, the rule of law and democracy.⁵³ The ACDEG urges member states to adhere to certain principles, including the separation of powers; the doctrine of the rule of law; exercising state power by the constitution; the holding of regular, transparent, free and fair elections; proscription and condemnation of unconstitutional changes in government; and the respect of human rights and democratic principles.⁵⁴ Ergo, constitutionalism, democracy, the rule of law, and good governance are not only state matters but feature in the African Union's normative framework.⁵⁵

The ACDEG further calls for cooperation between the African Union, RECs, and the international community regarding democracy, elections, and governance.⁵⁶ Moreover, it condemns, rejects and prohibits unconstitutional change of government in any member state as it may cause a grave threat to development, peace, stability and security.⁵⁷ To this end, the ACDEG, under Article 23, delineates five scenarios that would constitute an unconstitutional change of government.⁵⁸ In particular, Article 23(5) proscribes 'any amendment or revision of the constitution or legal instruments, which [amounts to] an infringement on the principles of democratic change of government'.⁵⁹

Suppose one accepts that constitutionalism, good governance, democracy, and the rule of law are central values of the African Union that it has a vested interest in regulating. In that case, the question becomes: How do constitutional changes adversely affect these values? In short, constitutional amendments impact the rule of law, democracy, constitutionalism, and good governance. I will expand on this next and provide some definitions of these values.

⁵² Preamble and Article 2, *ACDEG*.

⁵³ Preamble, *ACDEG*.

⁵⁴ Articles 2, 3 and 4, *ACDEG*.

⁵⁵ Gebeye BA, 'Global constitutionalism and cultural diversity: The emergence of jurisgenerative constitutionalism in Africa' 10(1) *Global Constitutionalism*, 2021, 54.

⁵⁶ Article 2(12), *ACDEG*.

⁵⁷ Article 2(4), *ACDEG*.

⁵⁸ Article 23, *ACDEG*.

⁵⁹ Article 23(5), *ACDEG*.

Undermining the rule of law, constitutionalism, democracy, constitutionalism and good governance through constitutional amendments

The rule of law, democracy, constitutionalism, and good governance are hotly contested terms and may be either of procedural or substantive significance. The rule of law and democracy, constitutionalism, and good governance are vital for an ideal state. The African Union and RECs commit to these principles. Yet, despite this, the African Union and the RECs have not furnished their understanding of these concepts and seem to have preferred a narrow, procedural conception of them. To properly assess whether they have achieved anything in this regard, considering these terms and providing some definition, albeit not comprehensive, is prudent.

a) Rule of law

The principle of the rule of law has been subject to robust debate.⁶⁰ Despite the rule of law being a cornerstone of any constitutional democracy,⁶¹ its content and meaning have been largely debated.⁶² These debates have turned on whether the rule of law is merely of procedural importance and does not inscribe any substantive value.⁶³ It is ubiquitous but has espoused different meanings across disparate jurisdictions.⁶⁴

Dicey, traditionally coined as the first scholar to introduce the rule of law to constitutional law,⁶⁵ provided three implications of the rule of law.⁶⁶ The first

⁶⁰ Waldron J, 'The concept and the rule of law' 43(1) *Georgia Law Review*, 2008, 6

⁶¹ Ferioli E, 'Rule of law and constitutional democracy' 46 *Turkish Yearbook of International Relations*, 2015, 91.

⁶² See Fuller L, *Morality of the Law*, Yale University Press, Yale, 1968; Raz J, *The Authority of Law: Essays on Law and Mortality*, Oxford University Press, 1979; Hayek F, *The Constitution of Liberty*, University of Chicago Press, Chicago, 1960; Locke J, *The Second Treaties of Government*, Oxford University Press, 1689 and Hobbes T, *Leviathan*, Oxford University Press, Oxford, 1651.

⁶³ See Rose J, 'The Rule of Law in the Western World: An Overview' 35(47) *Journal of Social Philosophy*, 2004, 457.

⁶⁴ Ferioli, 'Rule of law and constitutional democracy', 91.

⁶⁵ Despite Dicey being widely credited as the first person to use the notion of the rule of law, it appears that Aristotle was the first person to refer to it, by stating that 'it is better the law to rule than one of the citizens so even the guardians of the laws of the laws are obeying the laws.' See Warrington J, *Aristotle's Politics and Athenian Constitution*, J.M Dent and Sons Ltd, London, 1959, 97.

⁶⁶ Dicey AV, *An Introduction to the Study of the Law of the Constitution*, Macmillan and Co., London, 1885, 120.

implication refers to the absolute supremacy of the law instead of arbitrary power. Laws will govern individuals and not the arbitrary decisions of government. A person should only be punished in an ordinary, independent, impartial court for conduct proscribed by well-established, predetermined laws. No one should be punished merely at the government's dictates without an existing law.⁶⁷ The second implication is that no person is above the law, and everyone will be subject to the same law administered through courts.⁶⁸ The same law applies to everyone, regardless of status and rank. This is about equality before the law. The third implication encapsulates the notion that the law of the constitution results from the rights of individuals, which are administered and enforced by courts.⁶⁹

Bingham identifies eight principles, which the rule of law encompasses: (i) the law should be accessible, intelligible, clear and predictable;⁷⁰ (ii) law must apply equally to everyone, except where there is legitimate and objective differentiation;⁷¹ (iii) issues about legal rights and liability should be addressed by the application of the law, instead of discretion;⁷² (iv) public officials must exercise their powers reasonably and in good faith and for the aim they were conferred and not exceed those limits;⁷³ (v) human rights must be afforded sufficient protection through the law;⁷⁴ (vi) legal recourse must not be expensive or burdened by excessive delays;⁷⁵ (vii) procedures for adjudication should be fair;⁷⁶ and (viii) the state must comply with international law and national law obligations.⁷⁷ The notion, therefore, entwines a set of formal demands such as the

⁶⁷ Dicey, *An Introduction to the Study of the Law of the Constitution*, 120.

⁶⁸ Dicey, *An Introduction to the Study of the Law of the Constitution*, 120-121.

⁶⁹ Dicey, *An Introduction to the Study of the Law of the Constitution*, 121. Scholars like Waldron have highlighted that the rule of law also demands certain basic procedural conditions, which courts must observe when they endeavour to administer justice to ensure that parties are afforded a fair hearing. See Waldron J, 'The Rule of Law and the Importance of Procedure' 50 *Nomos*, 2011, 6.

⁷⁰ Bingham T, *The Rule of Law*, Penguin Books, London, 2010, 37.

⁷¹ Bingham, *The Rule of Law*, 55.

⁷² Bingham, *The Rule of Law*, 48.

⁷³ Bingham, *The Rule of Law*, 60.

⁷⁴ Bingham, *The Rule of Law*, 66.

⁷⁵ Bingham, *The Rule of Law*, 85.

⁷⁶ Bingham, *The Rule of Law*, 90.

⁷⁷ Bingham, *The Rule of Law*, 110.

fact that laws must be clear, stable, prospective, general and public⁷⁸ as well as substantive conceptions, including the requirement that law must embrace fundamental and social rights.⁷⁹ Amending the constitution in such a manner that it would weaken the independence of the judiciary would invariably subvert the rule of law. This is because judicial independence is a requisite of the rule of law and a fundamental guarantee of fair adjudication.⁸⁰ Without an independent judiciary, the rule of law is threatened.⁸¹ Consider the situation in Zimbabwe.

The Zimbabwean Constitution was amended to change the process of appointment and tenure of judges in the Zimbabwean Supreme Court of Appeals and the Constitutional Court.⁸² Concerning the tenure of judges, the amendment bestowed the President with the power to extend the term of service of a judge beyond the age of 70 (the compulsory retirement age for judges in Zimbabwe). After consultation with the Judicial Service Commission, the amendment permits the President to extend the term of service of a judge by five years. The provision presents the extension as an ‘election’ by the judge. However, the President ultimately decides whether to accept or reject the election. Accordingly, the President enjoys the discretion to extend the terms of judges at the Supreme Court of Appeal and Constitutional Court. It is trite that this may impugn the independence of judges, as they may be encouraged to rule in the President's favour. Allowing the President to enjoy the discretion to appoint creates tenure insecurity for judges, which may undermine their independence. The open-ended

⁷⁸ Raz J, ‘The Law’s Own Virtue’ 39(1) *Oxford Journal of Legal Studies*, 2019, 2-5; Fuller, *The Morality of Law*, chapter 2; Raz, *The Authority of Law*, 213-214; and J Finnis, *Natural Law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 270-273.

⁷⁹ Waldron J, ‘The Rule of Law’ *The Stanford Encyclopedia of Philosophy*, 22 June 2020 – <https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/> on 21 March 2023; Tamanaha BZ, *On the Rule of Law. History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, 112-113; Craig P, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ *Public Law* 1997, 467; and Zanghellini A, ‘The Foundations of the Rule of Law’ 28(2) *Yale Journal of Law & Humanities* 2016, 214.

⁸⁰ Masuku TS, ‘Judicial Independence as an Essential Aspect of the Rule of Law’ Southern Africa Litigation Centre - <<https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Masuku.pdf>>, on 3 June 2023.

⁸¹ Nxumalo SB and Jeewa TR, ‘Courts as a Bulwark against Democratic Regression: Theatres of Accountability’ in Enonchong LS, Fokala E, Abebe AK (eds) *Democracy in Africa: Regression and Resilience*, Juta and Co., Cape Town, 2022, 61-62.

⁸² Chimwamurombe F, ‘Zimbabwe: Unpacking Constitutional Amendment No. 2 Act: Implications on the Judiciary’ *Mondaq*, 14 May 2021 – <<https://www.mondaq.com/constitutional-administrative-law/1069156/unpacking-constitutional-amendment-no-2-act-implications-on-the-judiciary>>, on 12 May 2022.

nature of the discretion enjoyed by the President causes a reasonable apprehension that the independence of the judiciary may be susceptible to being subverted by the President. Judges may be pressured to favour the President in their decisions to secure their positions.⁸³ As recognised in the *Justice Alliance of South Africa*, the non-renewability of judicial offices is a prime feature of independence and bolsters public confidence.⁸⁴

Judicial independence is indispensable to the rule of law because the judiciary holds the executive and legislature accountable and guarantees fundamental rights and freedoms.⁸⁵ Weakening it would abolish the rule of law. The Zimbabwe example above illustrates how constitutional amendments may affect the rule of law.

b) Democracy

Like the rule of law, a precise definition of democracy is elusive.⁸⁶ These definitions may include substantive, procedural, constitutional, and process-orientated.⁸⁷ A substantive approach to democracy concentrates on a state's politics and living conditions. Thus, democracy is defined by considering whether a state advances individual freedom, social equality, human welfare, public participation, and peaceful conflict resolution methods.⁸⁸ A procedural approach to democracy focuses on several governmental practices considered pivotal to democracy. For instance, this approach investigates the nature of elections in a particular country, their frequency, fairness, and competitiveness.⁸⁹ A process-orientated approach to democracy identifies an irreducible core of processes that

⁸³ For a broader discussion, see Matanda T, 'Pacifying the Crises of (Un)Constitutional Amendments: The Case of Zimbabwe's Amendment (No. 1) and (No. 2) Acts' 7(1) *Strathmore Law Review*, 2022, 75.

⁸⁴ *Justice Alliance of South Africa v President of Republic of South Africa, Freedom Under Law v President of Republic of South Africa, Centre for Applied Legal Studies v President of Republic of South Africa* (2011), Constitutional Court of South Africa, para. 73.

⁸⁵ *De Lange v Smuts NO and Others* (1998), Constitutional Court of South Africa, para. 59 and Heyl C, 'The Judiciary and the Rule of Law in Africa' in Cheeseman N (ed), *Oxford Encyclopedia of African Politics*, Oxford University Press, Oxford, 2020.

⁸⁶ Tilly C, *Democracy*, Cambridge University Press, New York, 2012, 1-24 and Ludvig Beckman, 'Democracy' *Politics*, 26 October 2016 – <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-c-200>>, on 5 May 2022.

⁸⁷ Tilly, *Democracy*, 7.

⁸⁸ Tilly, *Democracy*, 7.

⁸⁹ Tilly, *Democracy*, 8.

must be upheld and enforced for a state to be considered to adhere to democracy. These include effective participation, voting equality, enlightened understanding, control of agenda and inclusion of adults.⁹⁰ A constitutional approach is concerned with laws enacted by a state to regulate the exercise of public power and the performance of public functions.⁹¹ Democracy is not merely about elections.⁹² It entails public participation, accountability, transparency, openness, and responsiveness. It goes beyond the rule of the majority but recognises that minorities also require protection. In a broad construction of democracy, courts play an indispensable role in ensuring that democracy functions properly by upholding and administering the checks and balances ingrained in a legal system.⁹³

A constitutional amendment may cause instability and uncertainty and subvert democratic institutions like the judiciary and processes. It may result in the state being unaccountable and unresponsive. In other words, constitutional amendments, unchecked, may lead to democratic erosion (or democratic regression, as articulated by Diamond⁹⁴).⁹⁵ At the most basic level, if arbitrary and unchecked, constitutional amendments may subvert the people's will as embodied by a constitution. They may create uncertainty and instability. Some amendments may have the effect of rendering certain fundamental freedoms and rights nugatory and hollow. Democratic institutions may be undermined and denuded of their powers. The state may become unaccountable and operate beyond the boundaries of the law without any consequences. In short, as inevitable as they may be, constitutional amendments can threaten and subvert democracy.⁹⁶

⁹⁰ Tilly, *Democracy*, 9.

⁹¹ Tilly, *Democracy*, 7.

⁹² Munck GL, 'What is Democracy? A Reconceptualization of the Quality of Democracy' 23(1) *Democratization* 2014, 1.

⁹³ Porta, RL, López-de-Silanes F, Pop-Eleches C and Shleifer A, 'Judicial checks and balances' 112(2) *Journal of Political Economy*, 2004, 445.

⁹⁴ Diamond L, 'Democratic regression in comparative perspective: Scope, methods, and causes' 28(1) *Democratization*, 2021, 22.

⁹⁵ Mstanda T, 'Democratic Erosion In Zimbabwe Through Constitutional Amendments' *Human Rights Pulse*, 21 February 2022 - <<https://www.humanrightspulse.com/mastercontentblog/democratic-erosion-in-zimbabwe-through-constitutional-amendments>>, on 3 June 2023.

⁹⁶ Some of these arguments are implicit in Fombad, 'Some perspectives on durability and change under modern African constitutions', 382-413.

Defusing accountability institutions, such as courts, threatens democratic order. These constitutional changes and their adverse effects on democracy are often difficult to detect because they are done under ostensibly legal and permissible means, unlike military coups, which are violent and leave dead bodies on the streets. For example, the Muslim Brotherhood in Egypt, which had a dominant electoral power in parliament, constituent assembly, and presidency, proposed a constitution that was quite favourable to the interests of the Brotherhood. It used its legal power, rather than extra-legal power, to advance this constitution, which would assist in constructing and consolidating an authoritarian government, ‘where elections are held but the incumbent party is difficult to dislodge and relatively unchecked in its power.’⁹⁷ Instead of reinforcing democracy and democratic order, constitutional amendments are used to retain power (subverting democratic processes) and establish authoritarian regimes.⁹⁸

c) Constitutionalism

Constitutionalism does not merely refer to the enactment or existence of a constitution in a country.⁹⁹ Like the other terms, it is not easy to define.¹⁰⁰ Constitutionalism recognises that a state’s power must be adequately constrained to safeguard citizens from arbitrary decisions by ensuring it acts within its constitutionally mandated boundaries.¹⁰¹ It requires the State to operate effectively within constitutional constraints, which permits people to invoke these provisions to compel the state to act within them.¹⁰² Fombad enunciates core features of constitutionalism: (a) the recognition and protection of fundamental rights and

⁹⁷ Landau D, ‘Abusive Constitutionalism’ 57(1) *UC Davis Law Review* 2013, 191. See also Landau D, ‘Constitution-Making Gone Wrong’ 64(5) *Alabama Law Review*, 2013, 923-980 and González-Jácome J, ‘From Abusive Constitutionalism to a Multilayered Understanding of Constitutionalism: Lessons from Latin America’ 15(2) *International Journal of Constitutional Law*, 2017, 447.

⁹⁸ Landau D, ‘Abusive Constitutionalism’, 259.

⁹⁹ Okoth-Ogendo HWO, ‘Constitutions Without Constitutionalism: Reflections on an African Political Paradox’ in Shivji I (ed), *State and Constitutionalism: An African Debate on Democracy*, South African Research and Documentation Centre, Harare, 1991, 261.

¹⁰⁰ Fombad C, ‘Democracy, Elections and Constitutionalism in Africa: Setting the Scene’ in Fombad CM and Steytier N (eds), *Democracy, Elections and Constitutionalism in Africa*, Oxford University Press, Oxford, 2021, 5.

¹⁰¹ African Union, *Report of the Commission on Governance, Constitutionalism and Elections in Africa (Assembly/AU/9 (XXVI))*, 31 January 2016, para. 27.

¹⁰² Fombad CM, ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects’ 59(4) *Buffalo Law Review*, 2011, 1013-1014.

freedoms; (b) institutions that support democracy; (c) separation of powers; (d) judicial review; (e) an independent judiciary; and (f) constraints on the ability to amend the constitution.¹⁰³ While these features are not dispositive of whether a specific country adheres to constitutionalism, they nevertheless enhance the probability of a country adhering to constitutionalism. Constitutionalism is a vital strut to ensuring that the state does not infringe on the rights and freedoms of people with impunity.¹⁰⁴

The African Union Commission defines constitutionalism as:

*'[C]onstitutionalism denotes limited government. It also entails protection of citizens against arbitrary rule. It is about the existence of clearly defined mechanisms for ensuring that the limitations on state power are legally enforceable. The core elements of constitutionalism include: (a) the recognition and protection of fundamental rights and freedoms; (b) the separation of powers; (c) an independent judiciary; (d) the review of the constitutionality of laws; (e) the control of the amendment of the constitution; and (f) institutions supporting constitutional democracy and accountability.'*¹⁰⁵

Judicial independence is again a key feature of constitutionalism, as Fombad and the African Union Commission have demonstrated in their expositions. The Zimbabwean example cited before demonstrates how interfering with the independence of the judiciary may impact constitutionalism.

The doctrine of separation of powers is also a key feature of constitutionalism.¹⁰⁶ There is a panoply of constitutional principles that relate to the government and the state. The separation of powers doctrine is central to constitutionalism as it delineates the powers and functions of three disparate branches of government.¹⁰⁷ Traditionally, the separation of powers doctrine concerned a bulwark against tyranny (or the threat thereof) and a single entity's

¹⁰³ Fombad, 'Constitutional Reforms and Constitutionalism in Africa', 1014.

¹⁰⁴ Waluchow W, 'Constitutionalism' in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy*, 20 December 2001 – <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/>, on 5 May 2022.

¹⁰⁵ African Union, *Report of the Commission on Governance, Constitutionalism and Elections*, para. 27.

¹⁰⁶ Waldron J, 'Separation of Powers and the Rule of Law' in Waldron J, *Political Theory*, Harvard University Press, Boston, 2016, 53-55.

¹⁰⁷ Barendt E, 'Separation of Powers and Constitutional Government' *Public Law*, 1995, 605-606.

abuse of state power.¹⁰⁸ Acutely aware of the danger of tyranny and potential abuse of state power, Montesquieu remarked that without the separation of powers doctrine, there would be no liberty.¹⁰⁹ Some have argued that the separation of powers doctrine is core to constitutionalism.¹¹⁰

However, Africa is replete with other constitutional amendments that undermine constitutionalism by contravening the constraints on the ability to amend the constitution. Consider the case of Denis Sassou Nguesso, the President of the Republic of the Congo, who introduced a new constitution in 2015 through a referendum to replace the 2002 Constitution to bypass constitutional prohibition that disallowed a constitutional amendment to presidential terms.¹¹¹ The 2002 Constitution prohibited serving more than two presidential terms,¹¹² and no one could hold office beyond the age of seventy years.¹¹³ The 2015 Constitution removed the upper age limit¹¹⁴ and extended the presidential term to permit an individual to run for three terms.¹¹⁵ Accordingly, since Nguesso was aware that he could not be a president for a third term due to the presidential limits and the age restriction, he bypassed the constitutional process by introducing an entirely new constitution, which would allow him to run for a third term. President Alpha Conde, the President of Guinea-Conakry, took pages from the Nguesso's playbook in 2020 and similarly subverted the non-amendability of the provisions about a presidential two-term limit.¹¹⁶ As the opposition argued, the new Constitution led to the 'resetting' of Conde's presidential terms back to zero, potentially allowing him to hold office for a further two terms.¹¹⁷ He was elected

¹⁰⁸ Barber NW, 'The Separation of Powers' in Barber NW, *The Principles of Constitutionalism*, Oxford University Press, Oxford, 2018, 53-56.

¹⁰⁹ Montesquieu C, *The Spirit of Laws*, Prometheus, London, 1748, Ch. 6.

¹¹⁰ Vile MJC, *Constitutionalism and the Separation of Powers*, Oxford University Press, Oxford, 1967, 97.

¹¹¹ Article 189, *Constitution of the Republic of Congo* (2002).

¹¹² Article 57, *Constitution of the Republic of Congo* (2002).

¹¹³ Article 58, *Constitution of the Republic of Congo* (2002).

¹¹⁴ Article 66, *Constitution of the Republic of Congo* (2015).

¹¹⁵ Article 65, *Constitution of the Republic of Congo* (2015).

¹¹⁶ Article 27 read with Article 154, *Constitution of Guinea* (2010).

¹¹⁷ 'Guinean President Alpha Conde Enacts New Constitution' *Al Jazeera*, 7 April 2020 – <https://www.aljazeera.com/news/2020/4/7/guinean-president-alpha-conde-enacts-new-constitution>, on 21 March 2023.

for a new ('first') term, his third term in December 2020.¹¹⁸ Condé subsequently was ousted in a coup in 2021.¹¹⁹

A restraint on constitutional amendments is a vital strut for constitutionalism, and as we have seen above, some states have avoided this constraint by introducing new constitutions. These examples buttress the scathing observation of Okoth-Ogendo that African states have constitutions without constitutionalism.¹²⁰

d) Good governance

Good governance is a relatively novel concept.¹²¹ The World Bank has defined good governance as requiring state effort to strengthen accountability, promote public debate and foster a free press.¹²² It is meant to make the state simultaneously stronger and weaker.¹²³ The state must be strong enough to implement policies and laws effectively. Therefore, the state must improve institutional, legal, and regulatory frameworks to ensure this occurs. This includes maintaining a stable, objective, transparent, and independent judicial system, and the state must create a conducive environment for civil society.¹²⁴ It is meant to be weaker because it is accountable, responsive, autonomous, and not oppressive.¹²⁵ Good governance creates a culture of accountability to prevent state officials from pursuing private interests through public (political) means. Thus, good governance might refer to legitimate, accountable, and effective ways of obtaining

¹¹⁸ 'Guinea's Condé takes presidential oath for third term after disputed election' *France 24*, 15 December 2020 - <https://www.france24.com/en/africa/20201215-guinea-s-president-condé-sworn-in-after-disputed-re-election-urges-unity>, on 28 May 2023.

¹¹⁹ 'Alpha Condé, the president of Guinea, is ousted in a coup' *The Economist*, 9 September 2021 - <https://www.economist.com/middle-east-and-africa/2021/09/09/alpha-conde-the-president-of-guinea-is-ousted-in-a-coup>, on 28 May 2023.

¹²⁰ Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox', 261.

¹²¹ Rothstein B, 'Good Governance' in Levi-Faur D (ed) *The Oxford Handbook of Governance*, Oxford University Press, Oxford, 2012, 144 and Ndulo M, 'Constitutions and Constitutional Reforms in African Politics' *Politics*, 2019 – <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1324>, on 5 May 2022.

¹²² World Bank, *Sub-Saharan Africa: From Crisis to Sustainable*. The International Bank for Reconstruction and Development and World Bank, Washington, 1989, 6.

¹²³ Williams D, 'Making a liberal state: "Good governance" in Ghana' 37(120) *Review of African Political Economy*, 2010, 408.

¹²⁴ World Bank, *Sub-Saharan Africa*, 55.

¹²⁵ World Bank, *Sub-Saharan Africa*, 1.

and exercising public power, including allocating resources and achieving social, legal, and economic objectives in the public interest.¹²⁶

Considering the examples above, it should be obvious how constitutional amendments would erode good governance. This includes replacing constitutions with entirely new ones aimed at consolidating the executive powers and extending presidential terms by weakening constitutional checks such as the judiciary's independence, weakening or eliminating civil society organisations and quelling competitive and legislative oversight.¹²⁷

In conclusion, Suber notes that a lack of robust and rigid mechanisms regulating constitutional amendments may result in a ruling party's disregarding and eliminating fundamental provisions and institutions through amendments.¹²⁸ A pliable amendment process may result in fundamental rights and freedoms being sacrificed for short-term political interests.¹²⁹ Empirical studies reveal a correlation between frequent constitutional amendments and an increased risk of a constitutional crisis and subsequent downfall.¹³⁰ Despite constitutions being amendable, these amendments must not be frequently and quickly done. This is because a constitution must be adequately and sufficiently stable for people to act in a manner that is consistent with the Constitution and anticipate the consequences of their conduct.¹³¹ Furthermore, an easily amendable constitution risks losing its legitimacy and authority. A constitution is meant to be the supreme law of any polity. It is plausible that a constitution constantly subject to

¹²⁶ Botchway FN, 'Good Governance: The Old, The New, The Principle, and The Elements' 13(2) *Florida Journal of International Law*, 2001, 159-210.

¹²⁷ Loughlin M, 'The Contemporary Crisis of Constitutional Democracy' 39(2) *Oxford Journal of Legal Studies*, 2019, 447 and Ginsburg T and Huq AZ, *How to Save a Constitutional Democracy*, University of Chicago Press, Chicago, 2018, 72-73.

¹²⁸ Suber P, 'Amendment' in Christopher B. Gray (ed), *Philosophy of Law: An Encyclopedia I*, Garland Publishing Co., New York, 1999, 31-32.

¹²⁹ Landau D, 'Abusive Constitutionalism' 47(1) *University of California Davis Law Review*, 2013, 223 and Gatmaytan DB, 'Can Constitutionalism Constrain Constitutional Change?' 3 *Northwestern Interdisciplinary Law Review*, 2010, 38.

¹³⁰ Elkins et al, *The Endurance of National Constitutions* 22, 31-32 and 140.

¹³¹ See Fuller, *The Morality of the Law* 79-81 and Roscoe Pound, *Law Finding Through Experience and Reason*, University of Georgia Press, Georgia, 1960, 23.

amendments will lose its authority and be perceived as nothing more than a political document, amended to achieve a ruling party's political objectives.¹³²

Having understood the relationship between the rule of law, constitutionalism, good governance, democracy, constitutional changes, and their attendant dangers, I turn to the role of the African Union in regulating constitutional amendments.

The African Union Framework on Constitutional Amendments

Article 10(1) of the ACDEG recognised and committed itself to the constitution's supremacy in states.¹³³ The African Union has thus established normative frameworks for adopting and amending constitutions. The Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government ('Lomé Declaration') prescribes that the drafting, amendment and revision method should be done per the generally accepted principles of democracy.¹³⁴ This is bolstered by ACDEG, which provides that such an amendment requires national consensus, which must be obtained through a referendum, if necessary.¹³⁵ The African Union Peace and Security Council (PSC) has upheld the principle that the making and amendments of constitutions must not be motivated by self- or personal interests. According to the PSC's framework, constitutions should not be amended to subvert the people's will.¹³⁶ Of note, the drafting documents of the ACDEG reveal that the drafters wanted Article 23(5) of the ACDEG to read: '[a]mendment or revision of constitutions and legal instruments, contrary to the provisions of the constitution of the State

¹³² Wright S, 'The Constitutional Implications in France of the Maastricht Treaty' 9 *Tulane European & Civil Law Forum*, 1994, 52 and Elkins *et al*, *The Endurance of National Constitutions*, 82 and 100.

¹³³ Article 10(1), *ACDEG*

¹³⁴ African Union, *Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI))*, 11 July 2000.

¹³⁵ Article 10(2), *ACDEG*. Africa is described as a pro-referendum continent, see Ankar D, 'Constitutional Referendums in the Countries of the World' 7(1) *Journal of Politics and Law*, 2014, 19 and Abebe, 'Taming Regressive Constitutional Amendment', 97.

¹³⁶ African Union Commission, *Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa*, 17-19 December 2009.

Party concerned, to prolong the tenure of office for the incumbent government.¹³⁷ Implicit in these normative frameworks was the recognition that constitutional amendments may cause instability and uncertainty and frustrate democratic processes and democracy.

The PSC is the standing decision-making body for managing, preventing and resolving conflicts.¹³⁸ The PSC Protocol reiterates the unconstitutionality of changes that subvert people's will and provides that sanctions will be taken whenever there is an unconstitutional change of government, as provided in the Lomé Declaration.¹³⁹ This is echoed in the Ezulwini Framework,¹⁴⁰ which further proscribes that the use of constitutions should not be manipulated to retain power, contrary to the people's will.¹⁴¹ The same framework discourages the amendment of constitutions and constitutional review processes for personal interests to circumvent popular opinion.¹⁴² These ideals were emphasised by the Assembly of Heads of State and Government in a decision where it was stated that there is a dire need for member States to 'uphold the rule of law and abide by their own Constitutions, especially about constitutional reforms, bearing in mind that failure to respect these provisions could lead to situations of tension which, in turn, could trigger political crisis'.¹⁴³ This, in my view, illustrates the African Union's acknowledgement of how constitutional changes may lead to instability bad governance and undermine the rule of law and the fundamental tenets of constitutionalism.

As is evident from the frameworks set out above, the African Union has taken a strong position against unconstitutional change of government, including by amending a constitution that would violate the principles of a democratic change of government. Although the chief focus of these frameworks is

¹³⁷ African Union, *Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the revision of the Lomé declaration on unconstitutional changes of government in Africa*, 25-29 June 2006.

¹³⁸ African Union, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 9 July 2002 (the PSC Protocol).

¹³⁹ Article 7(g), PSC Protocol.

¹⁴⁰ *Ezulwini Framework*.

¹⁴¹ *Ezulwini Framework*, para. 4(vi).

¹⁴² *Ezulwini Framework*, para. 4(vii).

¹⁴³ African Union, *Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union (Assembly/AHG/Dec.269 (XIV))*, 2 February 2010, para 6(ii)(a).

unconstitutional changes that affect democratic order, there is at least some attempt through the Ezulwini Framework to curb constitutional amendments that would circumvent the people's will. However, it remains unclear what constitutes a constitutional amendment that would infringe on democratic change of government. Do constitutional amendments that undermine the separation of powers doctrine, extend a particular presidential incumbent's tenure, or expand the executive's power amount to such a constitutional amendment? Are amendments that subvert the independence of the judiciary too remote to qualify under the proscription? Notwithstanding the prevalence of constitutional amendments, as demonstrated above, there is a gap in the frameworks of the African Union. These frameworks do not adequately address constitutional amendments, which may be as detrimental to constitutionalism, democracy, the rule of law and good governance as unconstitutional amendments and military coups.

The Sisyphean Struggle

a) Formal Constitutions Amendments

An unmitigated gap needs to be addressed in the terrain of the rule of law, constitutionalism and good governance. This is evident when one considers the prevalence of constitutional changes aimed at extending presidential terms, removing upper age limits for presidential candidates and weakening the separation of powers by denuding the judiciary of their independence and limiting parliamentary oversight. The African Union has faced significant challenges in effectively regulating and governing constitutional changes or amendments within its member states, leading to a detrimental impact on constitutionalism, good governance, democracy, and the rule of law across the continent. The African Union's failure in this regard can be attributed to a combination of factors, including limited enforcement mechanisms, political pressures, and a need for a more unified approach. As a result, several African states have experienced situations where constitutional changes have been used to subvert established democratic principles and consolidate power in the hands of a few. These actions undermine the foundations of constitutionalism, erode democratic institutions, and impede progress towards good governance and the rule of law. The silence and

lack of regulation by the African Union is concerning and requires urgent attention.

Africa has witnessed significant and alarming constitutional amendments over the past few decades. For instance, Zimbabwe (amending of the Constitution to reinforce the power of the executive to appoint individuals to crucial institutions such as the judiciary),¹⁴⁴ Rwanda (extension of presidential term),¹⁴⁵ Burundi (extension of presidential terms),¹⁴⁶ Comoros (extension of presidential term limit and termination of a power-sharing system),¹⁴⁷ Chad (extension of presidential term),¹⁴⁸ Gabon (amending the constitution from stating that the president would govern in consultation with the government to the president will determine the policy of the nation),¹⁴⁹ Uganda (extension of presidential term),¹⁵⁰ Algeria (changed the whole constitution)¹⁵¹ and the Republic of Congo

¹⁴⁴ Matanda T, 'Democratic Erosion in Zimbabwe Through Constitutional Amendments' *Human Rights Pulse*, 21 February 2022 – <<https://www.humanrightspulse.com/mastercontentblog/democratic-erosion-in-zimbabwe-through-constitutional-amendments>> on 1 February 2022. See also Shivamba A and Bugela N, 'An Analysis of Zimbabwe's Proposed Constitutional Amendments Relating to the Legislative and Executive Arms of Government' *SALC Policy Brief*, 2020 – <<https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/05/Policy-Brief-No.-2-of-2020-Final.pdf>> on 12 May 2022.

¹⁴⁵ Seburanga and Gatesire, 'The 2003 and 2015 Constitutional Referenda in Rwanda' and Reyntjens F, 'The Changes made to Rwanda's Constitution are peculiar – here's why' *The Conversation*, 28 January 2016 <<https://theconversation.com/the-changes-made-to-rwandas-constitution-are-peculiar-heres-why-53771>> on 12 May 2022.

¹⁴⁶ Lilley K, 'Burundi's flawed constitutional referendum' *Atlantic Council*, 16 May 2018 – <<https://www.atlanticcouncil.org/blogs/africasource/burundi-s-flawed-constitutional-referendum/>> on 12 May 2022.

¹⁴⁷ The Editors, 'Why Comoros' Constitutional Referendum Could Herald a New Era of Instability'.

¹⁴⁸ Reuters, 'Chad Parliament Approves New Constitution Expanding President's Powers' *Reuters*, 30 April 2018 – <<https://www.reuters.com/article/us-chad-politics-idUSKBN1H11RC>> on 12 May 2022.

¹⁴⁹ The North Africa Post, 'Gabon: Parliament adopts new Constitution' *The North Africa Post*, 30 December 2020 – <<https://nortiafricapost.com/46494-gabon-parliament-adopts-new-constitution.html>> on 12 May 2022.

¹⁵⁰ Athumani H, 'Uganda's Supreme Court Upholds Lifetime Term for Museveni' *Voice of America*, 19 April 2019 – <<https://www.voanews.com/a/ugandas-supreme-court-upholds-lifetime-term-museveni/4882969.html>> on 12 May 2022.

¹⁵¹ Biagi F, 'The Algerian Constitutional Reform of 2016: A Critical Analysis' 17(3) *Global Jurist*, 2017, 1.

(centralising power and extending presidential term)¹⁵² have recently amended their constitutions.¹⁵³

Even though these amendments have the adverse impact of dislodging the judiciary and strengthening the power and control of the incumbent executive and the legislature,¹⁵⁴ are ostensibly legal. These changes are not achieved through violent or extralegal means. Instead, they are done through constitutional and legally permissible means. And therein lies the rub. How do constitutional and legal amendments result in undemocratic outcomes, against constitutionalism, undermine the rule of law, and cause instability rather than good governance?

This a question that the African Union has not decisively addressed. Its normative framework fails to correctly identify the problem of constitutional amendments that undermine the values of constitutionalism, the rule of law, democracy, and good governance. The African Union and its institutions have spilt much ink on unconstitutional government changes, but it has remained eerily silent on constitutional amendments that distort these values. Thus, while the African Union has achieved some modicum of success in regulating coups, it has remained relatively inactive and ineffective in regulating constitutional amendments, which may be detrimental to constitutionalism, good governance, democracy, and the rule of law. The above examples, with the explanations proffered, should illustrate these effects. However, to be perspicuous, constitutional amendments may be highly problematic for the following reasons:

Such amendments undermine constitutionalism. Amendments aimed at extending presidential terms or consolidating executive power often violate the principles of checks and balances, separation of powers, and the rule of law enshrined in a constitution. Such amendments undermine the fundamental

¹⁵² Dawson M and Young DJ, 'Presidential Tenure and Constitutional Provisions: Recent Evidence from Central Africa' 55(3) *Africa Spectrum*, 2021, 272.

¹⁵³ Fombad provides some analysis of constitutional amendments of thirty African countries. See Fombad, 'Some perspectives on durability and change under modern African constitutions', 391-401.

¹⁵⁴ Abebe, 'Taming Regressive Constitutional Amendment', 91. Opalo K, 'Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi' *ConstitutionNet*, 30 July 2015 – <<http://www.constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi>> on 12 May 2022.

principles that ensure a system of government based on the rule of law and constitutional limits.

Constitutional amendments that weaken judicial independence also threaten the rule of law. An independent judiciary checks the abuse of executive power and ensures that laws and policies comply with constitutional standards. When the executive gains excessive control over the judiciary through constitutional amendments, it weakens its ability to act as an impartial arbiter and uphold the rule of law, leading to a loss of accountability and fairness.

Constitutional amendments aimed at consolidating executive power concentrate authority in the hands of a few, often the president. This concentration of power can lead to a lack of accountability, transparency, and checks on executive actions. It diminishes the role of other democratic institutions and hampers the functioning of a robust system of checks and balances. Consolidating power in the executive branch is detrimental to democratic governance, as it diminishes the voice and representation of diverse perspectives in decision-making processes.

Constitutional amendments that extend presidential terms or weaken judicial independence can also impair democracy and good governance. By prolonging the stay of a single individual in power or undermining the independence of the judiciary, these amendments limit citizens' ability to participate in free and fair elections, undermine the credibility of democratic institutions, and erode the principles of accountability and transparency. They create an environment where power becomes concentrated, political competition is stifled, and democratic principles are subverted.

Despite these inherent dangers outlined above, the African Union has remained mum. The African Union has adopted frameworks for protecting and enhancing democracy and good governance. These include the ACDEG, which I have discussed above. It has also adopted the Declaration on the Principles Governing Democratic Elections in Africa,¹⁵⁵ which sets out, *inter alia*, principles of democratic elections and broadly attempts to provide guidelines to ensure the

¹⁵⁵ African Union, *Declaration on the Principles Governing Democratic Elections in Africa*, AHG/Decl.1 (XXXVIII), 2002 - <<https://www.eisa.org/pdf/au2002declaration.pdf>>, on 3 June 2023.

conduct of democratic elections in Africa. The African Peer Review Mechanism is a voluntary self-assessment instrument encouraging African Union member states to evaluate their governance processes and practices.¹⁵⁶ Furthermore, the African Governance Architecture reflects the African Union's ambition to enhance, advance, and protect human and people's rights, foster democratic institutions and culture and ensure good governance and the rule of law.¹⁵⁷

It is essential to knowledge that the African Union has taken steps to regulate democracy and good governance. This is something to be lauded and commended. However, constitutional amendments undermining these values are a blind spot, which is the African Union's Achilles' heel. The African Union, as Abebe argues, has avoided engaging with these issues, particularly the extension of presidential terms, which he refers to as 'third-termism'.¹⁵⁸ The African Union has not invoked and cited Article 23(5) of the ACDEG, which prohibits any amendments of the constitution that amount to an infringement of principles of democratic change of government to prevent the extension of presidential terms and remove age limits.¹⁵⁹

b) Constitutional amendment by courts

Courts, through their decisions, generate rules.¹⁶⁰ When they interpret the constitution, they may amend the constitution by creating a novel rule or interpretation that does not expressly appear in the constitution.¹⁶¹ Without any safeguards and guarantees, the executive can use courts to secure their power by pressuring courts to favour one interpretation over the other, which would invariably violate democratic governance. This would allow the executive to

¹⁵⁶ Killander M, 'The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward' 30(1) *Human Rights Quarterly*, 2008, 41.

¹⁵⁷ Kariseb K and Okoloise C, 'Reflections on the African Governance Architecture: Trends, Challenges and Opportunities' in Addaney M, Nyarko MG, Boshoff E (eds), *Governance, Human Rights and Political Transformation in Africa*, Palgrave Macmillan, Cham, 2020, 42-43.

¹⁵⁸ Abebe A, 'It's time for the African Union to put a stop to "third-termism"' *Al Jazeera*, 8 July 2019 – <<https://www.aljazeera.com/opinions/2019/7/8/its-time-for-the-african-union-to-put-a-stop-to-third-termism>>, on 18 March 2023.

¹⁵⁹ Abebe A, 'It's time for the African Union to put a stop to "third-termism"'.
¹⁶⁰ Woolman S, 'The Amazing, Vanishing Bill of Rights' 124(4) *South African Law Journal*, 2007, 788.

¹⁶¹ Macfarlane, 'Judicial Amendment of the Constitution' and Albert R, 'How Unwritten Constitutional Norms Change Written Constitutions' 38(2) *Dublin University Law Journal*, 2015, 387.

subvert and avoid democratic processes, which may sometimes require exacting standards for constitutional amendments.¹⁶² Albert reasons:

*'[W]here courts possess the power of judicial review, and where that power is effective, the functionally binding quality of an interpretation of the constitutional text by the national court of last resort approximates the formally binding quality of a written constitutional amendment. The form of entrenchment may differ, but their effects are largely indistinguishable.'*¹⁶³

Consider Burundi, for example, where the Constitutional Court held that the Burundian Constitution did not prohibit a president (President Pierre Nkurunziza) from occupying the office for a third term, even though the Constitution expressly limits it to two presidential terms.¹⁶⁴ This case came after Nkurunziza failed to get the constitution amended formally.¹⁶⁵ The Court reasoned that Nkurunziza's first term did not count as part of two presidential terms, and it interpreted the first time as requiring the president to be elected by direct suffrage.¹⁶⁶ Simply put, the Constitution textually permitted a person to hold the presidency office for two terms; however, the Court held that it was possible to hold that office for three terms. Not only was this contrary to the language of the Constitution, but it also undermined the spirit and purport of democracy and good governance.

Integral to this is the protection of judicial independence. Courts are pivotal in any constitutional democracy, and accepting that the judiciary can informally amend a constitution is crucial to safeguard its independence and integrity. This ensures that courts remain impartial, unbiased and committed to the rule of law and the supreme law of the land.¹⁶⁷ The need to protect the courts and

¹⁶² Macfarlane, 'Judicial amendment of the Constitution', 1898.

¹⁶³ Albert, 'How Unwritten Constitutional Norms Change Written Constitutions', 389.

¹⁶⁴ An English version of this judgment, see RCCB 303 <<http://www.ihrda.org/wp-content/uploads/2015/05/Judgment-of-Burundi-Constitutional-Court-ENGLISH-Translation.pdf>>, accessed on 5 May 2022 (Burundi judgment). See also Dawson and Young, 'Presidential Tenure and Constitutional Provisions'.

¹⁶⁵ George Omondi, 'The New Assault on Presidential Term Limits in Africa: Focus on Burundi' (African Leadership Centre) <<https://www.africanleadershipcentre.org/index.php/2014-10-22-15-44-06/alc-newsletters/sept-2015-issue/385-the-new-assault-on-presidential-term-limits-in-africa-focus-on-burundi>>, accessed on 5 February 2023.

¹⁶⁶ Burundi judgment.

¹⁶⁷ For a compelling account of the relationship between the judiciary and the rule of law, see Waldron J, 'The rule of law and the role of courts' 10(1) *Global Constitutionalism*, 2021, 91.

guarantee their independence and impartiality was recognised in *Oba Lamidi Adeyemi (Alafin of Oyo) v Attorney General, Oyo State* and held that ‘the jurisdiction of the courts must be jealously guarded... for purposes of enhancing the rule of law.’¹⁶⁸

The African Union has engendered judicial independence and impartiality in its normative frameworks. As one of its objectives, the ACDEG commits itself to promoting and protecting the judiciary’s independence.¹⁶⁹ Despite this, no normative standard provided by the African Union would strengthen and reinforce the impartiality and independence of the judiciary. The lack of safeguards for judicial independence may lead to tainted judgments that interpret and informally change the Constitution in a manner that may undermine the rule of law and constitutionalism. The perennial and ever-looming attempts to distort judicial independence by making the judiciary require an urgent and robust intervention by the African Union. A failure to safeguard the independence of such a pivotal institution would lead to the gutting and hollowing of many constitutions.

Again, the example of Burundi is pivotal. It serves as a stark reminder of how a lack of judicial independence can undermine the fundamental principles of constitutionalism and democracy. By analysing the erosion of judicial independence during Nkurunziza's regime, we can discern the detrimental consequences that arise when the judiciary is compromised. In Nkurunziza's third term, the judiciary faced mounting pressure to align its decisions with the ruling regime's interests.¹⁷⁰ The constitutional court, entrusted with upholding the rule of law, succumbed to this pressure and made rulings favouring the regime's agenda, disregarding constitutional provisions and established legal norms.¹⁷¹ This erosion of judicial independence undermined the very foundation of the rule of law,

¹⁶⁸ *Oba Lamidi Adeyemi (Alafin of Oyo) and Others v Attorney General, Oyo State and Others* (1984) Supreme Court of Nigeria, 602.

¹⁶⁹ Article 2(5), ACDEG.

¹⁷⁰ ‘Burundi court ‘forced’ to validate leader’s third term’ *Al Jazeera*, 14 May 2023 – <<https://www.aljazeera.com/news/2015/5/14/burundi-court-forced-to-validate-leaders-third-term>>, on 3 June 2023.

¹⁷¹ ‘Burundi court ‘forced’ to validate leader’s third term’ *Al Jazeera* and Democratic Governance and Rights Unit, ‘Burundi: Assaults on the Rule of Law and Judicial Independence’ *DGRU*, 7 May 2015 – <<https://www.dgru.uct.ac.za/news/press-release-burundi-assaults-rule-law-and-judicial-independence>>, on 3 June 2023.

leading to a loss of trust in the judiciary and a sense of injustice among the citizenry.

The compromised judicial independence allowed for an unchecked concentration of power in the hands of the executive. The constitutional limits on presidential terms were disregarded, enabling the ruling regime to extend its grip on power without meaningful opposition.¹⁷² This erosion of checks and balances weakens democratic governance as the executive branch becomes untethered from constitutional restraints, undermining the principles of accountability and power distribution.¹⁷³

The disregard for term limits violated the constitutional framework, undermining the very essence of constitutionalism.¹⁷⁴ Filipi and Witting label the third term as unconstitutional.¹⁷⁵ The erosion of judicial independence allowed the ruling regime to manipulate and bend the constitution to suit its interests, rendering constitutional provisions meaningless.¹⁷⁶ This erosion weakened the integrity of the Burundian Constitution and eroded public trust in the legal and political institutions that were supposed to safeguard it. Compromised judicial independence during Nkurunziza's third term led to a justice system tainted by political interference and favouritism. Political opponents and dissenting voices faced persecution without any legal recourse to defend their rights and state-

¹⁷² Omondi G, 'The New Assault on Presidential Term Limits in Africa: Focus on Burundi' *African Leadership Centre* – <<https://www.africanleadershipcentre.org/index.php/2014-10-22-15-44-06/alc-newsletters/sept2015-issue/385-the-new-assault-on-presidential-term-limits-in-africa-focus-on-burundi>>, on 3 June 2023 and Opala K, 'Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi' *ConstitutionNet*, 30 July 2015 – <<https://constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi>>, on 3 June 2023.

¹⁷³ For a broader discussion, see Vandeginste S, 'Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi' 51(2) *Africa Spectrum*, 2016, 39-63.

¹⁷⁴ For a detailed discussion, see Dawson M and Young DJ, 'Presidential Tenure and Constitutional Provisions: Recent Evidence from Central Africa' 55(3) *Africa Spectrum*, 22 February 2021 – <<https://journals.sagepub.com/doi/full/10.1177/0002039720980457>>, on 3 June 2023.

¹⁷⁵ Filipi A and Witting K, "'Assuming our place in the concert of nations": Burundi as imagined in Pierre Nkurunziza's political speeches' 60(2) *Journal of Modern African Studies*, 2022, 256. Also see, 'US: Third Term for Burundi President is Unconstitutional', *VOA*, 29 May 2015 – <<https://www.voanews.com/a/us-third-term-for-burundi-president-is-unconstitutional/2804080.html>>, on 3 June 2023.

¹⁷⁶ Omondi, 'The New Assault on Presidential Term Limits in Africa: Focus on Burundi'.

sanctioned violence.¹⁷⁷ This situation is further exacerbated by the incoherent and unprincipled relationship between the African Union and RECs, which will be considered next.

c) The African Union, RECS and the Principle of Subsidiarity

Through Article 3, the Constitutive Act provides that there must be coordination and harmony between RECs and the African Union to ensure the incremental achievement of the African Union's objectives.¹⁷⁸ Axiomatically, this means that RECs must assist the African Union in furthering its objectives, including promoting good governance, democratic principles, the rule of law, and constitutionalism. RECs were established to facilitate and achieve regional economic integration in line with the principal objective of the African Economic Community. The African Economic Community was adopted as part of the Lagos Plan of Action and the Final Act of Lagos in 1980.¹⁷⁹ To give effect to the ambition of economic integration, the Treaty Establishing the African Economic Community was signed into force in 1994,¹⁸⁰ even though many RECs had already concluded their own treaties.

Currently, there are eight RECs recognised by the African Union, namely: Economic Community for West African States ('ECOWAS'); Common Market for Eastern and South Africa ('COMESA'); Southern Africa Development Community ('SADC'); Economic Community of Central African States; Arab Maghreb Union ('UMA'); East African Community ('EAC'); Intergovernmental

¹⁷⁷ 'We Will Beat You to Correct You' *Human Rights Watch*, 18 May 2018 – <<https://www.hrw.org/report/2018/05/18/we-will-beat-you-correct-you/abuses-ahead-burundi-constitutional-referendum>>, on 3 June 2023; 'Burundi: A Dangerous Third Term' *International Crisis Group: Africa Report N°235*, 20 May 2016 – <<https://icg-prod.s3.amazonaws.com/235-burundi-a-dangerous-third-term.pdf>>, on 3 June 2023; and Filipi and Witting, "'Assuming our place in the concert of nations": Burundi as imagined in Pierre Nkurunziza's political speeches', 256.

¹⁷⁸ Article 3(l) of the Constitutive Act reads:
'The objectives of the [African] Union shall be to:

...

(l) coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.'

¹⁷⁹ Mbenge MM and Illy O, 'The African Economic Community' in Yusuf AA and Ouguerouz F (eds) *The African Union: Legal and Institutional Framework*, Martinus Nijhoff Publishers, Leiden, 2012, 189-190.

¹⁸⁰ Organization of African Unity, *Treaty Establishing the African Economic Community*, 12 May 1994.

Authority on Development {‘IGAD’}; and Community of Sahel-Saharan States (‘CEN-SAD’). RECs are perceived as the ‘building blocks’ of integration.¹⁸¹ While the African Union has normative frameworks relating to democracy, good governance and the rule of law, the RECS also have their own democratic normative frameworks. For instance, The Treaty of the SADC provides that member states must act consistently with human rights values, the rule of law and democracy.¹⁸² SADC adopted the ‘SADC Principles and Guidelines Governing Democratic Elections’, which sets the guidelines, norms, and standards for effective elections.¹⁸³ ECOWAS also adopted a treaty concerning democratic governance, which prescribes minimum constitutional principles and norms that member states need to abide by.¹⁸⁴ This treaty sets out core constitutional principles to guide its member states, including that elections will be free, fair and transparent.¹⁸⁵

The Protocol on Relations between the RECs¹⁸⁶ and the African Union was recently signed into force.¹⁸⁷ The African Union and the RECs are parties to this Protocol, and its principal aim is to provide a normative framework for a coordinated response by these bodies. Another framework adopted to give effect to Article 3 of the Constitutive Act is the Memorandum of Understanding on Cooperation in the Area of Peace and Security Between the African Union, the Regional Economic Communities and the Coordinating Mechanism of the

¹⁸¹ African Union, ‘Regional Economic Communities (RECs)’ <<https://au.int/en/organs/recs>>, on 19 May 2022.

¹⁸² Article 4(c), *Treaty of the SADC*.

¹⁸³ Section 1, *SADC Principles and Guidelines Governing Democratic Elections*, 18 August 2004. See Matlosa K, ‘Democratisation at the Crossroads: Challenges for the SADC Principles and Guidelines Governing Democratic Elections’ 118 *Institute for Security Studies*, 2005, 1.

¹⁸⁴ *ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*, 21 December 2001. See Basiru AS, Salawu MLA and Adepoju A, ‘The 2001 ECOWAS Supplementary Protocol on Democracy in Light of Recent Developments in the Sub-Region of Africa’ 95(3) *International Social Science Review*, 2019, 1.

¹⁸⁵ Article 1(b), *ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*.

¹⁸⁶ Interesting, this ECOWAS Protocol defines a REC as a ‘regional grouping of African states organized into a legal entity by treaty, with economic and social integration as its main objective’. Accordingly, it does not restrict the definition to the African Union-recognised RECs.

¹⁸⁷ Erasmus G and Hartzenberg T, ‘How relevant is the Protocol on Relations between the RECs and the AU?’ *TralacBlog*, 6 March 2022 – <<https://www.tralac.org/blog/article/15548-how-relevant-is-the-protocol-on-relations-between-the-recs-and-the-au.html>>, on 12 May 2022.

Regional Standby Brigades of Eastern Africa and Northern Africa. The Memorandum takes notice of the need to, *inter alia*, establish strong democratic institutions and cultures and acknowledges the need to respect the rule of law and promote good governance.¹⁸⁸ Notwithstanding these frameworks and the injunction in Article 3, ambiguity still characterises the relationship between the African Union and the RECs. There is no clear pattern of which body (either the African Union or a REC) should respond to a particular constitutional change. From the few instances where these bodies have acted, it is difficult to discern a pattern of action as they are barely consistent.

The principle of subsidiarity is the key to understanding this relationship and lack of consistency. The principle, its provenance being the European Union,¹⁸⁹ is a concept that provides that institutions and actors closer to the problem should be tasked with solving that problem. It is a multifaceted concept that enjoins an effective competence allocation between multilevel governance structures such as transnational and national actors.¹⁹⁰ In other words, the principle of subsidiary prioritises governance at the lower, local levels. Von Staden remarks that the principle is underpinned by effectiveness and efficiency.¹⁹¹ In the African context, this means that problems must be resolved by the state, then RECS, the African Union and the United Nations as a measure of last resort.

The principle of subsidiary essentially is predicated on the idea that institutions closer to an issue or problem should ideally have the competence and remedies to address that issue.¹⁹² The primary justification for this principle is effectiveness. However, it is a double-edged sword. It also proscribes communities of a higher order from interfering in the work and functions of

¹⁸⁸ Preamble of the Memorandum.

¹⁸⁹ The concept was mentioned in European Union, *Treaty Establishing the European Community*, 25 March 1957 and Article 5, European Union, *Treaty of the European Union*, 7 February 1992.

¹⁹⁰ Kaaba O and Fagbayibo B, 'Promoting the Rule of Law through the Principle of Subsidiarity in the African Union: A Critical Perspective' 8(1) *Global Journal of Comparative Law*, 2019, 30.

¹⁹¹ von Staden A, 'Subsidiarity Regional Integration Regimes in Latin America and Africa' 79(2) *Law and Contemporary*, 2016, 29.

¹⁹² de Búrca G, 'Re-appraising subsidiarity's significance after Amsterdam' Jean Monnet Center for International and Regional Economic & Justice, Working Paper 7/99, 2000, 43 – <<https://jeanmonnetprogram.org/archive/papers/99/990701.html>>, on 18 March 2023.

lower-order communities from interfering with the affairs and competency of a higher-order community.¹⁹³ Plainly put, it inhibits both the higher and lower order communities ‘from taking action in areas properly falling within each other’s respective sphere of action.’¹⁹⁴

In Africa, subsidiarity underpins the relationship between the African Union and the RECs.¹⁹⁵ The principle of subsidiarity in this situation demands that regional institutions and structures should take charge of resolving an issue that is taking place in its region and under its political jurisdiction.¹⁹⁶ In the African landscape, there exist three distinct levels of relationships: the first being between the United Nations and the African Union, the second between the African Union and the Regional Economic Communities (RECs), and the third being a direct relationship between the United Nations and the RECs. These interrelated levels of engagement facilitate cooperation and coordination among these key regional and international actors, fostering collective efforts towards peace, development, and addressing challenges in the African context.¹⁹⁷ One could argue that a subsidiarity relationship exists between states, RECS and the African Union.¹⁹⁸ The African Union-RECs relationship and the principle of subsidiarity are explicitly addressed in the PSC Protocol and the Memorandum.¹⁹⁹ The REC is intended to be the first intervener, and when it fails, the African Union should intervene. With both RECs and the African Union, the United Nations will intervene.²⁰⁰ Article 16 of the PSC Protocol provides that the regional mechanisms for conflict prevention, management and resolution are part of the overall security architecture of the African Union – the institution charged with the primary responsibility for promoting security, peace and stability in

¹⁹³ Schilling T, ‘Subsidiarity as a Rule and a Principle or: Taking Subsidiarity Seriously’ Jean Monnet Center for International and Regional Economic & Justice, Working Paper 10/95, 1995 - <<https://jeanmonnetprogram.org/archive/papers/95/9510ind.html>>, on 18 March 2023.

¹⁹⁴ Toth AG, ‘Is Subsidiarity Justiciable?’ 19(3) *European Law Review*, 1994, 278.

¹⁹⁵ PSC Report, *Defining AU-REC relations is still a work in progress*, 1 August 2019.

¹⁹⁶ PSC Report, ‘Defining AU-REC relations is still a work in progress’.

¹⁹⁷ ECCAS-CMI, *The Principle of Subsidiarity: The Example of ECCAS in the Central African Crisis*, 2016, 4.

¹⁹⁸ Institute for Security Studies, *Unscrambling subsidiarity in the African: From competition to collaboration*, 2021, 5.

¹⁹⁹ Institute for Security Studies, *Unscrambling subsidiarity in the African*, 5.

²⁰⁰ Nathan L, ‘Will the lowest be first? Subsidiarity in peacemaking in Africa’ International Studies Association Annual Convention Conference, 16-19 March 2016, Atlanta, 1.

Africa. Furthermore, the Chairperson of the African Union Commission and the PSC must harmonise and coordinate the activities of the regional mechanisms to ensure that they are consistent with the objectives and principles of the African Union and work closely with these mechanisms to ensure effective partnership between them and the PSC.²⁰¹ According to the PSC Protocol, there is a hierarchical relationship between the African Union and the RECs, situating the African Union as the superior, higher institution.

The Memorandum also calls for subsidiarity between the African Union and the RECs. The Memorandum gives substance to the Article 16 of the PSC Protocol. It regulates the cooperation between the African Union and the RECs in peace and security. It does this by, inter alia, laying down the principles concerning the recognition of the African Union as bearing the primary responsibility for maintaining peace, security and stability in Africa,²⁰² as well as recognising the role and responsibilities of the RECs in their jurisdictions.²⁰³ It also acknowledges the role of subsidiarity, comparative advantage and complementarity.²⁰⁴ Clearly, the Memorandum identifies the principle of subsidiarity as an operational principle.²⁰⁵

Moreover, these principles invariably ought to inform the approach of the RECs and the African Union to conflict prevention, management and resolution. Article VII of the Memorandum provides that the African Union and RECs will intensify their efforts towards preventing conflicts by embracing policies and mechanisms to promote ‘democratic principles and practices, good governance, the rule of law and the protection of human rights.’²⁰⁶

Despite the acceptance and purported reliance on the principle, the Constitutive Act, the Protocol on Relations between the RECs and the African Union and the Memorandum do not define the principle.²⁰⁷ This makes it difficult to delineate the exact contours and boundaries of the principle.²⁰⁸ It is, however,

²⁰¹ Article 16(1), *PSC Protocol*.

²⁰² Article IV(ii), *Memorandum*.

²⁰³ Article IV(iii), *Memorandum*.

²⁰⁴ Article IV(iv), *Memorandum*.

²⁰⁵ ECCAS-CMI, ‘The Principle of Subsidiarity’, 7.

²⁰⁶ Article VII(1), *Memorandum*.

²⁰⁷ Institute for Security Studies, ‘Unscrambling subsidiarity in the African Union’, 5.

²⁰⁸ Institute for Security Studies, ‘Unscrambling subsidiarity in the African Union’, 2.

defined in the African Charter on Maritime Safety and Security and Development in Africa, adopted in 2016. There, subsidiarity is described as ‘the principle of ensuring a degree of independence for a lower authority from a higher authority or a local authority from central government. It therefore implies the sharing of competence at different levels of authority.’²⁰⁹

In practice, the application of subsidiarity has proven difficult.²¹⁰ This uncertainty has resulted in inconsistent responses by the African Union and the RECs. In 2017, an opposition leader in Zambia, Hakainde Hichilema, was arrested and detained for four months on accusations that he threatened the life of the President. The African Union and SADC failed to respond to this act and remained silent on the issue. This arrest was a perspicuous threat to democracy.²¹¹ The trumped-up charges were dropped after the Commonwealth intervened, with Secretary-General Patricia Scotland visiting Zambia and facilitating his release.²¹² In Burundi, there was a different response. After President Pierre Nkurunziza caused an amendment to the Burundi Constitution to prolong his stay in office (this led to political violence and instability), the PSC decided to deploy a military force of 5000 peacekeepers in Burundi.²¹³ However, the African Union Heads of State disagreed with the PSC and preferred the EAC to be responsible for resolving the Burundi crisis. The EAC appointed Ugandan President Yoweri Museveni to act as a mediator in the crisis. However, this led to nothing as Nkurunziza rejected proposals from the mediator, and there was no meaningful engagement.²¹⁴

This can be contrasted with the situation in The Gambia in 2017. Yahya Jammeh, the autocratic ruler of The Gambia who seized power from President

²⁰⁹ Article 1, *African Charter on Maritime Security, Safety and Development of 2016*.

²¹⁰ ECCAS-CMI, ‘The Principle of Subsidiarity’, 8.

²¹¹ Kaaba O and Fagbayibo B, ‘Promoting the Rule of Law through the Principle of Subsidiarity in the African Union’.

²¹² Kaaba O and Fagbayibo B, ‘Promoting the Rule of Law through the Principle of Subsidiarity in the African Union’, 42-43.

²¹³ Kaaba O and Fagbayibo B, ‘Promoting the Rule of Law through the Principle of Subsidiarity in the African Union’, 45.

²¹⁴ Kaaba O and Fagbayibo B, ‘Promoting the Rule of Law through the Principle of Subsidiarity in the African Union’, 46.

Dawda Jawara, lost the presidential elections in 2017 to Adama Barrow.²¹⁵ Jammeh refused to step down as President. Soon after, the African Union proclaimed that it would no longer recognise Jammeh as a head of state. ECOWAS then took military and diplomatic action against Jammeh without the African Union's interference.²¹⁶ This demonstrated a coordinated response from the African Union and a REC in the form of ECOWAS—the principle of subsidiarity in action.

The above scenarios illustrate the lack of consistent (and at times) robust coordination by the African Union and RECs to produce a tangible outcome. Furthermore, the situations that require the African Union's response or a REC are unclear. Is it a matter of political preference, or is there a criterion that allocates these functions? In the Zambia context, the African Union and SADC failed to respond to an act that undeniably threatened democracy, with neither body taking action to resolve the issue. In the Burundi context, there was a disagreement about which body should respond – either the African Union or the EAC. In the Gambian context, there was a clear, well-coordinated response between the African Union and ECOWAS. The African Union and RECs have responded inconsistently, and it is difficult to predict the grounds that warrant the various bodies' intervention and when such intervention should occur. The principle of subsidiarity has become a mere garb for the African Union and the RECs to hide behind, which bears no significance and has caused confusion and ambiguity. This has led to the African Union and the RECs failing to intervene, as seen in Zambia and Burundi meaningfully.²¹⁷ The principle is invoked without precision, filled with empty political rhetoric.

Conclusion

²¹⁵ See Wiseman JA and Vidler E, 'The July 1994 Coup D'Etat in the Gambia: The End of an Era?' 84 (333) *The Round Table* 1995, 53.

²¹⁶ Williams PD, 'A New African Model of Coercion? Assessing the ECOWAS Mission in The Gambia' *The Global Observatory*, 16 March 2017 – <<https://theglobalobservatory.org/2017/03/ecowas-gambia-barrow-jammeh-african-union/>>, on 5 February 2022.

²¹⁷ For a fuller discussion of these cases, see Kaaba O and Fagbayibo B, 'Promoting the Rule of Law through the Principle of Subsidiarity in the African Union' 27-51.

Against the backdrop of the history of violent government changes through coups, the African Union has impressively adopted normative frameworks to deal with unconstitutional changes of government, notably the Lomé Declaration, Constitutive Act and the ACDEG. However, its application of these norms is wanting. Concerning constitutional amendments that may have an adverse impact on the rule of law, good governance, democracy and constitutionalism, the African Union has been flat-footed. Constitutional amendments are inevitable. They can happen both formally and informally. While constitutional amendments are less violent than coups, they are insidious and may destroy the rule of law and constitutionalism. They may create uncertainty and instability, lead to (il)legitimacy of a constitution and halt the African Union's normative ambitions.

Constitutional amendments to amend presidential terms and remove age limits have led to constitutional coups. These amendments threaten and weaken the judiciary's independence and consolidate the executive's power. This untenable situation will erode any form of the rule of law, constitutionalism, democracy, and good governance that the African Union purports to uphold.

In this paper, I have sought to illustrate that the African Union, on paper, is committed to the rule of law, constitutionalism, democracy and good governance. It has grand and ambitious proclamations about these values and pledges its allegiance. To this end, it has adopted several frameworks that condemn and chastise unconstitutional government changes (in the form of military coups and other illegal conduct). However, it has done little to nothing about constitutional amendments that are ostensibly legal and have the same effect as unconstitutional changes of power in substance. Although they appear legal, they are at odds with principles that govern democratic change. I demonstrate these claims by looking at various countries that effected constitutional amendments to threaten the independence of the judiciary, remove presidential term limits and upper age restrictions, and consolidate and broaden the power of the executive. The African Union has fallen woefully short in addressing these constitutional changes, which strike at the core of the rule of law, constitutionalism, democracy and good governance. The principle of the subsidiary has also muddied the waters. The

African Union and RECs have responded inconsistently to political unrest and turmoil based on constitutional amendments and undemocratic practices.

Considering the shortcomings and gaps discussed in this paper, some recommendations are scoped to consider. These exhaustive recommendations are part of an ongoing conversation about fostering a culture that promotes and adheres to the rule of law, constitutionalism, democracy and good governance.

Although the ACDEG refers to democratic principles, good governance, constitutionalism, and the rule of law, they are of procedural value. Procedural safeguards are cardinal but do not go far enough as they may be manipulated and subverted. Furthermore, since no substantive legal guidelines are provided to flesh out the content of these values, we are left speculating as to what type of amendments are prohibited. The fact that the African Union has predominantly used these normative guidelines for unconstitutional changes of governments has meant that it has missed the opportunity to engage with constitutional amendments meaningfully.

The relationship between the African Union and RECs must be clarified and delineated. The principle of subsidiarity is a pivotal doctrine which should not be dismissed as creating inefficiencies. The African Union should be the notional primary responder to any issues of constitutional amendments that undermine the values set out in its normative framework, which are identified above. This would mean that the African Union must actively adopt a normative framework focusing on constitutional amendments that further rogue aspirations. This normative framework should contain rules of a legal nature that set out precisely how constitutional amendments are being governed and how the African Union and a REC will respond in a situation where these rules are contravened. These rules must be clear and predetermined so that the institution responsible for an immediate response knows its obligations to act accordingly and avoid the African Union and a REC from proverbially pointing fingers at each other. There must be policy considerations in this normative framework aimed at uniting African states under the same united object of furthering the rule of law, constitutionalism, and democracy the rule of law and reaffirming the essence of a constitution and why it cannot be amended or replaced to advance one's political

ambitions. With this normative framework, a fund must be created to support RECs and other organisations that curbed abusive constitutional amendments. This fund could be managed by the African Union Commission, which will decide how to allocate the necessary funding.

Furthermore, the African Court of Human and Peoples' Rights and the African Commission on Human and Peoples' Rights could be brought into the conversation. The African Court and the African Commission may provide the substantive definitions of the values of the rule of law, constitutionalism, democracy and good governance. This would provide an opportunity for all the relevant bodies of the African Union to be in conversation with each other and ensure that its vision of Africa is manifested and is deeply embedded in the ethos and practices of Africa.

Another possible solution is the establishment of a commission or a similar body which is functionally independent of the executive branch of member states. It is widely recognised that upholding constitutionalism, democracy, and the rule of law calls for constitutionally entrenched institutions that are not under any legislative or executive control. This is to avoid a lack of political will from tainting the process of embedding a culture of constitutionalism in Africa. This may be seen as a body of experts whose primary role is to monitor, consider, develop, and implement broader and substantive conceptions of the rule of law, democracy, constitutionalism, and good governance. This would comfortably address constitutional amendments that make inroads into these values. Ergo, the function of this body will not only be performing 'negative' functions (in monitoring and checking) but will also be tasked with performing 'positive' tasks (developing and implementing). The appointment of the members of such a commission would be multi-partisan to ensure that it is transparent and seen as legitimate. Since such a body is meant to monitor and check constitutionalism, the rule of law and democracy about member states, member states mustn't have control over the appointment and work of this body.

Authors' Contributions

S.B.N., as the main author of this article, was responsible for the research activities, such as the data collection, presentation, and writing of the report and manuscript.

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