Paper Delivered by The Hon. Justice Dr. Abou Bhakarr M. Binneh-Kamara J. Justice of Sierra Leone's Superior Court of Judicature, at the International Conference of the ECOWAS Community Court of Justice, Held in Banjul, The Gambia, between the 21st and 25th May, 2023.

Conference Theme: ECOWAS' Zero Tolerance for Unconstitutional Change of Government

1.1 Introduction

Mr. Chairman, all protocols observed. My task in this auspicious occasion is to do a presentation on the topic: 'The Rule of Law, Democracy and Good Governance – ECOWAS' Constitutional Convergence Principles in Perspective'. Mr. Chairman, please permit me to rather do a presentation on 'ECOWAS' Categorical Imperative Principles of Governance in Regional International Law'. The presentation is so re-named, because in the context of West Africa's regional international law, the entire membership of ECOWAS is bound by its Revised Treaty, signed in Cotonou, Benin, on the 24th July 1993 and its subsisting Protocols and Declarations, ratified and/or domesticated, pursuant to the appropriate provisions of its Member States' respective constitutions.

Thus, the paper presents the case that the current worrisome trend in global politics, regarding the resurgence of political authoritarianism, has had serious ramifications for regional integration and the fundamental political and legal architecture upon which ECOWAS is built[1]. This trend has manifestly heightened the potential for intra-states conflicts[2] that would undermine regional cooperation, security and peaceful coexistence in the Sub-region. Further, the paper reiterates the significance of ECOWAS' zero tolerance policy of unconstitutional change of government[3] in projecting its interlocking fundamental ideals of

[1] The Revised Treaty of 1993, The Protocol on the Community Court of Justice (1991/1996), The Supplementary Protocol Amending the Protocol Relating to the Community Court of Justice (2005), The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (1999), The Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security 2001/2008) The Protocol Relating to the Free Movement of Persons, Residence and Establishment (1979/1980) and all its supplementary protocols adopted between 1985 and 1999, Declaration on the Fight Against Trafficking in Persons (2001), Accra Declaration on War- Affected Children in Africa (200), The Declaration of ECOWAS' Political Principles (1991) etc.

[2] See Chapter X of the Revised Treaty, regarding Cooperation in Political, Judicial and Legal Affairs, Regional Security and Immigration: Article 58 (1) (a).

[3] See Section 1: Constitutional Convergence Principles- Article 1 (c) of the Supplementary Protocol on Democracy and Good Governance (2001/2008).

democratisation and constitutionalism, the rule of law, human rights and good governance. Meanwhile, the surge of military interventions in West Africa's body-politic is undemocratic, unconstitutional and manifestly antithetical to the Sub-region's democratic progression. This retrogression is unacceptable; it is a digression from West Africa's resolve to relegate political authoritarianism to the doldrums[4].

The presentation condemns the military's unwarranted intrusion into politics; and simultaneously espouses their disdain for ECOWAS' core democratic ideals, while locating the military's role in its actual constitutional and democratic context[5]. The paper also contextualises ECOWAS' unprecedented positive strides since the 1990s, in the projections of democratisation through constitutionalism in the Sub-region; and how those positive strides have impacted the need for having strong democratic institutions[6], reasonably fair democratic processes[7] and credible democratic cultures[8] in the Sub-region. The paper concludes that despite its challenges, the security and socioeconomic development of West Africa, in this era of postmodernism and Information Technologies (ICTs), are still in the hands of ECOWAS, which has a crucial role to play in bringing West Africa together; and thereby projecting it as Africa's beacon for the implementation of democratic initiatives and good governance ideals.

1.2 Constitutionalism and Governance in Human Affairs

Humanity has always grappled with the philosophical issues of how to organise and govern a political community and the fundamental ideals upon which society should be built. These issues are compounded by the fact that human nature is underpinned by two extremes: cooperation and conflict. Thus, humanity has always pushed for cooperation over conflict, because of its tendency to foster man's relative security, bring a political community together, and simultaneously propel it to development and prosperity. Analytically, it is upon cooperation that the concepts of Statehood and Sovereignty are built; it is upon cooperation that the international community and its regulatory regimes are constructed; and it is upon cooperation that even ECOWAS and its sui generis legal order, which Member States are

[4] See Section1: Constitutional Convergence Principle- Article (1) (e) and Section 4: The Role of the Armed Forces, the Police and Security Forces in a Democracy.
[5] Ibid.
[6] Op. cit: Article 1 (a)- (l).
[7] See Section 2: Elections- Articles 2-10
[8] See Section 6: Education, Culture and Religion- Articles 29-31.

bound to constitutionalise and enforce, has emerged in the context of regional international law. Invariably, conflict can cause miseries and devastating scourges at the micro and macro levels.

In fact, conflict has become the World's greatest challenge in this third decade of the twenty-first century. And humanity's existence is even threatened by potential nuclear wars, rooted in political and ideological conflicts, that have sent shock waves, across the World's Community of Nations, about the future of the human race. West Africa's governance experiences, had been fraught with a plethora of debacles, including the devastating effects of colonialism and imperialism, one-party oligarchies and political authoritarianisms, endemic corruption and ethno-regional considerations in the allocation of States' resources, military coups and rebellions, and a general sense of hopelessness in international relations. Nonetheless, the final decade of the twentieth century, witnessed a Liberal democratic transition in international relations that impacted the evolution of general and regional international laws.[9] Thus, the need to strengthen regional integration, democratisation and constitutionalism, the rule of law, human rights and good governance, became the principal thrusts of West Africa's governance architecture and development initiatives[10]. Meanwhile, it is in this context that ECOWAS developed its Political Principles, rationalised in Declaration A/DCL. /1/7/91 adopted in Abuja, Nigeria on 6th July 1991. This Declaration was followed by the adoption of the ECOWAS Revised Treaty in 1993, which signaled a clear retreat from political authoritarianism and its manifest challenges in the socioeconomic, political and legal spheres of West Africa.

1.3 Conceptual Framework

Conceptually, political authoritarianism is rationalised in Statism (in the name of Sovereignty); whereas democracy is rationalised in Liberalism (in the name of constitutionalising the limitations of the overwhelming political powers of the State). The political realists (the so-called statists) still believe that politics is underscored by the quest for, consolidation and use of State power, to project the multidimensional interests of the ruling class (political realism). And the political idealists (liberals and moralists) believe that politics is about upholding the

[9] D Armstrong, T Farrell and H Lambert, International Law and International Relations (2 edn. Cambridge University Press) 2-3.
[10] See Article 4 (a) and (i) of The Revised Treaty of 1993.

fundamental ideals, upon which a political community is constructed[11]. What are those ideals, upon which peaceful, stable and developmentally-oriented political communities are built?

Thus, justice and constitutionalism, democracy and the rule of law, human rights and freedom and by extension good governance, are the most salient. Analytically, notwithstanding ECOWAS' strives towards political and constitutional liberalism, political realism has continued to influence West Africa's political and constitutional landscapes; and it has threatened peaceful coexistence in the Sub-region, with a diabolical potential to resuscitate intra-states conflicts, that would undermine the sub-region's stability. The political realists consider State Sovereignty as the basis of its laws; and that the overwhelming political and constitutional powers of the State, must invariably surpass the rights and freedoms of citizens and their legitimate socioeconomic and political organisations and institutions (including political parties in opposition, the media and civil society).

This is how they (the statists) would rather want their Superior Courts of Judicature to interpret and enforce their laws and constitutions; so that the ruling elites can disguise their political shenanigans under the rule of law; and hereby adulterate the constitutional ideals of limited government. What are the fundamental paraphernalia of limited government? Again, the most notable are the rule of law, separation of powers, judicial independence, decentralisation of State administration and the power of the Legislature in its oversight functions of the Executive's Ministries, Departments and Agencies (MDAs). Contrariwise, the political liberals believe in the conception that one of the fundamental considerations upon which the State is built is to protect and enforce the fundamental rights and freedoms of the individual (personal autonomy).

Therefore, the State must not (in the name of Sovereignty) overwhelmingly exercise its powers to infringe on the rights and freedoms of its citizens, as guaranteed and protected by the State's constitutional and legal regimes. The political liberals conscientiously clamour for

[11] This conceptual dichotomy has been explored by theorists in domestic and international relations/law, including, R Morgenthau, Politics Among Nations: The Struggle for Power and Peace (7 edn. New York: Alfred A. Knopf); J Alder, Constitutional and Administrative Law (6 edn. Palgrave Macmillan) 19-43; O Nnoli, Introduction to Politics (1 edn. Longman Singapore) 7-10; C W Kegley Jr., World Politics: Trend and Transformation (11 edn. Thompson and Wadsworth) 25-32); B Dupre, 50 Political Ideas You Really Need to Know (Quercus) 3.

limited government, through democratisation and constitutionalism. They also believe that the foregoing paraphernalia of limited government are the architecture of a functional democracy. Constitutionally, it is the Judiciaries of Member States of ECOWAS, pursuant to their adjudicative functions, that should enhance the balance between the constitutional positions of the political realists and the political liberals in the political and constitutional debates. This constitutional balance, recognises the Sovereignty (Supremacy) of the State and simultaneously protects and enforces democratic citizenship and human rights, freedoms and liberties. This balance is rationalised in the constitutionalism of political pragmatism. Significantly, this discrete and sacred constitutional responsibility of Judiciaries, must be conscientiously exercised without fear or favour, affection or ill-will.

As stated above, there is a clear connect between democracy and limited government. And the most significant paraphernalia of limited government, are arguably the most prominent characteristics of good governance. Good governance is characterised by participation, the rule of law, transparency, responsiveness, consensus oriented, equity, effectiveness and efficiency, accountability and strategic vision[12]. Thus, despite democracy's challenges in the twenty-first century, it is upon these good governance ideals that it has successfully continued to thrive. Democracy reflects a governance system that constitutionally empowers the electors to freely and fairly elect their President (The Chief Executive and Head of State) that implement the law, and their Parliamentary Representatives (Legislature), that make and unmake the law, which are interpreted and enforced by the Judiciary, to uphold the supremacy of the constitution; maintain social order and control; protect fundamental rights, freedoms and liberties; preserve the State, its resources and culture ; and settle disputes.

The following inferences are discernible from this conception. First, there is a nexus between democracy and constitutionalism. That is, democracy must be constitutionally sanctioned. And in a democracy, the constitution is the supreme law. Therefore, every other legal doctrine: statute or the common law, is subservient to the constitution. Secondly, governance in a democracy is about the rule of law: It is about the rule of law making. The rule of law implementation. And the rule of law interpretation and enforcement. Thirdly, elections are fundamentally crucial to democracy. They are the tectonic plates, upon which the democratic

[12] The United Nations Development Programme (UNDP: 1997): A Brochure on Good Governance, page 3.

architecture is constructed. They are the forces that propel the functions and functionalities of the State and its operatives. They are as well the basis for democratic legitimacy and the constitutional and legal powers of the occupants of political offices.

Fourthly, the concept of separation of powers is cognate with democracy. The principal thrust of this concept is that the cardinal governance architecture: Legislature, Executive and Judiciary are constitutionally bound to be kept separate of each other in terms of functions, personal and control, but there must as well be legal and constitutional regimes, preventing one organ of government, from infringing on the functions of the others; while creating a room for the apposite checks and balances, consonant with law. Laws are implemented by the Executive, through MDAs. They are made by Parliament, consonant with constitutional processes and procedures. And they are interpreted and enforced by the Judiciary, which principal constitutional responsibility is rooted in the administration of justice. Fifthly, fundamental human rights, freedoms and liberties, must be recognised, guaranteed, protected and enforced. The judiciary's functionality as an arbiter of justice and dispute settlements is crucial here.

Fifthly, democracy is not only about the functions and functionalities of democratic institutions; it is also about the processes, underscoring the exercises of democratic functions in the context of the apposite democratic culture. So, the ideals of true democracy are realised when the democratic trilogy: institutions, processes and culture, converge and work in the interest of the electorate[13]. Sixthly, there must as well exist an independent institution that monitors the credibility of the democratic institutions as they exercise their functions; examine whether the democratic processes are honoured; and uphold the democratic cultures; thereby giving succour to the notions of democratic legitimacy and accountability. Undoubtedly, this institution is the media, which should exercise interlocking functions with Civil Society Organisations (CSOs) in the context of democratic citizenship. Analytically, the above constitutional and institutional safeguards in liberal democracies uphold the ideals of justice.

[13] Abou B. M. Binneh-Kamara, The Nexus Between Conflict and Democratic Good Governance in Sierra Leone, Paper Delivered at the National Consultative Conference on Building a United and Cohesive Nation, 20-22 March 2013, Bank Complex, Freetown, Sierra Leone.

Justice is the constant and perpetual will to render to others what is due to them. Justice is the crowning glory; it is the sovereign mistress and queen of all the virtues[14]. So, justice is the most cardinal or supreme political and legal virtue[15]. It is the only justification for law[16]. A fortiori, humanity's clamour for justice has been viewed through lenses coloured by the promotion of virtues and values, the maximisation of societal welfare and the protection and enforcement of rights, freedoms and liberties[17]. Thus, justice in the judicial sense should be justified in this trilogy. Judicially, justice has a context and a content. The context being the facts underpinning every case; and the content is the applicable laws (the legal doctrines)[18]. Therefore, justice in the eyes of the Courts is viewed in a concrete (not in an abstract) sense. Constitutionally, justice must be seen done, through credible, fair and judicious public hearing processes by independent, impartial, incorruptible and neutral judicial institutions.[19]

Pragmatically, it is through law that justice can triumph and reign supreme; it is through law that rights and liberties are enforced. In fact, the manifestation of truths for peaceful coexistence in society is tied to law and justice: Justice, peace and truth are an inseparable triplet unconnected with Natural Law. Natural Law is indeed the ultimate test of justice and liberty in all human affairs[20]. The political idealists and liberals believe in the core truths of Natural Law. So, the influence of Natural Law on State affairs is inextricably linked to Liberalism in modern democracies. The ideas of Natural Law are anchored by the belief that the validity of human law (Positive Law), must approximate to a higher law, rationalised in morality. That higher law is secularly discovered by human reason and theologically through the scriptures[21]. Thus, there is a connect between morality and human reasoning. There is also a connect between nature and reason; for reason governs the universe. So, humanity is part of the universe and of nature. Thus, to coexist naturally, humanity must live by reason. Therefore:

---

[14] Cicero, Political Speeches: A new translation by D.H. Berry Oxford World's Classics (Oxford University Press, 2006).
[15] M Tebbit, Introduction to the Philosophy of Law, op. cit: 6-7.
[16] G. H. Sabine, A History of Political Theory (3rd. ed., New York: Holt, Rinehart & Winston, 1961) 558
[17] M. J. Sandel, Justice: What is the Right Thing to Do? (Penguin Books, 2010) 19-21.
[18] Lord Donaldson MR in R **v.** Secretary of State for Home Department ex parte Cheblak {1991} 2 All ER 319.

[19] See Section 17 (1) (a) and subsections (5), (6) and (7) of section 120 of Act N0.6 of 1991}
[20] E Burke and the Natural Law (1958) pages 34-36.
[21] M Tebbit, Philosophy of Law, (3 edn. Routledge) 11- 12.

> …True law is right reason in agreement with nature. To curtail this law is unholy, to amend it is illicit, to repeal it impossible. One and the same law, eternal unchangeable, will bind all people and all ages. What of the many deadly, the many pestilential statutes which nations put in force? These are no more deserve to be called laws than the rules a band of robbers might pass in their assembly. Law is the distinction between things just and unjust, made in agreement with most primal and ancient of all things, nature[22].

Thus, Human Laws are deemed unjust when they are made to protect the fundamental interests of the political status quo; when they transcend the powers of their makers ; when they impose unequal burdens on the people[23]; and when they contravene the fundamental ideals on which States' constitutions are built. Thus, unjust laws have become the juristic weapons of political authoritarianisms in the name of sovereignty to suffocate humanity's basic freedoms, rights and liberties[24]. But power and authority (Sovereignty) without justice, is a complete manifestation of criminality on the part of the governors over the governed[25]. Therefore, Liberalism's core legal truths of justice and the protection of citizens' fundamental freedoms and liberties, must be the principal concern of the Sovereign. Unlike the case in political authoritarianisms, this is exactly the idea underscoring the ideological foundation of the Liberal democracies, upon which ECOWAS' constitutional convergence principles are anchored.

Thus, the connection between Natural Law and Liberalism has been made quite salient. Despite the juristic challenges posed to Natural Law[26], Liberalism has continued to find solace in its revived thesis, which confirms that Natural Law's normative principles, reflect what is evidently good for humanity and are derived from the practical experience of one's natural and personal inclinations. Man's objective goods (life, knowledge, play, aesthetic experience, friendship or sociability, practical reasonableness and religion) are clearly not discernible in any moral evaluations of goodness. They are rather those practical things that really make

[22] Cicero (1928{54-52 BCE}) De Republica and De Legibus, trans. C.W. Keyes, London: Heinemann.
[23] Ibid.
[24] H LA Hart, Concept of Law, op. cit: 205-206.
[25] Augustine, The City of God: Book XIX (Chapter 21) in S. M. Cahn's Classics of Political and Moral Philosophy, with introductory note by Paul J. Weithman, OP. CIT: 306-307;
[26] Particularly during the 18th and 19th centuries by David Hume, Adam Smith, Baron de Montesquieu, Jeremy Bentham, John Austin and Hans Kelsen.

one's life worthwhile. This is man's objective knowledge of what is right; the basis of human flourishing. The possibility of realising objective goods, depends on a legal system that upholds the common good[27]. Thus, the essence of law making, law implementation and law interpretation and enforcement, is to ensure that the common good is upheld. This is the Sovereign's principal responsibility. And unjust laws which work against the common good may be valid, but do not resonate with the Sovereign's authority.

The existence of unjust laws in the legal system amounts to nothing, but corruption of law. Thus, contemporary human history, is replete with evidence of how political authoritarianisms, have corrupted law to achieve their diabolical and anti-humanistic objectives (again in the name of Sovereignty). The legality accorded to the statutes of the criminal Nazi regime of Hitler in Germany; the recent attempts to rejuvenate the manifestly overwhelming power of the State to curtail civil liberties and human freedoms[28]; the global decline of economic and social security, the threats of modern political authoritarianisms[29] etc., lend credence to Liberalism's quest for constitutionalising the limitations of the overwhelming political powers of the State; thereby giving succour to the ideals of justice, democratisation and constitutionalism, the rule of law and human rights: Ecowas' constitutional convergence principles. Thus, the basic forms of human flourishing (basic goods), are the solid pillars of juristic considerations, on which Liberalism will continue to build its justifications for limited government.

[27] J Finnis, 'Natural Law and Natural Rights' (Clarendon Press, 1980). See analysis in particularly chapters III, IV and V.

[28] Helena Kennedy, Just Law: The Changing Face of Justice and Why It Matters to Us All Vintage Books, London, 2005.

[29] Erica Frantz, Authoritarianism: What Everyone Needs to Know Oxford University Press

1.4 Analytical Exposition: Towards Constitutionalising Democracy, the Rule of Law and Good Governance in ECOWAS Member States

A fortiori, ECOWAS is a non-state actor in international relations and a subject of general international law with juridical status.[30] Essentially, the distinction between general and regional international law must be made quite salient at this stage. General international law has universal and global applicability; whereas the rules of regional international law, have restrictive applicability to the communities of States that have created them.[31] Analytically, the legal significance of ECOWAS is manifested in customary international law and its 1993 Revised Treaty and adopted Protocols and Declarations[32]. The Revised Treaty is accordingly registered with the Secretariat of the United Nations Organisation (UNO), pursuant to Article 102 (1) of the latter's 1945 Charter.

This means that, the Revised Treaty can thus be invoked by its entire membership or any of its members, before any organ of the UNO. And in situations that necessitate regional intervention to maintain international peace and security in any Member State, ECOWAS can as well invoke Article 52 of the UNO's Charter, seeking the Security Council's mandate. Thus, treaties in themselves are sources of international law[33]. But treaties that are made in contravention of any peremptory norm or jus cogens are null and void ab initio in general international law[34]. Moreover, jus cogens are erga omnes norms that are generally recognised and accepted by States as norms of imperative character from which no derogation in permitted, except by a subsequent norm of general international law, having the same character[35].

And, in general, treaties establishing international organisations bind their entire membership. They do not bind third States, without their consents[36]. However, the modern

[30] B A Simmons and LL Martin, International Organisations and Institutions, in Walter, T Risse, B A Simmons, Handbook of International Relations, op. cit:132.
[31] T Hillier, Principles of Public International Law (2 edn. Cavendish Publishing Ltd.) 202- 93.
[32] See Articles 6 and 26 of the Vienna Convention on the Law of Treaties of 1969.
[33] On the legality of treaties as sources of international law, see Article 38 of the Statute of the International Court of Justice (1945).
[34]See Article 53, op. cit.
[35] S Besson & J Tasioulas, The Philosophy of International Law (2010 edn. Oxford University Press) 10; see also T Endicott, The Logic of Freedom and Power in page 245 of the same publication.
[36]See Articles 26 and 34, op. cit.

conception of relative normativity[37], seems to contradict this notion on the applicability of treaties in general international law.[38] Nevertheless, the law-making processes of international law, enable States to create rules within a narrow compass, binding its membership[39] (regional international law). In this context, the constitutional regimes of ECOWAS, have emerged as a sui generis legal order that bind its entire membership. So, ECOWAS' impacts and competencies in influencing the constitutional and institutional reforms processes of Member States cannot therefore be overemphasised. Meanwhile, the revision of ECOWAS' 28 May 1975 Treaty, was not unconnected with the evolving dynamics of contemporary international relations/law, which have challenged the concept of Sovereignty. The principal challenge to State Sovereignty is justified in the political liberals and idealists' agenda to constitutionalise the limitations of the overwhelming powers of the State. Sovereignty denotes absolute independence externally, and full State power as a juristic person.[40] Sovereignty was the basis for the creation of the fundamental regimes of international law[41].

The criteria for Statehood; the need to protect their independence, sovereignty and territorial integrity; and their principal functions, are manifested in the Westphalia Treaty (1648) and the Congress of Vienna (1814-15), but rationalised in Articles 1 and 3 of the Montevideo Convention on the Rights and Duties of States (MCRDS: 1933). These instruments are still crucial to the dynamics of contemporary international law. Thus, Article 3 of the MCRDS reads:

[37] D Shelton, International Law and 'Relative Normativity' in International Law in M D Evans' International Law (4 edn. Oxford University Press) 137- 135; P. Weil, Towards Relative Normativity in International Law, American Journal of International Law, 77 (1983), 413; J Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, Oxford Journal of Legal Studies 16 (1996), 85.

[38] D Shelton, International Law and 'Relative Normativity' in International Law in M D Evans' International Law (4 edn. Oxford University Press) 137- 135; P. Weil, Towards Relative Normativity in International Law, American Journal of International Law, 77 (1983), 413; J Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, Oxford Journal of Legal Studies 16 (1996), 85.

[39] G Schwarzenberger, International Law as Applied by International Courts and Tribunals, Volume 1 (3 edn. London: Stevens & Sons Ltd., 1957) 20.

[40] T Endicott, The Logic of Freedom and Power in S Besson & J Tasioulas' The Philosophy of International Law (1 edn. Oxford University Press) 245- 256.

[41] D Archibugi & A Pease, Crimes and Global Justice: The Dynamics of International Punishment (1 edn. Polity Press) 3.

> The political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to defend the jurisdiction and competence of its court. The exercise of these rights has no other limitation than the exercise of the rights of other States according to international law.

Significantly, though Article 3, articulates the rights and powers of States; it equally stipulates the principal circumstances in which such rights and powers are restricted. This points to the fact that even in international law Sovereignty is never absolute[42] (Though the political realists think it is). First, this legal truism is endorsed in general international law in Chapter VII of the UNO's Charter (1945) in the context of protecting international peace and security, and its numerous Human Rights Conventions and Instruments, that have attained the jus cogens status[43]. Secondly, in regional international law, Sovereignty's restrictions is endorsed in Articles 3 and 4 of the African Union's (AU's) Constitutive Act (2001) and its Conventions and Protocols on democratisation and constitutionalism, the rule of law, human rights and good governance in Africa[44].

This same position is rationalised in Article 4 (g) and (i) of the ECOWAS Revised Treaty, concerning the fundamental principles upon which the organisation is built; and the prominent ECOWAS' Protocols and Declarations on the above liberal democratic ideals. In

[42] J L Cohen, Sovereignty in the Context of Globalisation: A Constitutional Pluralist Perspective in S Besson & J Tasioulas' The Philosophy of International Law, op. cit: 265.

[43] The Universal Declaration of Human Rights (1945), The International Covenant on Civil and Political Rights (1966), The International Covenant on Economic, Cultural and Social Rights, The Genocide Convention (1948), The Nuremberg Principles (1949), The Convention on the Elimination of All Forms of Discrimination Against Women (1979), The Convention on the Rights of the Child (1989) etc.

[44] The African Charter on Human and Peoples Rights and Its Optional Protocols (1981/1986), The OAU's Solemn Declaration Security, Stability, Development and Cooperation in Africa adopted in Abuja, Nigeria on 8th and 9th May, 2000, The Decision of AHG Declaration142 (XXX) on the Framework of OAU's Reaction to Unconstitutional Change of Government adopted in Algiers in July 1991, The African Charter on Democracy, Elections and Governance ((2007/2012), Aspiration 3 of Agenda 2063 (The Africa That We Want), the Declaration on the Principles of Freedom of Expression and Access to Information in Africa (2019) and the Work of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, the African Convention on Cyber Security and Personal Date Protection (2014) etc.

fact, paragraph five (5) of the Preamble to the Revised Treaty clearly articulates the point about the need to restrict State Sovereignty in West Africa:

> CONVINCED that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will.

Thus, the concept of regional integration, has made it mandatory for Member States, to be bound by duly ratified and domesticated treaties, constituting the building blocks of regional international law[45]. Thirdly, the evolution of the principle of universal jurisdiction, invoked in the trial of Chilean dictator, Augusto Pinochet in London (1998-2000), confirms the principle that territorial sovereignty, does not shield even political leaders from prosecution for heinous crimes against humanity. And the former Liberian President, Charles Taylor, was convicted and sentenced by the Special Court for Sierra Leone (SCSL) on the basis of the principle of universal jurisdiction[46]. Fourthly, the concept of humanitarian intervention in the name of human rights protectionism, led the General Assembly of the UNO to adopt its Resolution on the Responsibility to protect'; in justification of the limitation of the sovereignty of independent States; for the protection of the lives of its citizens against despicable human rights violations.

This evolving principle in international law, was brought to the fore after the commission of genocides in Rwanda and the former Yugoslavia and the indiscriminate killings in conflict-afflicted zones. Fifthly, the idea of cosmopolitanism, can as well account for another limitation to sovereignty. Cosmopolitanism is antithetical to the notion that States are the only legitimate political organisations in international relations. Cosmopolitanism, the bastion of civil society activism, calls for active democratic citizenships and their involvements on issues of national and international importance that affect their varied interests[47]. Thus, the quest for global peace and justice, leading to the creation of the International Criminal Court (ICC), is not also unconnected with the cosmopolitan project in international relations. Notwithstanding the fact that sovereignty in international law has been circumscribed by the

[45] See The AU's Constitutive Act, 2001 and The ECOWAS' Revised 1993 Treaty, for example.
[46] C Jalloh, The Legal Legacy of the Special Court for Sierra Leone, op. cit:
[47] D Hirsh, The Law against Genocide: Cosmopolitan Trials (2003 edn. London: Glasshouse Press); A Franceschet, Four Cosmopolitan Projects: The International Criminal Court in Context (in Roach, 2009).

exigencies of time and the foregoing conceptual phenomena in global politics, which are in themselves Liberal ideals; the World's most powerful and populous nations, have vehemently clung on to Sovereignty, while undermining the operations of the ICC. They are not a signatory to the Rome Statute and would never (at this time) subject their nationals to the Court's jurisdiction.

Thus, in the context of international criminal justice, Sovereignty still protects the pike and leaves the minnows vulnerable to prosecution. How does this uphold the ideal of international criminal justice in the quest for human rights? However, Sovereignty was a fundamental weakness of ECOWAS' functionality as a vibrant and robust regional economic organisation at its inception. The peremptory norm of States' Sovereignty and the protection of their independence and territorial integrity was rationalised in the doctrine of non-interference into the internal affairs of States. The prevalence of this norm, manifested a clear inability of ECOWAS, to generate the apposite legal norms that would have fostered the requisite cooperation and integration in the Sub-region. Thus, effective regional integration, would have helped to address the multidimensional socioeconomic, political and legal obstacles that have crippled West Africa's progression to development and prosperity.

Thus, the framework of the original ECOWAS Treaty was devoid of the concept of supranationalism, which was never considered as having any place in the context of Africa's regional international law. Again, it was clear that ECOWAS States were ill-prepared to cede their Sovereignty. So, it was hard for ECOWAS to develop a coherent legal order, binding its entire membership. Thus, the establishment of institutions, such as the ECOWAS Community Court of Justice, has been crucial in developing the jurisprudence of ECOWAS law. Meanwhile, ECOWAS' Revised Treaty, Protocols and Declarations, together with the decisions of the Community Court of Justice, constitute a plethora of rules that now bind West African States. Therefore, it is incumbent on them to conduct their politics and design their constitutions and other legal regimes, consonant with the converging constitutional principles of ECOWAS[48]. Thus, the nature and legal significance of regional rules, were accordingly enunciated in the locus classicus of the International Court of Justice (ICJ) in the Columbian-Peruvian Case of 1950 as follows:

[48] Article 1 Paragraphs (a) – (i) on ECOWAS Protocol on Democracy and Good Governance (A/ASP1/12/O1.

1. Regional rules are not necessarily subordinate to general rules of international law, but may be in a sense 'complementary' or 'correlated' thereto; and
2. An international tribunal must as between States in the particular region concerned, give effect to such regional rules as and duly proved to the satisfaction of the tribunal.

Therefore, inferentially, the regional rules of international law (regarding democratisation and constitutionalism, the rule of law, human rights and good governance), which ECOWAS has created for its Members, are not in contradistinction to popular demands in global politics and contemporary international law. Moreover, ECOWAS since its formation (almost five decades ago) has made incredible progress in its quest for the above ideals in the governance processes of West Africa. Thus, when ECOWAS was formed, eight (8) of its Member States were governed by brutal military dictators that defiled their respective States' constitutions, sanctioned impunity and committed widespread human rights violations. In fact, throughout the cold war period and beyond, West Africa was notorious for unconstitutional change of government. The Sub-region was nicknamed 'Africa's coup belt'.

Thus, with the emergence of the Third Wave of democratisation[49] and the need for the formation of strong regional groupings (this time in the name of political and economic integration) in the 1990s, the unconstitutional practice of usurping State power was abandoned for democratisation and constitutionalism in the Sub-region. Thus, it was clear that economic growth and development (the principal thrusts of the Community's existence), could never be achieved in an environment marred by instability, violence and rebellion, injustice and poor governance: The principal factors that caused and exacerbated the civil wars in Liberia and Sierra Leone, which ECOWAS alongside the international community commendably resolved; and thereby preventing the spillover effects on a Sub-region, already trapped in abject poverty and underdeveloped. Meanwhile, it was against this backdrop, that ECOWAS' Heads of State and Government, three (3) months after the commencement of the civil war in Sierra Leone and at the peak of the rebellion in Liberia, adopted its Declaration of Political Principles (Declaration A/DCL. /1/7/91) in Abuja, Nigeria on 6th July 1991.

[49] Samuel P. Huntington, The Clash of Civilisation and the Remaking of World Order, Simon & Schuster UK Ltd. 1997.

This Declaration is justified in the rationale for democratisation and constitutionalism, the rule of law, human rights and good governance in West Africa's body-politic. The Declaration was followed by the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Protocol A/P1/12/99), signed in Lomé, Togo, on 10th December, 1999, when it entered into force. Analytically, the above political and constitutional ideals, constitute the pillars upon which the Protocol is built.

Thus, Paragraph thirteen (13) of Protocol A/P1/12/99, states in its elaborate Preamble that 'good governance, the rule of law and sustainable development are essential for peace and conflict prevention'. Progressively, ECOWAS' Heads of State and Government adopted the Protocol on Democracy and Good Governance (Supplementary to Protocol A/P1/12/99), signed in Dakar, Senegal, on 21 December 2001, and entered into force on 10 February 2008. Thus, it is this ECOWAS Protocol that finally laid the bedrock for the practice of democratic good governance in Africa's regional international law. In fact, the African Charter on Democracy, Elections and Governance, adopted by the African Union (AU) in Addis Ababa, Ethiopia, on 30 January 2007 and entered into force on 15 February 2012, was inspired by the ECOWAS Protocol on Democracy and Governance (2001/2008); with which it shares so many commonalities. Suffice it to say that virtually all the conceptual issues of democratic good governance distilled from the ECOWAS Protocol are found in the AU's Charter on Elections, Democracy and Governance (2007/2012).

Section 1 of the Protocol on Democracy and Good Governance (2001/2008), contains Article 1, which relates to the Community's constitutional convergence principles. Article 1 is quite generic and establishes the basic governance principles, underscoring democracy and constitutionalism in West Africa. A fortiori, the principles of democratisation and constitutionalism: separation of powers, the rule of law, judicial independence, the conduct of periodic free, fair and transparent elections, decentralisation of State administration at all levels, the exercise of parliamentary oversight functions over Executive actions and decisions, the free media's functionality in promoting democratic institutions and the need to monitor the credibility and reliability of the democratic processes and cultures, mass democratic participation through civil society activism (the paraphernalia of limited government) conceptualised 1.3, are generically referenced in Article 1, but the essential characteristics

underpinning the concepts and the respective safeguards, pursuant to which their democratic utility, can be felt in a functional democracy are articulated between Articles 2 and 50.

Moreover, Section 2 deals with elections. The section spans between Articles 2 and 10. The respective Articles indicate the processes, resonating with the conduct of periodic free, fair and transparent elections by independent, neutral and impartial electoral commissions (bodies). Section 3 covers election monitoring and ECOWAS assistance. This section encompasses Articles 11-18. The section makes ECOWAS' role in monitoring the electioneering processes in Member States quite salient. The section is analogous to the provision in Article 42 (1) of Chapter 11 of Protocol A/P1/12/99, dealing with ECOWAS institutional capacity for peace-building. The Article thus states:

> To stem social and political upheaval, ECOWAS shall be involved in the preparation, organisation and supervision of elections in Member States. ECOWAS shall also monitor and actively support the development of democratic institutions in Member States.

The criticality of elections to democratic governance, peaceful coexistence and regional stability, which are the cornerstone of ECOWAS' existence and essence in this twenty-first century cannot therefore be underestimated. Section 4 contains the role of the Armed Forces, the Police and the Security Forces in a democracy. The section spans between Articles 19 and 24. The section swirls around their independence and neutrality in the exercise of their constitutional and statutory functions; and simultaneously pontificates the rationale of their apolitical functionality in maintaining law, order and social control throughout the pre-electioneering, electioneering and post-electioneering phases. Section 5 concerns poverty alleviation and the promotion of social dialogue. The section covers Articles 25-28. Thus, poverty alleviation and the promotion of frank social dialogue, through the public sphere, sustained by the media, are crucial for peace and national development.

Section 6 extends to education, culture and religion. The section purls around Articles 29 and 31. There is a clear interconnectedness between education and culture in a democracy. It is through the right, proper, genuine and exact education, that citizens can imbibe the apposite cultures, geared towards democratic legitimacy and accountability; the need to abide by law and order without coercion; and the essence of upholding the ideals of democratic pluralism

and diversity. Section 7 takes in the rule of law, human rights and good governance. The section swirls between Articles 32 and 39. In fact, the significance of these concepts in the democratisation process, has been laid bare. Nevertheless, what is really laudable about Section 6 is the provision in Article 39, which is quoted herein for ease of reference:

> Protocol A/P. 1/7/91 adopted in Abuja on 6 July 1991, relating to the Community Court of Justice shall be reviewed as to give the Court the power to hear, inter alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed.

The legal significance of this Article is seen in ECOWAS' unflinching preparedness to embrace the importance of supranationalism in the context of West Africa's regional international law. As espoused above, the drive towards supranationalism at the formative years of ECOWAS was forestalled by Sovereignty. Now, Member States have consented to the functionality of ECOWAS' formal judicial institution (the Community Court of Justice), to preside over matters of human rights violations in the interest of justice. Moreover, it should be noted that the applicability of human rights norms by national judicial institutions in Africa is a sine qua none. This is an obligation that binds African States. Article 1(3) of the UNO's Charter and the entire African Charter on Human and Peoples' Rights (1981/1986) are quite instructive on this point.

Thus, irrespective of whether a State is monist or dualist in international law, it is bound to give effects to human rights norms, consonant with the spirits and intendments of their creating international legal instruments. This is the essence of the Bangalore Principles on the Domestic Application of International Human Rights Norms (1998). In fact, human rights provisions in international instruments are of jus cogens status in general international law. They are part of customary international law; and are an authoritative interpretation of the UNO's Charter[50]. So, in circumstances wherein Justices of the Superior Courts of Judicature of West Africa are determined to uphold the ideals of human rights in their respective countries, the Community Court of Justice will never be inundated human rights cases. Furthermore, Section 8 concerns women, children and the youth. The section swirls around Articles 40 and 43. The section is by extension a reflection of the same human rights issues made quite valent

[50] Javaid Rehman, International Human Rights Law: A Practical Approach (Pearson Education Ltd.2003): 57-61.

between Articles 32 and 39. The human rights issues emphasise between Articles 40 and 43, dovetailed with the basic rights of women and children in a democracy.

The ultimate thrust of the said Articles are reflected in the Universal Declaration of Human Rights (1948), the Convention on the Political Rights of Women (1952), the International Covenant on Civil and Political Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the UNO's Convention on the Rights of a Child (1989), the African Charter on Human and Peoples Rights (1981/1986), Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (The Maputo Protocol) (2003/2005) and the African Children's Charter (1990/1999). Meanwhile, Articles 44 and 45 resonate with the modalities for the implementation of the Protocol and its requisite sanctions to be invoked to enhance compliance. Moreover, the provisions between Articles 46 and 50, engulf issues relative to amendments, withdrawal, entry into force and depository authority.

1.5 The Critical Perspective: The Constitutional Challenges of ECOWAS States in the Context of Global Politics

The foregoing analysis points to the unprecedented positive strides, which ECOWAS has made since the end of the cold war in embracing supranationalism in the context of West Africa's regional international law. Analytically, ECOWAS' determination and commitments to influence the functions and functionalities of States' institutions and their operatives, consonant with sound democratic processes and cultures, have somewhat transformed the political and constitutional landscapes of the Sub-region. ECOWAS States have ratified Protocol A/P1/12/99 and its profound Supplementary Protocol on Democracy and Good Governance (2001/2008), containing the Community's constitutional convergence principles; which are a sine qua none for West Africa's governance infrastructure. Moreover, the constitutions of Member States have domesticated the essential paraphernalia of democracy and limited government. Thus, constitutionalising the limitations of the preponderance powers of the State in the name of political and constitutional liberalism is quite essential for the practice of democratic good governance.

This does not presuppose an effort to weaken the State, but it is directed at striking the appropriate balance, between the rights and powers of the State, rationalised in Articles 1

and 3 of the Montevideo Convention of 1933 and the protection of the rights, freedoms and liberties of citizens in the interests of justice, democratic citizenship and mass political participation. This has been the essence of the constitutional jurisprudence of political pragmatism, to which the Courts are mandated to play a crucial role, consonant with the ideals of the Bangalore Principles on the Domestic Application of Human Rights Norms (1988), found in the numerous international human rights instruments referenced above. The questions that arise at this stage are how determined and committed are the Judiciaries of Member States to interpret international human rights instruments with the requisite profundity, in tandem with the sprits and intendments of the conventions, protocols and declarations, pursuant to which they are made?

Have the Courts been really interpreting the law to uphold the ideals of justice, democratisation and constitutionalism, the rule of law, human rights and good governance, the very virtues and values on which the World's most prosperous States have prided their developmental orientations and inclinations? Regrettably, the resurgence of political authoritarianisms, in this era of State security, neo-nationalism and terrorism, have threatened the practice of democratic good governance at a global scale. Presently, around 40% of the World's population live under some form of authoritarian rule, and authoritarian regimes govern about a third of the World's countries[51]. This worrisome trend in the World's Community of Nations is increasingly becoming complex for political and constitutional practices in West Africa; a Sub-region that has really progressed beyond the scourges of the political authoritarianisms of the cold war era.

What is now even more worrisome, is the extent to which the political authoritarians (realists) have shrouded their dictatorial tendencies, postures and outbursts in democratic constitutionalism. They have constitutionalised the notable democratic institutions and processes, but because the apposite democratic cultures, rationalised in the democratic ideals are lacking, they have been constantly interfering with the functions and functionalities of democratic institutions and operatives; while manipulating the democratic processes; hereby slaughtering the democratic ideals and cultures at the altar of bigotry and dictatorship. As espoused in 1.3 above, governance is about constitutionalism and the rule of law. But how

[51] Erica Frantz, Authoritarianism: What Everyone Needs to Know, op.cit: 1-16.

does the rule of law really work? The law must be accessible and so far as possible intelligible, clear and predictable; questions of legal right and liability should be ordinarily resolved by application of the law and not by discretion; the laws of the State should apply equally to all, save to the extent that objective differences justify differentiation; ministers and public officers at all levels must exercise the powers conferred on them in good faith and fairly and for the purpose for which the powers are conferred, without exceeding the limits of such powers and not unreasonably; the law must afford adequate protection of fundamental human rights; means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes, which the parties themselves are unable to resolve; the State's adjudicative procedures should be fair; the rule of law requires compliance by the State with its obligations in international law as in national law[52].

Do West African States sanctify and uphold the above criteria for the workability of the rule of law as sanctioned by their constitutions? Thus, efforts are being made to give credence to the rule of law, but such effort is being thwarted principally because of Executive interferences into the law machine of some States in West Africa. In fact, in certain instances ethno-political considerations are undermining the workings of the rule of law. There are instances in the Sub-region, when the law has been used to protect the pike of ruling political parties and their stalwarts, but the minnows in opposition parties, are left vulnerable. In fact, the evidence is there, that some political opponents are being arbitrarily arrested and injudiciously detained for raising critical issues against the ruling elites. Are West African States really complying with their obligations to ECOWAS' sui generis legal order in regional international law?

Again, there has been compliance, but there are so many instances in which ECOWAS' Protocols and Declarations have been violated. The military coups in Mali, Guinea and Burkina Faso, are clear instances in which Section 4 of the ECOWAS Protocol on Democracy and Good Governance (2001/2008) was blatantly violated (I will return to this frustratingly thorny issue later). The reluctance of Member States to domesticate the conventions and treaties, which they have ratified in general and regional international law, undermines the rule of law. Even the failure of Member States to meet their financial obligations with ECOWAS, contravenes

[52] Tom Gingham, The Rule of Law (Penguin Books, 2010) 37-90.

the rule of law. Furthermore, elections are fundamentally crucial to democracy. If elections are that crucial to democracy, why is it that the Justices of the Superior Courts of Judicature of West Africa's democracies are unelected? Why should the discrete and sacred task of judicial adjudication in the name of law interpretation and enforcement be entrusted to unelected Judges, who are being accused of not being apolitical, because the law guarantees their political right to exercise their franchise in free, fair and credible elections; making it hard for them not to be interested in the political dynamics of the State? If this is so, are they independent, impartial and neutral of the political dynamics of the State? Do their political orientations and inclinations influence their decisions?

Again how are elections conducted? How credible and legitimate are the electioneering processes as sanctioned by the constitution and the other laws of a democracy? Of what significance are elections to the culture of democratic citizenship? The above questions are cognate with two issues: judicial independence and the conduct of periodic free, fair and transparent elections. I will analyse the first in the context of judicial independence later. Nonetheless, elections are the only means of ascending to power in a democracy. This is a constitutional prerequisite. So, a government is clothed with democratic legitimacy and accountability only when it is freely, fairly and transparently elected. Article 1 (b) of the Protocol on Democracy and Good Governance (2001/2008) is salient on this point. And the conduct of periodic free, fair and transparent elections is a valent component of ECOWAS' constitutional convergence principles. That is why the same Article 1(d) emphasises 'zero tolerance for power obtained or maintained by unconstitutional means'.

So, the credibility of electioneering processes in the Sub-region's law texts, must reflect the provisions between Articles 2 and 10 of Section 2 of the above Protocol. Because elections are fundamentally crucial to power ascendancy in a democracy, it has always been a potential source of conflict in the Sub-region. In some Member States, elections have become only a win affair, because the winners always take all at the expense of the losers. In multiethnic States, elections have unhelpfully fanned the flames of ethno-regionalism. Thus, forthcoming elections, if not properly monitored by ECOWAS, pursuant to Section 3 and the provisions between Articles 11 and 18 of the Protocol on Democracy and Good Governance (2001/2008) and Article 42 (1) of Protocol A/P1/12/99, together with the internal regulatory regimes of

such States, the Sub-region would likely witness, other devastating conflicts that might threaten regional peace, security and stability.

Some of those States are quite prone to conflicts. And it is easy for countries that have been through brutal wars to be plunged into more dangerous wars. Thus, electoral violence is indeed a cause for concern in the Sub-region. So, the bodies responsible for the conduct of elections must be independent, neutral and impartial in exercising their national statutory mandates. Article 3 of Section 3 of the Protocol is quite instructive on this point. The judiciaries' role in West African democracies is paramount for regional stability. Judiciaries are the bastions of justice. Their independence, neutrality and impartiality in the political dynamics of Member States are assessed by the reliability and credibility of their decisions, directions, rulings, orders and judgments, based on the rule of law as opposed to any other extraneous considerations in Member States. The constitutions of Member States expressly guaranteed judicial independence, but critics believe that in some ECOWAS States judicial integrity and independence are compromised by mostly Executives' inferences, because of their constitutional powers to appoint Justices of Superior Courts of Judicature.

Critics also believe that judiciaries are States' superstructures used by ruling elites to maintain the so-called ideals of the status quo, which are considered as ordeals for ordinary men. Thus, unfairness in the administration of justice, fuels disenchantments and conflicts at the micro and macro levels. In Sierra Leone for example, its Truth and Reconciliation Commission's Report (TRC), makes it very clear that unfairness in the administration of justice was a notable factor that caused and exacerbated the decade long civil war (1991-2002). Meanwhile, what about separation of powers? Do the constitutions of Member States make provisions for it? The constitutions of Nigeria (1999[53] with Amendments through 2011), Sierra Leone (1991[54]), Ghana (1992[55] with Amendments through 1996), Guinea (2010[56]), Mali (1992[57]), The Gambia (1997[58]) etc. contain clear and unambiguous provisions on separation of powers. But have such provisions been upheld?

[53] See provisions between Chapters 5 and 7.
[54] See provisions between Chapters 5 and 7.
[55] See provisions between Chapter 8 and 11.
[56] See provisions between Titles 3 and 7.
[57] See provisions between Titles 3 and 8
[58] See provisions between Chapters 5 and 7.

To a large extent they have been, but the Executives of some Member States have become too powerful. But why is it that Executive powers, are so manifest that, one begins to wonder how strong are West Africa's democratic institutions? Why is it that ECOWAS is calling for strong democratic institutions, when the concept of separation of powers is already enshrined in the constitutions of Member States? Is it that ECOWAS is aware about issues of Executive overreach in the activities and operations of the other arms of Government in some of its Member States? Laws are implemented by the Executives, but how do Executives implement the law? Do they implement it as it is, or seek to implement it in ways that suit their whims and caprices, prejudices and idiosyncrasies or deprecations? These questions are a pointer to some of the political dynamics in some Member States. What are the consequences for State security and peaceful coexistence, when the rule of law is not justly, fairly and reasonably implemented? The answer is simply that the rule of law is undermined.

Invariably, when this is widespread the foundations of conflict and instability are laid. Do citizens whose fundamental rights are infringed by the illegal and unconstitutional actions of Executives get justice from their Courts? Also, Parliament makes and unmakes laws, but how does Parliament make and unmake laws? What are the processes of law making, amending or repealing? Are they adequately provided for in the national constitutions of Member States? What happens when such processes are circumvented? Is law really a law, when its enactment processes are circumvented? Are the things done under such a law, have any legitimacy? What happens when parliament cannot exercise its oversight functions, because of manifest executive overreach? These questions are also a pointer to how in some West African States, parliamentary procedures and processes are circumvented with impunity, when the ruling elites are poised to enacting laws that opposition parties are not comfortable with.

In recent times, the oversight functions of Parliaments are being crippled by the Executives. West Africans have witnessed situations in which members of ruling political parties in Parliaments, have been subsequently denied party symbols; for being vibrant and vocal against the wrongful actions and decisions of the ruling elites. And the modern trend in party politics has made political parties stronger in West Africa. In these circumstances, can Parliaments really exercise their oversight functions in the midst of the growing powers of the Executives in West Africa? Moreover, in constitutional democracies, Sovereignty belongs to

the people from whom governments through their respective constitutions, derive their powers, authorities and legitimacies. This constitutional principle is confirmed in Article 1 (g) of Section 1 of the ECOWAS Protocol on Democracy and Good Governance (2001/2008). The people's power to elect their Presidents and Legislators, justifies the centrality and inevitability of freedom and diversity in a constitutional democracy. Invariably, to be free is the desire of every man. No man wants to be imprisoned, enslaved or prevented from enjoying his human rights and freedoms. Every man wants to enjoy the beauties of freedom of expression, conscience, assembly, movement, association etc. The liberty of everyman is paramount. No man is desirous of being treated unjustly in society. No region, ethnic group or district is desirous of being discriminated against in the allocation of the State's economic resources. Thus, freedom manifests human dignity and sanctity.

Analytically, the judiciary's functionality as an arbiter of justice and dispute settlements is crucial here. Thus, a right is only as powerful as its justification makes it. The numerous human rights instruments referenced above are a manifestation of the international community and ECOWAS' commitment in protecting people's fundamental rights in the Sub-region. And the national constitutions of Member States contain adequate human rights provisions, which can also be enforced by the Community Court of Justice, when domestic remedies have been exhausted {see Article 39 of Section 5 of the Protocol on Democracy and Good Governance (2001/2008)}. Thus, the State must not infringe on the rights of citizens and political opponents in the name of consolidating power and frightening the opposition. When a political community allows the basic rights, freedoms and liberties of human beings to be violated with impunity, the consequences are dire for peaceful coexistence, national security and stability. In such circumstances, disgruntled persons would stop at nothing to satisfy their unmitigated selfishness and rapacity.

Further, information and communication, which lie at the heart of any society to govern itself'[59] are inextricably linked to constitutional democracies. A fortiori, there subsists an independent and interlocking relationship, between media and democracy. Democracy needs media for the regular flow of information; and media needs democracy for the protection of

[59] M. Andrejevic, Automated Media (New York: Routledge, 2020) 162.

its freedoms and independence.[60] Thus, media freedoms enable mediated communicators to impart information and ideas[61], through the public sphere, without fear of being prosecuted and/or persecuted.

They offer the citizenry, the opportunity of making the most appropriate choices, resonating with their varied socioeconomic and political interests and simultaneously constitute the platform, for civil society activisms. They can as well influence and shape public opinions on issues of national[62] and international importance[63]. The principal function of the media in a democracy, is in summary, based on the clamour for democratic legitimacy and accountability in the governance processes of the State, through the dissemination of reliable and credible information and the sustenance of constructive debates, on particularly issues of socioeconomic and political importance; to actualise the ideals of democratisation and constitutionalism, the rule of law, human rights and good governance (the very legal and political architecture that can propel the wheels of justice, truth and peaceful coexistence in West Africa).

Analytically, this principal function of the media in modern democracies, resonates with Goal Sixteen of the UNO's Sustainable Developments Goals (SDGs: 2016) and Aspiration 3 of Africa's Agenda (2063): The Africa That We Want. In fact, this phenomenal role, essentially dovetails with the media's centrality, in communicating the ideals of the Seventeen SDGs and Africa's Seven Aspirations which, if realise, should make the World and Africa a better place. Thus, the media should in this context, be seen as a partner in national and international developments. This functional (as opposed to its conflictual[64]) role, has invariably made the

[60] J Stromback, In Search of a Standard: Four Models of Democracy and Their Normative Implications {6 (3) Journalism Studies} 331-345; W Dizard. Jr. Old Media New Media, Mass Communications in the Information Age (3 edn. Longman) 67-70; L Edwards, Law, Policy and The Internet (1 edn. HART Publishing) 213-228; M Schudson, The Power of News (1996 edn. Harvard University Press) 204

[61] J Akpasubi, A Practical Guide to Investigative Journalism (2010 edn. Mirror Color Prints Limited) 208.

[62] Lord Denning, Due Process of Law (1980 edn. Butterworths) 28; Lord Denning, What Next in the Law (1982 edn. Butterworths) 326-328; K H Jamieson and P Waldman, Press Effects: Politicians, Journalists, and the Stories that Shape the Political World (2003 edn. Oxford University Press) xiii; R M Entman, Media in the Distribution of Power (Journal of Communication **57** (2007) 163- 173 © 2007 International Communication Association); C H. de Vreese, News Framing: Theory and Typology, Information Design Journal and Document Design 13 (1), 51-62 © John Benjamin Publishing Company, p. 1; E Griffin, A First Look At Communication Theory (6 edn. McGraw Hill) 395-406.

[63] P Robinson, Theorizing the Influence of Media on World Politics (European Journal of Communication, Copyright © 2001 SAGE Publications) Vol. 16 (4): 523-544.

[64] R T Schaefer, Sociology (8 edn. McGraw Hill) 159-164; S L Carruthers, The Media At War (2000 edn. Palgrave Macmillan) 23-108.

media a primal social institution, attracting sociopolitical, legal and communications research in national and global contexts. Explicatively, whereas the functional perspective of the media (as a social institution), emphasises the constructive role, which it can play in national and international developments; its conflictual perspective, establishes how the media can foment renewed conflicts, in particularly post-conflict societies, undergoing democratic transformations.[65]

However, it is the conflictual tendency of the media that has arguably heightened the quest for effective media regulations in constitutional democracies. But regulation should not be exploited to the detriment of the media's functionalities and communications exercises in general; neither should it inhibit free speech; nor prevent citizens from accessing the most sensitive information that should guide the choices they make. In a post-conflict governance context, the media serves as a functional mechanism, for consolidating justice, peace and reconciliation.[66] So, media freedoms are indubitably crucial to media operations in post-conflict democracies. Invariably, the constitutions of Liberal democracies, guarantee a relative degree of media freedoms, with mostly clearly defined paraphernalia for regulations[67]. This trend is arguably reflective of the constitutional safeguards of the media and its regulatory regimes in West Africa. Thus, Article 38 of Section 7 of the Protocol on Democracy and Good Governance (2001/2008), concerns issues of communications rights and media freedoms; and the role of Member States to capacitate the independent media in the exercise of its functions.

Meanwhile, the fight against corruption should not be left to fester unaddressed in democratic settings. Article 38 (1) and (2) of Section 7 of the same Protocol thus states:

> Member States undertake to fight corruption and manage their resources in a transparent manner, ensuring that they are equitably distributed. In this regard, Member States and the Executive Secretariat undertake to establish appropriate

[65] R Howard, Conflict Sensitive Journalism (International Media Support and Institute for Media Policy and Civil Society) 1-4.
[66] A B M Binneh-Kamara, Media Reporting of War Crimes Trials and Civil Society Responses in Post-Conflict Sierra Leone (University of Bedfordshire, Ph.D. Thesis) 53-54.
[67] J D Derbyshire and I Derbyshire, World Political Systems: An Introduction to Comparative Government (1 edn. W & R Chambers, Ltd.) 34; S Chiumbu and D Mayo, Media Institutions, Regulation and Governance in a Global South Context in Media Studies (1 edn. Oxford University Press, South Africa) 2020.

mechanisms to address issues of corruption within the Member States and at the Community level.

Corruption which is increasingly becoming endemic and almost uncontrollable in some Member States, is now a serious systematic problem, that can be robustly addressed with the involvement of every player in the democratic milieu, through a holistic approach. Issues of financial mismanagement, misapplication and misappropriation in particularly the public sectors of West African countries, have caused serious economic burdens for some Member States; and can fuel conflict at the macro level. When States' resources are irresponsibly plundered, misallocated and mismanaged, governance institutions are left in ruins, because they are deprived of the requisite resources to execute the functions for which they are crated. And the underprivileged are left to languish in abject poverty. Thankfully, efforts are being made by Member States to curb corruption. Some of them have institutionalised profound anti-corruption strategies and enacted laws, being used to prevent and address the scourges of corruption; while deploying the prosecutorial approach in other circumstances. However, in some West African countries, the fight against corruption is being manifestly selective. This idea of selective justice in dealing with anti-corruption matters is again influenced by political interference.

Frustratingly, the main threat to ECOWAS' constitutional convergence principles is the unwelcome and ugly development of the recently unwarranted resurgence of military intrusions into the Sub-region's body politic. This unfortunate development is horrific for democratisation and constitutionalism in West Africa. The Sub-region had long transcended the bounds of ruthless military interventions and their concomitant dangerousness. West Africa was seriously prone to military coups. Countries that experienced the horrors of brutalities and atrocities, human rights violations and extra-judicial killings of their loved ones by terrible military dictators, are still being hunted by the horrors of that era. Elderly Sierra Leoneans for example, are yet to forget about how the Armed Forces Revolutionary Council (AFRC) brutally sized power in a bloody coup de 'tat on 25 May 1997, broke into the central maximum prisons and threw open the gates, letting out all sorts of criminals and convicts; and simultaneously invited the barbaric Revolutionary United Front (RUF) to form the most feared and ignominious junta that Africa had ever seen.

That unconstitutional and illegal regime practically transformed Sierra Leone into a killing field. However, the military's infiltration into the politics of Mali, Guinea and Burkina Faso, in this era of post-modernism is undemocratic, unconstitutional, unacceptable and politically retrogressive for the Sub-region. Section 4 of the ECOWAS Protocol on Democracy and Good Governance (2001/2008), deals with the armed forces' role, the police and other security forces in a democracy. Thus, Article 19 (1) and (2) states:

> The armed forces and police shall be non-partisan and shall remain loyal to the nation. The role of the armed forces shall be to defend the independence and the territorial integrity of the State and its democratic institutions. The police and other security agencies shall be responsible for the maintenance of law and order and the protection of persons and their organisations.

This provision is analogous to the principal thrust of Title 12 of the Constitution of Guinea. The provisions between Articles 141 and 145 are instructive on this point. This is also the case of the provisions of Chapter 17 of Ghana's 1992 Constitution (see Article 210-215). Again, see Chapter 11 of Sierra Leone's Constitution Act N0.6 of 1991(Sections 165-168) and Nigeria's 1999 Constitution (Articles 217-2020) etc. As it stands, the constitutions of Mali, Guinea and Burkina faso have been suspended and the said countries are now being governed by military decrees, which in the context of the rule of law, are made in violations of parliamentary procedures and processes. Military regimes have never been good for West Africa. The sub-region's history is replete of evidence of the military's destructions of the critical governance infrastructure, constitutional virtues and values, human capital and the economic resources of Member States. And the spillover effects of the resurgence of military coups to other countries, can distabilise the Sub-region.

It is frustrating to note that, despite ECOWAS[68] and the AU's efforts to convince the juntas to relinquish power and return their countries to constitutional rule, they are still being recalcitrant and intransigent to comply. Thus, the situations in all three Member States, illegally governed by juntas, fall within the purports of Article 25 of Chapter 5 of Protocol A/P1/12/1999, for appropriate actions. Pursuant to this, ECOWAS imposed sanctions on the

[68] See Article 45 (3) of Protocol A/P1/12/ 1999.

juntas. The sanctions were imposed in accordance with Article 45 (1) of the Protocol on Democracy and Good Governance (2001/2008). The provision reads:

> In the event that democracy is abruptly brought to an end by any means or where there is massive violation of human rights in a Member State, ECOWAS may impose sanctions on the State concerned.

Thus, the sanctions imposed on the juntas, are accordingly provided for in Article 45 (2) of same. The most notable is suspension of the memberships of the affected countries. What is also worrisome is the fact that the coupists in Mali, have banked on the seemingly popular support, which the junta has gained from the populists. Their position is that democratic governance is about the people's political will. This is a weak defence; and it is contrary to Mali's obligations to the ECOWAS Revised Treaty, Protocols and Declarations. Again, Article 1(c) of the Protocol on Democracy and Good Governance (2001/2008), concerns ECOWAS' zero tolerance for power retained or maintained by unconstitutional means. Furthermore, Article 45 (4) of same provides that, on the recommendation of the Mediation and Security Council, a decision may be taken at the appropriate time to proceed as stipulated in Article 45 of Protocol A/P1/12/1999. This provision deals with restoration of political authority in situations where such authority is absent or has been seriously eroded. And according to Article 52 of Chapter 11 of same, in accordance with Chapters VII and VIII of the UNO's Charter, ECOWAS shall inform the UNO of any military intervention in pursuance of the objectives of the same Protocol.

This was the procedure that ECOWAS invoked in 2017, when it intervened in The Gambia, to forestall the undemocratic efforts of its erstwhile President to maintain power unconstitutionally, after having conceded to losing the Presidential election, but eventually failed to relinquish power, until he was forced into exile by ECOMOG. The question being asked is why was ECOWAS that swift in invoking its legal procedures for restoring constitutionality in The Gambia, but somewhat slow in restoring constitutionality to Mali, Guinea and Burkina Faso. In fact, Mali has even threatened to withdraw its membership from ECOWAS. However, ECOWAS must strengthen it resolve to do all in its powers to restore constitutionality to the said countries in the interest of regional security and stability.

1.6 The Way forward

Pragmatically, the institutionalisation of ECOWAS' constitutional convergence principles in West Africa's governance systems, is perceived as safeguards for conflict prevention and resolution in the Sub-region. The constitutional principles of limited government are also humanity's best known antidotes against the scourges of political authoritarianism and tyranny. They constitute credible legal processes, pursuant to which the ideals of justice are realised: The promotion of virtues and values of a State, the maximisation of the welfare of its citizens, and the extent to which their rights, freedoms and liberties are guaranteed, protected and enforced. The constitutional principles of limited government are a prerequisite for peaceful coexistence. It is in them that the core truths of human governance are manifested. They suffocate the ills of injustice, vengeance and rebellion. They are a means of ensuring that everyone gets what they deserve from the system.

They are a motivation for all to tread in the paths of development and prosperity. They propel the indolent into actions; for they know that the system is well structured and constructed on rules that cannot be circumvented for whatever considerations. It is the rule of law that prevails in such a system. They create a fair environment in which everyone is relatively secured. They are a means of efficient allocation of resources. Arguably, it is the stringent applicability of the principles of limited government that have undoubtedly motivated hundreds of thousands of people from Africa, Asia and South America, risking their lives in dangerously perilous journeys, through the Mediterranean Sea and other unsafe routes to get to the Western hemisphere. Those leaving for the West are not like persons swimming in fresh waters carrying they are thirsty, when all that they seek is all around them. But, they are deeply conscious that there is nothing in their respective systems for them.

So, risking their lives to get to the 'promise land' is the only thing that is left for them. In this era of post-modernism and ICTs, ECOWAS still has a role to play in bringing West Africa together in the name of regional solidarity and security, socioeconomic and political developments, upholding the constitutional principles of limited government, and making the Sub-region a bastion of African democracy and good governance.