

SYMBOLIC POPULAR PARTICIPATION IN CONSTITUTION-MAKING AND CONSTITUTIONALISM IN FRANCOPHONE AFRICA

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I. INTRODUCTION

Over the past three decades, popular participation has increasingly come to be regarded globally as a best practice in constitution-making.¹ In Africa, the importance of popular participation was first underscored by the adoption of the African Charter for Popular Participation in Development and Transformation in 1990. Article 10 declares that ‘popular participation is the fundamental right of the people to fully and effectively participate in the determination of the decisions which affect their lives at all levels and at all times’. This was taken further by the African Charter on Democracy, Elections and Governance (ACDEG). Adopted by the African Union (AU) in 2007, it contains several provisions that encourage inclusiveness, trust, dialogue and consensus in the democratic processes in member states.² In the context of constitution-making, many studies have shown that since the onset of the third wave of democratisation in the 1990s, popular participation has played an increasingly important role in anglophone Africa.³ By contrast, no similar attempts have been made to study the role of popular participation in constitution-making in francophone Africa on a wider scale across countries.⁴

¹ See, for example, M. Brandt, J. Cottrell, Y. Ghai and A. Regan, *Constitution-Making and Reform: Options for the Process*, Interpeace (2011) 9; M. Böckenförde, N. Hedling and W. Wahiu, *A Practical Guide to Constitution Building*, International Institute for Democracy and Electoral Assistance (2011) 16; *Guidance Note of the Secretary-General on United Nations Constitutional Assistance*, United Nations (2020) 4.

² See, for example, articles 10(2), 13, 27(2), 31, 38(1) and 39 of the ACDEG.

³ For an overview, see C. Kirkby and C. Murray, ‘Constitution-Making in Anglophone Africa: We the People?’, in M. Ndulo and M. Gazibo (eds), *Growing Democracy in Africa: Elections, Accountable Governance, and Political Economy*, Cambridge Scholars Publishing (2016) 86–113.

⁴ For the only notable exception see L. Croce, ‘The Francophone Paradox’ in T. Abbiate, M. Böckenförde and V. Federico (eds), *Public Participation in African Constitutionalism*, Routledge (2019) 100–127, comparing Senegal’s failed constitutional amendment process of 2016 with the making of the 2016 Constitution of the Central African Republic.

Since 1990, all francophone African countries, including Cameroon,⁵ have adopted new constitutions, with some even having rewritten their constitutions more than once.⁶ While a comprehensive review of the role of popular participation in the making of all these countries would go beyond the scope of this article, we analyse the different forms of popular participation in the most recent constitution-making processes and discuss their impact on the prospects for constitutionalism in francophone Africa. As will be shown, the dominant form of popular participation continues to be symbolic. Moreover, we argue that while it cannot be said conclusively that a high level of popular participation in constitution-making automatically enhances the prospects for constitutionalism, there is evidence to suggest that the dominant symbolic form of popular participation has had a negative impact on the legitimacy, constitutional stability, and the entrenchment of the core elements of constitutionalism in francophone Africa.

II. HISTORICAL FOUNDATIONS

The origins of popular participation in constitution-making in francophone Africa can be traced to the 1958 French constitutional referendum, in which the people living in the French overseas territories were asked whether they approved of the adoption of the French Constitution of the Fifth Republic. In this way, the Gaullist constitutional model was introduced into francophone Africa.⁷ Although copies of the draft constitution were printed and distributed in the territories, the vast majority of the electorate was arguably not fully aware of the difference between a ‘no’ vote, meaning immediate and unconditional independence, and a ‘yes’ vote, entailing preservation of the overseas status or membership in the newly set-up French Community.⁸ The

⁵ Although Cameroon’s 1996 Constitution is described as a mere revision of the 1972 Constitution, it is effectively a new document. See C. M. Fombad, ‘Cameroon: Text of the Constitution’ in R. Blanpain (ed), *International Encyclopaedia of Laws*, Kluwer Law International (2003) 10.

⁶ Benin in 1990; Burkina Faso in 1991; Burundi in 1992, 2005 and 2018; Central African Republic in 1994, 2004 and 2016; Chad in 1996 and 2018; Comoros in 1992, 1996, 2001 and 2018; Congo Republic in 1992, 2001 and 2015; Côte d’Ivoire in 2000 and 2016; Djibouti in 1992; the Democratic Republic of the Congo in 1997, 2003 and 2005; Gabon in 1991; Guinea in 1990, 2010 and 2020; Madagascar in 1992, 1998 and 2010; Mali in 1992 and 2023; Niger in 1992, 1996, 1999, 2009 and 2010; Rwanda in 1991 and 2003; Senegal in 2001; and Togo in 1992. For detailed chronologies of (almost all) francophone African constitutions, see the website of the *Constitute* project at www.constituteproject.org/countries/africa (accessed 4 June 2024).

⁷ In 1958, President Charles De Gaulle agreed to form a government in France only if he were allowed to draw up a new constitution giving greater powers to the executive. This was because the power imbalance caused by the overbearing legislature under the 1946 Constitution of the Fourth Republic had led to a serious economic crisis, colonial problems, parliamentary logjams, deadlocks and futile coalitions that resulted in twenty-three changes of government in twelve years. The new 1958 Gaullist Constitution swung the pendulum from an overbearing legislature towards an extremely powerful executive. See S. Finer, V. Bogdonor and B. Rudden, *Comparing Constitutions*, Clarendon Press (1995) 8–9.

⁸ F. Simonis, ‘L’administration coloniale et le référendum du 29 septembre 1958 dans les fédérations d’AOF et AEF’ 85 *Oltre-mers* (2008) 59–73.

French government, in any case, campaigned strongly for participation in the referendum and approval of the constitution, thereby ‘creating a context militating against consummation of the independence clause’; given that immediate independence would also mean an end to economic aid from France, ‘the referendum was tinged by blackmail’.⁹ Unsurprisingly, the constitution received overwhelming approval in almost all overseas territories,¹⁰ with approval rates as high as 99.18 per cent in Upper Volta (today’s Burkina Faso) and 99.99 per cent in Côte d’Ivoire.¹¹

In retrospect, the 1958 referendum arguably set a ‘fateful precedent’ for popular participation in constitution-making processes in francophone Africa.¹² In the subsequent making of the so-called independence constitutions, popular participation played no significant role, and the documents derived their legitimacy rather from the countries’ ‘founding fathers’, such as Léopold Sédar Senghor of Senegal, Félix Houphouët-Boigny of Côte d’Ivoire, or Ahmed Sékou Touré of Guinea, along with a few local elites.¹³ In the three decades that followed, this pattern continued. Commenting in 1986 on constitution-making in francophone Africa, Filip Reyntjens observed: ‘The major part of the preparation of a draft is conducted in private, popular reaction and participation is not invited, and in fact discouraged ...’¹⁴ In some cases, referendums were conducted on the return to constitutional government after a period of military rule.¹⁵ More often, however, referendums were used in an attempt to legitimise the scrapping of presidential term-limits, such as in 1964 in Dahomey (today’s Benin); to allow military coup leaders to remain presidents in civilian governments, such as in 1970 in Upper Volta; or to abrogate multiparty systems, such as in 1986 in the Central African Republic.

Apart from nominal participation by way of referendum, francophone African constitution-making until the late 1980s was ‘marked by vagueness and lack of organised public debate’, whereas some anglophone countries had started to experiment with participatory elements in

⁹ K. van Walraven, ‘Decolonization by Referendum: The Anomaly of Niger and the Fall of Sawaba, 1858–1959’ 50 *Journal of African History* (2009) 269–92, 273.

¹⁰ The only exception was Guinea, where more than 95 per cent of the electorate voted against the constitution – and thereby for immediate independence. See E. Schmidt, *Cold War and Decolonization in Guinea, 1946–1958*, Ohio University Press (2007) 157 et seq.

¹¹ In the African French overseas territories, approval rates were consistently above 90 per cent, with French Somaliland (today’s Djibouti), Madagascar and Niger the only notable exceptions, with approval rates of roughly 75 per cent. See 234 *Journal officiel de la République française* (1958) 9177–9.

¹² L. Croce, ‘The Francophone Paradox’, in T. Abbiate, M. Böckenförde and V. Federico (eds), *Public Participation in African Constitutionalism*, Routledge (2018) 100–27, 101.

¹³ H. K. Prempeh, ‘Conclusion: Does Participation Help to Foster Constitutionalism in Africa?’, in T. Abbiate, M. Böckenförde and V. Federico (eds), *Public Participation in African Constitutionalism*, Routledge (2018) 296–307, 296.

¹⁴ F. Reyntjens, ‘Recent Developments in the Public Law of Francophone African States’, 30 *Journal of African Law* (1986) 75–90, 88.

¹⁵ *Ibid.*

the drafting process, elements ‘often involving constitutional commissions hearing the views of the public and of experts, and constituent assemblies debating in public session’.¹⁶ A good example is the making of the 1979 Nigerian Constitution. Here, the entire process was tightly controlled by the military, which certified all candidates to the constituent assembly and made several unilateral amendments to the draft before it was adopted.¹⁷ On the whole, the Gaullist model, which most francophone leaders inherited and replicated, treats constitution-making as an elite project rather than an opportunity for dialogue and consensus. The involvement and participation of the general public thus has been, at best, symbolic.

III. CONTEMPORARY FORMS

A comprehensive review of the role of popular participation in the making of all eighteen francophone African countries would go beyond the scope of this article. Rather, this section analyses the different forms of popular participation in some of the most recent constitution-making processes in these countries.

A. Framework for analysing popular participation

Our analysis is based on a framework developed by Abrak Saati, who identifies four variable factors that can assist in determining the level of possible influence of popular participation on the constitution-making process. These are, first, the initiators of the process; secondly, the forms of communication used; thirdly, the degree of inclusion; and, finally, the question of who has the final authority to approve the constitution.¹⁸

As variables, each can take different forms. For example, initiators of the constitution-making process may be national military or political elites, but they can also be civil society

¹⁶ Ibid.

¹⁷ P. Koehn, ‘Competitive Transition to Civilian Rule: Nigeria’s First and Second Experiments’, 27 *Journal of Modern African Studies* (1989) 401–30.

¹⁸ A. Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy*, Umeå Department of Political Science Research Report (2015) 25 et seq. Since the publication of this report, Saati has refined the framework further in a number of publications but has kept its basic variables and forms of categorizations, see, in particular, ‘Participation – To Unveil a Myth’, in T. Abbiate, M. Böckenförde and V. Federico (eds), *Public Participation in African Constitutionalism*, Routledge (2018) 13–25, and ‘Public Participation, Representative Elites and Technocrats in Constitution-Making Processes: Nigeria, Uganda, South Africa and Kenya’ in R. Dixon, T. Ginsburg and A. K. Abebe (eds), *Comparative Constitutional Law in Africa*, Edward Elgar (2022) 16–39.

organisations or even external actors such as the United Nations (UN) or the AU. Forms of communication range from educating the public to consulting them for their views or inviting them to contribute their own proposals. The degree of inclusion depends on whether all groups in society have been invited to participate and, if so, whether they have chosen to do so. Lastly, final authority over the approval of a constitution may vest in the executive or in the hands of the people, either directly through a binding referendum, or indirectly through a popularly elected constituent assembly.¹⁹

By applying the variables in concrete cases, Saati categorises constitution-making processes into different forms of popular participation, depending on the level of influence. These forms range from ‘symbolic’, ‘limited’, and ‘consultative’, to the highest level, ‘substantial’ participation.²⁰ While each form of participation is described in general terms and a specific case can be categorized as an example of one particular form even if it doesn’t fulfil all the criteria of the description, Saati outlines some cut-off points marking a shift from one form of participation to another. The main difference between limited participation on the one hand and false and symbolic participation on the other hand lies in how the constitution-making process is communicated to the public, Saati argues. In cases of limited participation,

[national elites] usually establish a two-way model of communication, or even a two-way model with integrated proactive measures (e.g. constitutional education programs), thus making it possible for people to get engaged in the process and provide more feedback than in cases of false and symbolic participation.²¹

In turn, consultative participation differs from other forms mainly in its types of communication and the degree of inclusion in the constitution-making process:

In consultative participation, the initiators of the process establish a more developed form of communication, providing not only avenues for feedback but also various types of mechanisms that enable constitution making bodies to contact individuals who have provided feedback in order to ask additional questions about their arguments and ideas on particular issues ... Degree of inclusion also sets this type of participation apart ... in the sense that not only all segments of the population are allowed to participate in the process, [but] all segments actually take the opportunity to do so (i.e. no groups voluntarily choose to boycott the process).²²

¹⁹ Saati, *The Participation Myth*, *supra* note 19, 25 et seq.

²⁰ *Ibid*, 37 et seq. In her report, Saati describes an additional fifth form, ‘false’ participation, which will not be discussed further here. According to Saati, it is characterised by external actors determining the process, with (at 88) Afghanistan, Iraq and Kosovo listed as typical examples.

²¹ *Ibid*, 38.

²² *Ibid*, 38–9.

Lastly, substantive participation, as the highest level of popular participation, differs from the other forms in that the final authority at the end of the constitution-making process is placed directly in the hands of the people through the use of a binding referendum.²³

B. The Dominant Form: Symbolic Participation

The dominant form of popular participation in recent constitution-making processes in franco-phone Africa continues to be symbolic. In these processes, the public has had no meaningful channels to provide feedback to drafters. Although (with the exception of Chad, discussed below) referendums were regularly used at the end of the process, the outcomes seemed, much like the case in the Cold War era, to be foregone conclusions, with approval rates of 90 per cent or higher.

A first example of symbolic participation is the making of the 2015 Constitution of Congo-Brazzaville. Among the changes it introduced, such as the creation of the post of prime minister and the abolition of the death penalty, the 2015 Constitution eliminated the maximum age limit for presidential candidates and allowed for three presidential terms, thereby paving the way for long-standing President Denis Sassou Nguesso to run for a third term. The changes were initiated by the ruling party and confirmed in an orchestrated five-day ‘National Dialogue’ which was boycotted by opposition groups.²⁴ Violent protests against the changes erupted, and at least four people were reportedly killed. A referendum was conducted in which the new constitution was approved by 92.96 per cent of the electorate in a turnout of 72.44 per cent.²⁵

In the making of the 2016 Constitution of Côte d’Ivoire, President Alassane Ouattara unilaterally appointed a panel of experts without seeking the approval of parliament or officially consulting or including representatives of opposition groups or civil society organisations.²⁶ According to the rules establishing the panel, interested groups and individuals could however

²³ Ibid, 39.

²⁴ ‘Congo-Brazzaville: les participants au dialogue national recommandent le changement de la Constitution’, *Jeune Afrique* (15 July 2015), www.jeuneafrique.com/247655/politique/congo-brazzaville-participants-dialogue-national-recommandent-changement-de-constitution (accessed 4 June 2024).

²⁵ ‘Over 90% Vote to Allow Congo Leader’s Bid to Extend Rule’, *Agence France Press* (27 October 2015), news.yahoo.com/more-90-vote-allow-congo-leaders-bid-extend-071858967.html (accessed 4 June 2024).

²⁶ See B. Mieu, ‘Côte d’Ivoire: Ouattara nomme un comité d’experts pour une nouvelle Constitution plus consensuelle’, *Jeune Afrique* (1 June 2016), www.jeuneafrique.com/330170/politique/cote-divoire-ouattara-nomme-comite-dexperts-nouvelle-constitution-plus-consensuelle (accessed 4 June 2024).

make proposals to the President, who would pass them on to the panel.²⁷ These rules were largely symbolic, and a coalition of 23 parties, headed by former president Laurent Gbagbo, rejected the draft prepared by the panel due to the lack of meaningful popular participation.²⁸ The new Constitution – which introduced a senate, removed a controversial nationality clause from the presidential requirements, and established the post of vice president – was approved in a referendum by 93.42 per cent.²⁹ The turnout was low, at only 42.42 per cent, as opposition leaders had called for a boycott of the vote and some had even urged their supporters to disrupt the referendum, which resulted in violence at about a hundred polling stations on the day of the referendum.³⁰

Another example of symbolic popular participation is the process followed in the making of Chad's Constitution of 2018. This process started when the long-standing president, Idriss Déby, promised during his 2016 presidential election campaign to undertake constitutional reforms, in particular to establish federalism and introduce presidential term-limits. Déby set up a technical committee consisting of 21 members, with only two members representing opposition groups and two, civil society.³¹ After public consultations with selected groups in all 23 regions of the country, the technical committee submitted a report with recommendations to an 'Inclusive National Forum', which in turn endorsed some of the committee's proposals and modified or rejected others.³² The reform process was largely boycotted by opposition groups and civil society organisations, which had demanded that the draft constitution be put to the vote in a referendum; instead, it was adopted by parliament in May 2018.³³ The process was repeated in 2020 when a second 'Inclusive Forum' was conducted, with most opposition groups and civil society organisations either not invited to it or choosing to boycott it.³⁴ The 2018

²⁷ P. O. Lobe, 'The Third Cote d'Ivoire Republic: Towards an Inclusive Constitutional Reform Process', *Constitutionnet* (13 July 2016), constitutionnet.org/news/third-cote-divoire-republic-towards-inclusive-constitutional-reform-process (accessed 4 June 2024).

²⁸ I. Akwei, 'Ivory Coast Referendum to Take Place on October 30' *Africanews* (13 October 2016), www.africanews.com/2016/10/13/ivory-coast-referendum-to-take-place-on-october-30 (accessed 4 June 2024).

²⁹ J. Bavier, 'Ivory Coast Approves New Constitution, Opposition Claims Fraud', *Reuters* (1 November 2016), www.reuters.com/article/us-ivorycoast-referendum-idUSKBN12W50V?il=0 (accessed 4 June 2024).

³⁰ *Ibid.*

³¹ S. M. Dominique, 'Constitutional Reforms in Chad: Edging Towards Federalism?', *Constitutionnet* (29 November 2017), constitutionnet.org/news/constitutional-reforms-chad-edging-towards-federalism (accessed 4 June 2024).

³² S. M. Dominique, 'Reforming the Content, Rather than Context, of the Chadian Constitution: Old Wine in a New Bottle?', *Constitutionnet* (9 May 2018), constitutionnet.org/news/reforming-content-rather-context-chadian-constitution-old-wine-new-bottle (accessed 4 June 2024).

³³ 'Chad Parliament Approves New Constitution Expanding President's Powers', *Reuters* (30 April 2018), www.reuters.com/article/us-chad-politics-idUSKBN1111RC (accessed 4 June 2024).

³⁴ S. M. Dominique, 'Chad's 'Inclusive' Constitutional Reform Process Widens Political Rifts', *Constitutionnet* (16 December 2020), constitutionnet.org/news/chads-inclusive-constitutional-reform-process-widens-political-rifts (accessed 4 June 2024).

Constitution was suspended by a military government which seized power on Déby's death in April 2021.³⁵

Other instances with no meaningful forms of popular participation include the constitution-making processes of Burkina Faso, Mali, Togo, and Niger. In Burkina Faso, after a two-year transitional period following the overthrow of former dictator Blaise Compaoré, President Roch Marc Kaboré, who was elected in November 2015, established a Constitutional Commission to draft a new constitution and gave it 60 days to submit its draft to him. The mandate allowed little room for popular consultation. The President, on receipt of the draft, was allowed eight days to make his observations, after which the Commission was required to adopt the constitution by a simple majority of its members before its submission to a referendum.³⁶ In Mali, Colonel Assimi Goïta created a committee to draft a new constitution in 2022 and submit it to him within two months. The Committee was given the powers to consult political parties and members of civil society, including religious organisations and traditional authorities.³⁷ In June 2023, the constitution was approved by 97.00 per cent of the electorate, on a 39.40 per cent turnout.³⁸ A similar approach had been adopted by the former president of Togo, General Gnassingbe Eyadema, when he reluctantly convened a national conference in 1991, with 75 per cent of the delegates appointed from his ruling party.³⁹ Lastly, perhaps one of the most extreme examples is Niger, where constitutional referendums were held five times over the past three decades, with approval rates of 90 per cent or more on voter turnouts of 50 per cent or less.⁴⁰ In most of these cases, the committees appointed by the presidents were given insufficient time to enable them to involve the public meaningfully in the process.

³⁵ K. Nodjimbadem, 'Chad's Coup Leader Stops Democracy in Its Tracks', *Foreign Policy* (6 December 2022), foreignpolicy.com/2022/12/06/chad-deby-coup-leader-democracy (accessed 4 June 2024).

³⁶ S. Lamoussa, 'Burkina Faso's Constitutional Reform Process to Accommodate the Spirit of the Popular Uprising', *Constitutionnet* (30 May 2016), constitutionnet.org/news/burkina-fasos-constitutional-reform-process-accommodate-spirit-popular-uprising (accessed 4 June 2024).

³⁷ See C. Pauvarel, 'Mali's Junta Creates a Body in Charge of Suggesting a New Constitution', *Africanews* (12 June 2022), www.africanews.com/2022/06/12/mali-s-junta-creates-a-body-in-charge-of-suggesting-a-new-constitution (accessed 4 June 2024).

³⁸ 'Les Maliens approuvent le projet de nouvelle Constitution avec 97% des voix, selon l'autorité électorale', *RFI* (23 June 2023), www.rfi.fr/fr/afrique/20230623-les-maliens-approuvent-le-projet-de-nouvelle-constitution-avec-97-des-voix-selon-l-autorit%C3%A9-%C3%A9lectorale (accessed 4 June 2024).

³⁹ See J. Heilbrunn, 'Social Origins of National Conferences in Benin and Togo', 31 *Journal of Modern African Studies* (1993) 277–99.

⁴⁰ The 1992 Constitution was approved by 89.79 per cent on a 56.6 per cent turnout; the 1996 Constitution, with 92.34 per cent on a turnout of 35 per cent; the 1999 Constitution, with 89.61 per cent on a turnout of 31.2 per cent; the 2009 Constitution, by 92.50 per cent on a turnout of 68.3 per cent (according to official numbers, the opposition boycotted the vote); and the 2010 Constitution, by 90.19 per cent on a turnout of 52.0 per cent. See African Elections Database, 'Elections in Niger', africanelections.tripod.com/ne.html (accessed 4 June 2024).

C. Exceptional Cases of Limited Participation

Apart from this dominant form of symbolic constitution-making in francophone Africa, two exceptional cases of limited participation exist. Arguably the best example is the making of the 1990 Constitution of Benin, one of the oldest constitutions on the African continent in force today.⁴¹ With the country having been governed since 1972 by Mathieu Kérékou and his People's Revolutionary Party of Benin, growing demands for political liberalisation forced Kérékou to reluctantly introduce a multiparty system and call for a National Conference in early 1990.⁴² The National Conference had 488 members, with representatives drawn from different segments of society, including religious groups, academia, unions, women organisations, and non-governmental organisations. It has however been noted that the process was still-top-down, as these representatives were drawn 'from the political class and the educated elites of civil society'.⁴³ Moreover, the Beninese Communist Party, the strongest opposition party working underground during Kérékou's rule, boycotted the conference.⁴⁴

Negotiations over the provisions of the new constitution began already during the National Conference. The Conference's Constitutional Commission debated whether to adopt a semi-presidential or a presidential system as well as the kinds of checks on the executive that needed to be introduced.⁴⁵ Based on the preliminary work of that Commission, a separate Transitional Constitutional Committee was set up which produced a first draft by April 1990 and presented it to the High Council of the Republic, the newly established transitional legislative body. In an attempt 'to better understand popular opinion on the proposed constitution' and also 'to secure citizen's understanding and approval of constitutional provisions', a so-called vulgarisation campaign was launched in June 1990 during which small official teams visited the regions, asked the citizens for their input, and collected public opinion on the draft.⁴⁶ In December 1990, the final text was put to a referendum, in which an age limit for candidates for the presidency (thereby excluding Benin's former presidents) was left for the electorate to decide.⁴⁷ At the end,

⁴¹ On the making of the 1990 Constitution of Benin as a 'canonical' example see now also J. Fowkes, 'A Constitutional Canon for Africa', in S. Choudhry, M. Heilbrunner and M. Kumm (eds), *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights*, Oxford University Press (2024) 112–37.

⁴² R. M. Gisselquist, 'Democratic Transition and Democratic Survival in Benin', 15 *Democratization* (2008) 789–814, 796.

⁴³ P. T. Robinson, 'The National Conference Phenomenon in Francophone Africa', 36 *Comparative Studies in Society and History* (1994) 575–610, 576–7.

⁴⁴ Gisselquist, 'Democratic Transition', *supra* note 42, 796.

⁴⁵ J. Seely, *The Legacies of Transition Governments in Africa: The Cases of Benin and Togo*, Palgrave Macmillan (2009) 82–3.

⁴⁶ *Ibid.*, 83.

⁴⁷ *Ibid.*, 87.

73.29 per cent approved the new constitution with the age limit, 19.93 per cent approved it without, and 6.78 per cent rejected the draft, on a 63.6 per cent turnout.⁴⁸

Similar national conferences were held between 1990 and 1993 in Chad, the Comoros, Gabon, Congo-Brazzaville, Madagascar, Mali, Niger, Togo and Zaire.⁴⁹ However, most studies of the proceedings of the national conferences in these countries have shown that no popular participation of the broader public comparable to what took place in Benin occurred in these countries.⁵⁰ It is thus no surprise that Benin has been widely considered as the flag-bearer of a new era of democracy and constitutionalism in francophone Africa.⁵¹ Meanwhile, during the same period, attempts at Benin-like national conferences were blocked or rejected by the leaders and ruling elites in Burkina Faso, Cameroon, Central African Republic, and Guinea.

Of the more recent constitution-making processes in francophone Africa, the making of the 2016 Constitution of the Central African Republic in the aftermath of the signing of the cease-fire agreement in the civil war is arguably the only other example of a limited participatory constitution-making process in francophone Africa. Formally, it started with the transitional council's appointment of a 30-member drafting committee, which presented a preliminary text in May 2015.⁵² Informally, however, recommendations for a new constitution had been made already at the 'Forum of Bangui', a popular conference held as part of the wider peace process in the country. In preparation for this event, consultation teams consisting of 10 to 15 members drawn from a pool of 30 national civil society organisations and the international community held three-day meetings in most of the country's regions. Collected inputs were presented at the Forum, which in turn formulated recommendations and called for participatory and inclusive democracy.⁵³ The Forum's recommendations were considered by the transitional council when reworking the preliminary draft prepared by the constitutional committee. A second participatory element in the drafting process was an ensuing 'National Workshop', a two-day event held in July 2015 in which 110 invitees from religious groups, civil society organisations and armed groups went through the reworked draft, formulated comments and made

⁴⁸ African Elections Database, 'Elections in Benin', africanelections.tripod.com/bj.html (accessed 4 June 2024).

⁴⁹ See P. Robinson, 'The National Conference Phenomenon in Francophone Africa', 36 *Comparative Studies in Society and History* (1994) 575–610.

⁵⁰ See, for example, for the case of Togo, Alexander Hudson, *The Veil of Public Participation: Citizens and Political Parties in Constitution-Making Processes* (CUP 2021) 167–8.

⁵¹ See C. M. Fombad, 'An Overview of the State of Electoral Democracy in Africa', 14 *African Journal of Legal Studies* (2022) 245–268.

⁵² Croce, 'The Francophone Paradox', *supra* note 12, 113.

⁵³ *Ibid*, 110–1.

recommendations.⁵⁴ A revised draft was then presented to the Constitutional Court, which found that not all the recommendations from the Workshop had been considered. Leopoldine Croce has pointed out that certain recommendations were ultimately not reflected in the final draft but opines that this may ‘perhaps [be] because the [transitional council] felt that it was neither bound by the court’s opinion, nor by the [workshop]’s input’.⁵⁵ The final draft, which introduced a senate and limited the presidency to two terms, was confirmed in a referendum in December 2015 by 93 per cent of the electorate, on a 38 per cent turnout.⁵⁶ However, the referendum was marred by violence, with militant groups killing two people and attacking a polling station in Bangui.⁵⁷

D. No Cases of Substantive Participation

There is little evidence in the practice of constitution-making in francophone Africa to indicate that any of the processes could be construed as falling under either the consultative or substantive participatory category. By contrast, there are a number of examples of this in anglophone Africa, the best of these being the processes that took place in South Africa leading to the 1996 Constitution, and in Kenya leading to the 2010 Constitution.

South Africa’s multifaceted participation programme has in fact become the paradigm of a new African constitutionalism. Although national political elites initiated the process, it was open to everyone, and final authority was vested indirectly in the hands of the people. Popular participation consisted of three distinct programmes in which more than two million submissions were received; a media campaign reached two-thirds of all adult South Africans within three months; and members of the constituent assembly participated in public meetings attended by over 20,000 people.⁵⁸ Similarly, the making of the 2010 Constitution of Kenya in the aftermath of the crisis triggered by the contested 2007 election is a good example of substantial popular participation.⁵⁹ A committee of experts appointed by parliament was advised by a reference

⁵⁴ Ibid, 114–5.

⁵⁵ Ibid, 115.

⁵⁶ ‘CAR Voters Approve New Constitution’, *Deutsche Welle* (22 December 2015), www.dw.com/en/central-african-republic-voters-say-yes-to-new-constitution/a-18933653 (accessed 4 June 2024).

⁵⁷ Ibid. In August 2022 president Faustin-Archange Touadéra created a constitutional committee by presidential decrees to draft a new constitution with the primary goal to remove the presidential term-limit which had been introduced in the 2016 Constitution. The Constitutional Court declared the decrees however unconstitutional.

⁵⁸ See H. Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa*, Oxford University Press (1998) 243–6.

⁵⁹ See C. O. Oyaya and N. Poku, *The Making of the Constitution of Kenya: A Century of Struggle and the Future of Constitutionalism*, Routledge (2018) 187–212.

group of 30 representatives from civil society organizations and collected more than 25,000 submissions from the public. In addition, a civic education programme was conducted throughout the country. Importantly, final authority over the changes was conferred to the people in a binding referendum, one in which 68.55 per cent of the electorate approved the new constitution in a 72.2 per cent turnout.⁶⁰

IV. SYMBOLIC PARTICIPATION AND THE PROSPECTS FOR CONSTITUTIONALISM

Against this backdrop of dominantly symbolic popular participation in constitution-making processes, the following section will discuss its potential impact on the prospects for constitutionalism in francophone Africa. Most of the literature indicates that it is often difficult if not impossible to show a direct link between popular participation in constitution-making and the content of the constitution as well as the particular constitution's prospects for fostering constitutionalism. Nevertheless, an examination of how attempts have been made to involve ordinary citizens in constitution-making cannot be complete without trying to see what impact this could be having on the prospects for constitutionalism in francophone Africa.

Some studies on popular participation in constitution-making have drawn attention to advantages and disadvantages that may result from the way the process is initiated, conducted and concluded.⁶¹ Although the literature lists several advantages associated with a participatory constitution-making process, they can be summarised under five main points. First, through its inclusive nature, a participatory process strengthens the legitimacy of the constitution and thus its acceptance; secondly, it has educational value in that in the exercise, more people become aware of the contents, values and importance of the constitution; thirdly, popular participation through discussion and debate induces a sense of ownership of and trust in the constitution; fourthly, it provides an opportunity for debate, tolerance, consensus, reconciliation and

⁶⁰ African Elections Database, 'Elections in Kenya', africanelections.tripod.com/ke.html (accessed 4 June 2024).

⁶¹ See in general Premeh, 'Conclusion', *supra* note 14, 300–1, arguing that the question of whether it fosters constitutionalism does not yield a definitive and unqualified affirmative answer. See also Kirkby and Murray, 'Constitution-Making in Anglophone Africa', *supra* note 4, 110–112; T. Ginsburg, J. Blount and Z. Elkins, 'The Citizen as Founder: Public Participation in Constitutional Approval', 81 *Temple Law Review* (2008) 361–82, 369–70; M. Böckenförde, 'Letting the Constituent Power Decide? Merits and Challenges of Referenda in Constitution-Making Processes in Africa' in T. Abbiate, M. Böckenförde and V. Federico (eds), *Public Participation in African Constitutionalism*, Routledge (2018) 26–39; G. Negretto, 'Replacing Constitutions in Democratic Regimes: Elite Cooperation and Citizen Participation' in G. Negretto (ed), *Redrafting Constitution in Democratic Orders: Theoretical and Comparative Perspectives*, Cambridge University Press (2020) 101–27.

compromise, especially amongst former adversaries; and, finally, participation provides a foundation in which democracy can take root and grow.⁶²

However, many of the potential advantages may also turn into disadvantages.⁶³ Some grounds for scepticism about popular participation in constitution-making include the fact that the process is not necessarily established by leaders and their supporters for the altruistic purpose of promoting democracy and constitutionalism; they may control and manipulate the process from start to finish in order to perpetuate their grip on power. Secondly, too much participation by too many actors can lead to too many compromises, and to confused and unworkable outcomes or even deadlocks. Thirdly, using a referendum as an indication of popular participation in a constitution-making process may be misleading if, for example, the turnout is very low or where the organisers rig the process. Lastly, there is a risk of illiberal, populist capture of popular participation, in the sense that it can be used by social groups to preserve majoritarian preferences that place the rights of other groups in danger.⁶⁴

Mindful of the considerations above, we will focus only on three aspects of the dominantly symbolic participation in constitution-making on constitutionalism in francophone Africa. These aspects are the possible impact on the constitutions' legitimacy, on constitutional stability, and on the entrenchment of the core elements of constitutionalism.

A. Impact on the Constitution's Legitimacy

A first aspect concerns the potentially negative impact of only symbolic popular participation on the constitutions' legitimacy. There is an assumption in the relevant literature that the higher the level of popular participation, the more likely a majority of citizens will regard a constitution as legitimate, relevant, and something with which they can identify and claim ownership of. Arguably, one of the best ways there is to enhance the legitimacy and credibility of a constitution are referendums which, to use Jon Elster's words, function as 'downstream constraints' that enable the population to act as final-stage gatekeepers.⁶⁵

⁶² For a discussion of some of these points, see Saati, 'Participation – To Unveil a Myth', *supra* note 19, 14–15 and Prempeh, 'Conclusion', *supra* note 14, 300–2; Kirkby and Murray, 'Constitution-Making in Anglophone Africa', *supra* note 4, 110–2; Ginsburg, Blount and Elkins, 'The Citizen as Founder', *supra* note 61, 369–70.

⁶³ See generally W. Partlett, 'The Dangers of Popular Constitution-Making', 38 *Brooklyn Journal of International Law* (2012) 193–238.

⁶⁴ Prempeh, 'Conclusion', *supra* note 14, 301.

⁶⁵ J. Elster, 'Forces and Mechanisms in Constitution-Making Process', 45 *Duke Law Journal* (1995) 364–96, 373.

Unlike the case with the independence constitutions and the frequent, arbitrary and abusive amendments that were made to them, post-1990 constitution-making processes for the first time provided ordinary citizens with an opportunity to participate in the making of these constitutions, and in this respect made them more legitimate in the eyes of citizens. As noted earlier,⁶⁶ Benin took the lead in initiating the so-called national conference phenomenon in the 1990s, and although many other countries, among them Gabon, Mali, Niger and Togo, followed suit, none of them had an open and inclusive process similar to what was followed in Benin. More recently, most of the constitution-making commissions in francophone Africa have been established unilaterally by presidents, who have not only decided upon their composition but also dictated their mandates and given them unrealistic deadlines by which to submit drafts, consequently limiting the window of opportunity for broad popular participation and consultation. In most cases, there were no attempts to seek parliamentary approval, let alone consult opposition groups or civil society organisations.⁶⁷ In addition, although referendums are provided for and frequently used in constitution-making processes, they are, like elections, regularly manipulated to ensure that the governments obtain the outcome they desire.⁶⁸

B. Impact on Constitutional Stability

A second aspect concerns the potentially negative impact of the low level of popular participation on constitutional stability. Whether constitutions that result from processes with higher levels of popular participation are more likely to be durable and better protected against authoritarianism and coups is an open question.⁶⁹ However, the experience with popular participation in constitution-making in francophone Africa at least suggests that had there been broader meaningful participation during these processes, it is unlikely that there would have been such frequent, and destabilising, constitutional changes.

Firstly, after a significant reduction since 1990, there has been a worrying increase in military coups. In the past three years alone, with the exception of Sudan, all African coups have been recorded in francophone countries: Mali (2020 and 2021), Chad and Guinea (2021), Burkina

⁶⁶ See Section 3.3 above.

⁶⁷ See, for example, Lobe, 'The Third Cote d'Ivoire Republic', *supra* note 28.

⁶⁸ See P. A. Eyebe, 'Electoral Governance and Democratization in Francophone Africa: A Critical Appraisal', 10 (2) *International Relations and Diplomacy* (2022) 51–58.

⁶⁹ See J. M. Carey, 'Does it Matter How a Constitution is Created?', in Z. Barany and R. G. Moser (eds), *Is Democracy Exportable?*, Cambridge University Press (2009) 156–77; T. Ginsburg, Z. Elkins and J. Blount, 'Does the Process of Constitution-Making Matter?', 5 *Annual Review of Law and Social Science* (2009) 201–23.

Faso (2022), and most recently in Gabon and Niger (2023). Moreover, even where some limited restraints were included in the constitutions, the most significant being presidential term-limits, these have all been either removed or manipulated. In fact, of the 13 countries in Africa where presidential term limits were tampered with or ignored, nine were in francophone Africa.⁷⁰

Secondly, because of their status as the supreme law, constitutions are invariably designed so as to endure and thereby ensure peace and stability within a polity. This does not mean, however, that they should endure unchanged forever.⁷¹ In fact, in their extensive research on constitutions, Zachary Elkins, Tom Ginsburg and James Melton have suggested that the average life expectancy of all national constitutions that have existed around the world between 1789 and 2005 is 19 years.⁷² By contrast, if we apply the same methodology to the constitutions that have been rewritten during the third wave of democratisation in francophone Africa until the end of 2022,⁷³ their average life expectancy of 15 years is significantly lower.⁷⁴ For example, Niger holds the record, with five newly adopted constitutions within the past 30 years, followed by the Comoros with four, the Central African Republic, Congo Republic, Democratic Republic of the Congo, Guinea, and Madagascar with three, and Burundi, Chad and Côte d'Ivoire with two new constitutions. If we also factor in the amendments that are regularly made to these constitutions, it is clear that such a permanent state of constitutional change cannot be conducive to political stability.

C. Impact on the Entrenchment of Constitutionalism

A third aspect concerns the potential link of only symbolic participation and the entrenchment of constitutionalism. In this regard, there is at least some evidence to suggest that the higher the

⁷⁰ The nine francophone countries are Burundi, Cameroon, Chad, Djibouti, Gabon, Guinea, Rwanda, Senegal and Togo. The other countries are Algeria, Eritrea, Namibia and Uganda.

⁷¹ On the goal of the durability of constitutions, see Carey, 'Does it Matter How a Constitution is Created?', *supra* note 69, 158–9.

⁷² Z. Elkins, T. Ginsburg and J. Melton, *The Endurance of National Constitutions*, Cambridge University Press (2009) 2.

⁷³ Importantly, the calculation by Elkins, Ginsburg and Melton included interim constitutions as well as constitutions that were suspended and not replaced by another new, interim or reinstated constitution.

⁷⁴ Benin: 22 (new constitution adopted in 1990); Burkina Faso: 21 (1991, suspended in 2022); Burundi: 6.5 (2005 and 2018); Central African Republic: 9.33 (1994, 2004 and 2016); Chad: 6 (1993, 1996 and 2018, suspended in 2021); Comoros: 10 (1992, 1996, 2001 and 2018); Congo Republic: 7.75 (1991, 1992, 2001 and 2015); Côte d'Ivoire: 11 (2000 and 2016); Djibouti: 30 (1992); Democratic Republic of the Congo 8.33 (1997, 2003 and 2005); Gabon: 31 (1991); Guinea: 10.66 (1990, 2010 and 2020); Madagascar: 10 (1992, 1998 and 2010); Mali: 15 (1992 and 2020); Niger: 6 (1992, 1996, 1999, 2009 and 2010); Rwanda: 13.5 (1991 and 2003); Senegal: 21 (2001); and Togo: 30 (1992).

level of popular participation, the higher the prospects for the incorporation of more rights in the constitution and other core elements of constitutionalism such as the separation of powers and effective judicial review.⁷⁵

In the case with the highest level of participation in francophone Africa, the making of the 1990 Constitution of Benin, popular participation contributed to the incorporation of some innovative provisions that make this country's constitution the most liberal in francophone Africa today.⁷⁶ For instance, it not only complied with popular demands that the constitution should include presidential age- and term-limits but went further to expand the scope for judicial review by allowing for concrete review and expanding rules of *locus standi*. Other questions on which the public was consulted included the structure of the executive (resulting in the introduction of a presidential or a semi-presidential system) and the issue of whether public education should be free and obligatory. The latter was left to be decided in the vulgarisation campaign, ultimately resulting in a provision making primary education obligatory and 'progressively' free.⁷⁷

In the making of the 2016 Constitution of the Central African Republic,⁷⁸ on the other hand, two of the recommendations that resulted from the 'Forum of Bangui' which were eventually included in the final draft were the right to free education and the right to compensation for civil war victims.⁷⁹ Most of the recommendations were, however, not considered by the constituent assembly. These touched on issues such as more equitable natural-resource revenue distribution; directly elected local government; reform of the armed forces and intelligence services to prevent future coups; timely transitional justice; greater transparency in public administration; regional power-sharing through a system of a rotating presidency limited to a single term; and greater separation of powers and judicial independence.⁸⁰

V. CONCLUSIONS

Unlike in the past, some attempt has been made to involve ordinary citizens and civil society organisations in the making of the latest generation of constitutions in francophone Africa.

⁷⁵ For a discussion of these core elements, see C. M. Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa', 55 *American Journal of Comparative Law* (2007) 1–45.

⁷⁶ On the constitution-making process of Benin see Section 3.2 above.

⁷⁷ Seely, *The Legacy of Transition Governments in Africa*, *supra* note 44, 82–4.

⁷⁸ See Section 3.4 above.

⁷⁹ Croce, 'The Francophone Paradox', *supra* note 12, 110.

However, with the exception of Benin and arguably the Central African Republic, constitution-making processes in francophone African countries have only symbolic popular participation. Although the degree of influence on the process varied from country to country, the main features are that most national conferences or constitution-making commissions were convened by presidents, who maintained firm control of the process from beginning to end by determining who would participate and the duration of the process, as well as sometimes by unilaterally amending draft constitutions; the latter, furthermore, were usually approved in stage-managed referendums. As a consequence, the defective Gaullist constitutional model that not only gave presidents exorbitant powers but left the judiciary and legislature in a subordinate position has stayed intact. The resultant constitutional instability arguably reflects the fact that the new generation of francophone African constitutions little reflect the will, desires or hopes of the majority of the ordinary citizens of these countries.

If governance challenges in francophone Africa are to be overcome, there is a need for the adoption of a more participatory, inclusive, transparent, and democratic approach to constitution-making. A leaf could be taken from the 2010 Constitution of Kenya, which arose from a broad participatory process and contains such innovations as the possibility of a ‘popular initiative’ as an option for amending the constitution.⁸¹ A legacy of an inclusive and participatory process in amending the constitution will generate expectations of at least a similar level of popular participation when a new constitution is being made. The support of the international community, particularly international organisations such as the UN and regional associations such as the AU and its regional economic communities (RECs), needs to be more visible and more proactive. For example, although the ACDEG of 2007 mentioned at the outset of this paper provides in its article 38(1) that ‘State Parties shall promote peace, security and stability in their respective countries, regions and in the continent by fostering participatory political systems with well-functioning and, if need be, inclusive institutions’, this is clearly not good enough. In line with article 44(2) of the ACDEG, the AU and its RECs should develop guidelines and benchmarks to assist states involved in the constitution-making process which emphasise the importance of ensuring broad and inclusive popular participation in the process. Similarly, the UN recognises popular participation as one of its core principles in constitutional assistance.⁸²

⁸¹ See article 257 of the Kenyan Constitution of 2010.

⁸² United Nations, *Guidance Note*, *supra* note 1, 4.

Constitutionalism in francophone Africa is in dire straits. There is little chance of the situation improving unless its constitutions are revised to entrench some of the most basic principles of constitutionalism, such as an effective separation of powers, a truly independent judiciary, a constrained and accountable executive, and an effective system of judicial review. Although there is no guarantee that more substantive popular participation would rectify all flaws, it will undoubtedly go a long way. A more participatory process is likely to lead to a more legitimate and widely accepted constitution, and, in turn, to one that enhances the prospects for constitutional stability and constitutionalism in francophone Africa.