Law, Religion and Leadership in Africa

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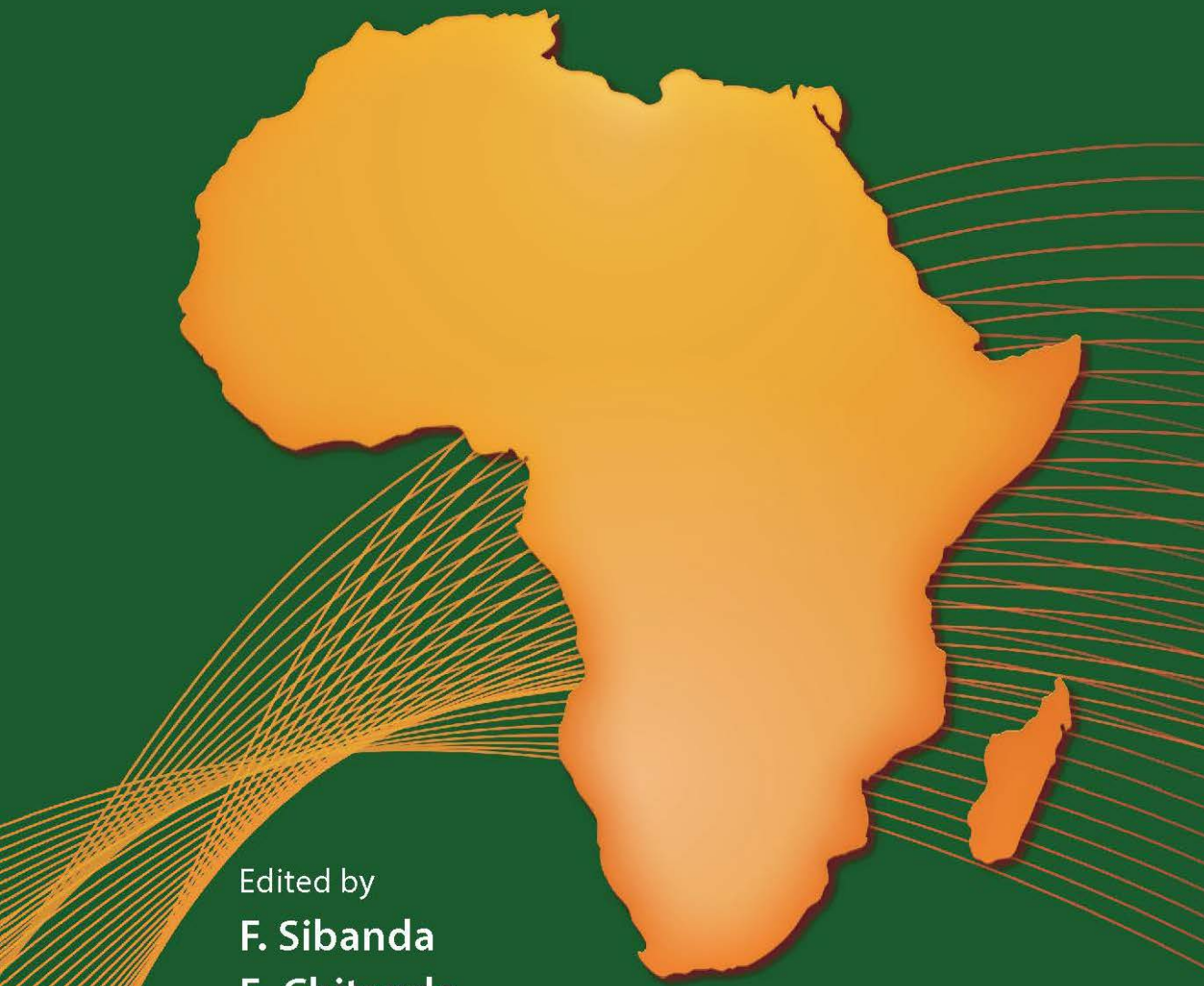

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AFRICAN CONSORTIUM FOR LAW AND RELIGION STUDIES

1 The leadership of traditional institutions: ancestral law in the construction and consolidation of the rule of law in pre-colonial Africa

Komoé Guy-Roland Kossonou[1]

INTRODUCTION

For some time now, Togolese political news has plunged us into the thorny debate of constitutional revision.[2] Indeed, as soon as the political authorities announced a possible revision of the constitution, an "anti-constitutional revision" movement emerged that was masterfully led by Nathanaël Olympio, president of the Togolese Party (PT), and other political forces, such as the National Alliance for Change (ANC) of Mr. Jean-Pierre Fabre, the Alliance of Democrats for Integral Development (ADDI) of Professor Aimé Gogue, the Socialist Pact for Renewal (PSR) of Professor Komi Wolou, the Democratic Forces for the Republic (FDR) of Mr. Paul Dodji Apevon and the Front Citoyen Togo Debout (FCTD) of Professor David Dosseh and Mr. Yao Gbandou, have stepped up to the plate through their common motto: "Don't touch my constitution". To better make itself heard in a most deleterious socio-political context, the movement called for popular demonstrations on April 11, 12 and 13, 2024 to protest against the Togolese constitutional revision.

Beyond its slogan, the movement has tried to justify its position in the clearest terms: "This is a deception. The time has come to mobilise to defend our constitution, that of 1992, and our democracy."[3] If the Togolese example is to be enlightening, it must be recognised that constitutional changes are more and more frequent in most contemporary democracies. Unlike contemporary societies, it was not at all obvious in precolonial societies to modify ancestral law, because of its capital importance and its leadership in the legal order of that time. It is in this perspective that it seems

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2 Togo is a coastal country in the Gulf of Guinea located in West Africa. It was negatively affected by the coup d'état of 13 January 1963—the very first in contemporary Black Africa—perpetrated by Nicolas Grunitzky, which led to the assassination of the first president Sylvanus Olympio. Later in 1967, four years after the first coup d'état, Grunitzky was in turn overthrown by Kléber Dadjo, whereupon Gnassingbé Eyadéma took advantage of the opportunity to establish himself in power until his death on 5 February 2005. The current Togolese head of state, son of the late President Gnassingbé Eyadema, succeeded in switching the country from a presidential to a parliamentary regime by means of a constitutional revision of parliament on the night of 25 into 26 March 2024.

3 Logo *A.* 2024. « Togo : Togo : le Front 'Touche pas à ma constitution' appelle à la résistance", AA.com, 5 August.

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wise to look at the present subject of this chapter: the leadership of traditional institutions: the example of ancestral law in the construction and consolidation of the rule of law in pre-colonial Africa.

In this approach, the term "leadership" refers to the dominant position of one person over another or of one thing over another. It also refers to a form of natural charisma with which certain creatures or institutions are endowed, allowing them to place themselves above others. This was the case with the ancestral law, the expression of the exclusive will of the founding ancestor as an exceptional being, according to legal historian and theorist Séraphin Néné Bi, "The notion of founding ancestor evokes the civilising hero. The one who first founded and organised society. He is the first occupant of the ground; the master of the earth. The one who gave the first laws to the village community."[4]

In the past, the acquisition of the right of soil by the founding ancestor stemmed from his ability to establish a link with the spirits of the place by lighting a fire. According to the ancients, two stones had to be rubbed three times in a row. If in the course of the three attempts, the individual manages to light the fire, this supposes that the spirits are in favour of the human presence. On the other hand, if all three attempts fail, it means that they are at the mercy of the place, which refuses any human presence. This gesture therefore confers a double power on this hero: master of fire and indisputable founder of the political community.

Thus, emanating from the founding ancestor, the ancestral law is, in principle, above other legal provisions, in particular the law of the head, which is subordinate to it. As Néné Bi rightly points out, "The ancestral law emanates from the founding ancestors. The founding ancestors are the holders of original power in traditional law. They are the ones who have set once and for all, the rules relating to the organisation and functioning of the institutions. They are the authors of what is considered to be the fundamental law."[5]

What does the term "rule of law" mean? The rule of law, as opposed to the police state, is the situation in which the state, the public authority, respects the law. Thus, authority submits to the laws to-the-rule-of law instead of despising them as do some rulers who trample on them by trampling them underfoot. It also requires that everyone enjoy equal protection under the law and prevent the arbitrary use of power by the authorities. It guarantees the protection and respect of fundamental civil and political rights, as well as civil liberties. In addition, it should be noted that the concept of "rule of law" is based on four fundamental principles: (1) legality through a procedure for the adoption of legislation based on transparency, accountability and democracy, (2) legal certainty, (3) prohibition of arbitrariness and, finally, (4) access to justice before independent and impartial courts.

4 Néné Bi S. 2023. *Histoire du droit et des institutions méditerranéennes et africaines, des origines à la fin du moyen âge européen* [History of Mediterranean and African Law and Institutions. From the origins to the end of the European Middle Ages] Fourth Edition. Abidjan: ABC Editions, Abidjan, 103.

5 Néné Bi S. *Histoire du droit et des institutions méditerranéennes et africaines*,109.

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It is interesting to carry out this reflection on ancestral law in order to understand the need to look in the rearview mirror of history and to immerse oneself in ancestral governance in order to better orient the political choices that could facilitate the optimal functioning of our current states. Indeed, since the advent of political pluralism in most African states in 1990, respect for alternation of leaders, one of the pillars of the democratic movement, seems to be an illusion. It is not uncommon for sitting heads of state to insidiously manipulate their constitutions in order to stay in power for the long term. This is why many leaders hold a record for longevity in political power in Africa, such as Equatorial Guinea's Teodoro Obiang Nguema Mbasogo (45 years in office), Cameroon's Paul Biya (42 years in office), Congo's Denis Sassou Nguesso (28 years in office) and, finally, Togo's Gnassingbé Eyadéma (38 years in office). These examples often inspire the new generations of heads of state of the continent in a negative way.

Therefore, the place of ancestral law in pre-colonial African institutions is posed in problematic terms: How did the leadership of ancestral law promote the construction and consolidation of the rule of law in pre-colonial Africa? Indeed, as the emanation of the founding ancestor, the ancestral law was imprinted with status based on both the ancestor's historical and paternal legitimacy. From then on, a filial submission bound individuals to ancestral law, making it the norm of norms, the compass that guides other laws. Clearly, ancestral law imposes, therefore, its authority, its leadership in the legal order. For the purposes of this study, it is important, with regard to the construction and consolidation of the rule of law in pre-colonial Africa, to consider, on the one hand, ancestral law as a sacred "constitution" of social regulation, and, on the other hand, as reflecting superiority or leadership of ancestral law in the legal order of pre-colonial Africa.

ANCESTRAL LAW, A SACRED "CONSTITUTION" OF SOCIAL REGULATION

To say that ancestral law is a "constitution" is first and foremost to understand it or to accept it as a set of provisions, rules or legal texts that define the functioning of the institutions of the state and that organise their relations. In other words, the constitution as the fundamental law of a state also defines the rights and freedoms of citizens. In Côte d'Ivoire and even in most African states, the constitution clearly sets out the relationship between the executive, legislative and judicial branches. In African pre-colonial institutions, ancestral law is above all a custom, that is to say, an unwritten rule resulting from the generalised repetition of behaviour accepted by the people as the application or expression of a binding rule of law,[6] whose existence is subordinate to the combination of four elements.[7] Because of its sacred origin, ancestral law enjoyed special protection as the predominant source

6 The custom is imposed on everyone (rulers and governed), hence its binding and coercive nature. Any violator of custom is exposed to rigorous sanctions.

7 First, there is a set of uses that fall within the legal field. Then, the practice of this use must be repeated over a long period of time because for once is not customary. In addition, there must be a conviction among the social group concerned that the practice considered

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of law in Africa. As such, it was inviolable, which was a guarantee of maintaining socio-political stability. But ancestral law also enjoyed historical and charismatic legitimacy, thus promoting respect for the cosmic order.

The inviolability of ancestral law, a guarantee of the maintenance of socio-political stability

In African societies before colonisation, ancestral law was worth its weight in gold, because it was in the image of its initiator, the founding ancestor, and thus respected by all. As a sacred norm, it benefitted from special protection not only from the chief, but also and above all from the subjects and even the ancestors because, as Senegalese poet Birago Diop describes it so well, in words quoted by Ivorian writer and literary scholar Amadou Koné, "Those who died never left . . . The dead are not dead".[8] In the logic of African religious beliefs, ancestors always watch over the works of the living, so that whoever respects their will receives their blessing. On the other hand, anyone who disobeys them is immediately punished by calamities, including poverty, disease and sometimes death. Thus, warned, individuals conform to the letter and spirit of ancestral law.

Moreover, the current leader is the first link in society to observe the ancestral law in all its rigor. This gives rise to the observation of the principle of legality, that is to say that by respecting ancestral law, it thereby obliges the other members of the social body to do the same. In addition, the violation of ancestral principles exposes the violator, whether he is a chief or an ordinary citizen, to exemplary sanctions.[9] These play an important social role, because they not only make it possible to punish the culprits but also to deter potential troublemakers, as the Ivorian writer François-Joseph Amon d'Aby rightly points out in the context of the Ivorian Akan society, "Anyone who commits an offence against the established custom or order undermines the authority of the chair. He is said to have violated the king's oath. He must therefore justify himself before the royal court."[10] Under these conditions, society is doing well overall because everyone is called upon to play their role while respecting that of others.

Respect for the ancestral will is a vital necessity in almost all pre-colonial collectivist or communitarian societies. Here, the individual and the social group are in a kind of complicity. They are welded together, as Ivorian politician Rolland Zakpa rightly states, such that "Individual and group are complementary to each other. The group is not an abstract entity, any more than the individual is an autonomous reality; they are both, one through the other. On the one hand, there are the rights of the group

is binding. Finally, there must be exclusively oral transmission of the practice from generation to generation.

8 Koné A. 2002. *Le respect des morts* [Respect for the dead]. Paris: Hatier 7 (quoting Birago Diop)

9 Speaking of exemplary sanctions, it should be noted that each particular fault corresponds to a particular sanction.

10 Amon d'Aby F-J. 1988. *Le problème des chefferies traditionnelles en Côte d'Ivoire* [*The Problem of Traditional Chiefdoms in Côte d'Ivoire*]. Abidjan: Les Nouvelles Editions Africaines, 21.

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in so far as its members constitute it; on the other hand, there are individuals who derive their rights from their membership in the group."[11] Today, this thinking has evolved thanks to colonisation, which, as Zapka describes it, introduced European political and legal thought to Africa "based on the idea that man can, by law, modify his legal destiny and shape his future and that of his children."[12]

Instead of taking his oath on ancestral law or a fearsome fetish, the African ruler in most of our states prefers to do so on the constitution, the fundamental norm. In some countries, the constitution represents, in the eyes of the authority, only a simple document that can be modified at will; it is incapable of producing effects in the event of non-compliance. In Africa, some heads of state sometimes prefer to take their oath on the Bible or the Quran rather than on an ancestral law or a fearsome fetish capable of causing misery in the event of a violation. Thus, in order to build credible institutions that can guarantee socio-political and economic stability, it is desirable to resort to certain ancestral practices, in particular strict respect for customs. At this level of our reflection, it seems useless for Africans to reinvent the wheel; rather, we must look in the rearview mirror in order to exalt the pre-colonial instruments capable of unravelling the invisible mystery of these societies. In this same dynamic, the ancestral law, because of its historical and charismatic legitimacy, imposes strict respect for the cosmic order.

The historical and charismatic legitimacy of ancestral law, a guarantee of respect for the cosmic order

In Africa, the general belief is that the invisible universe, that is to say, the place of residence of spirits, is far superior to that of the visible universe. It can therefore be stated, unequivocally, that the invisible world holds the visible world in its grasp, so much so that the inhabitants of the temporal world often submit to those of the invisible world. This is the logic behind the ancestral law and the law of the chief. Indeed, historically, the ancestral law emanating from the original constituent power precedes the law of the head, described by Séraphin Néné Bi as the one which corresponds "to the rules of law created by successive powers in the course of the history of the community".[13] It can at no time call into question the ancestral law that saw it born. In this same perspective, the charismatic legitimacy of ancestral law imposes itself on that of the law of the chief. Indeed, the social status of the founding ancestor is incomparable to that of the chief, as evidenced by the transmission of the name of the founding ancestor to successive generations. In addition, the lineage of the founding ancestor is designated by the same name, as is the practice among the Akan, which is why we find family names such as: the Tanoh or Tanoé family, the Tan-Datè family, the Aka family and the Pokou family, among others.

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11 Zakpa KTR. 2008. *Histoire du droit et des institutions,* [History of law and institutions] Third Edition. Abidjan: Les éditions ABC, 68.

12 Zakpa, *Histoire du droit et des institutions,* 69.

13 Néné Bi, *Histoire du droit et des institutions méditerranéennes et africaines,*111.

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Thus, through the parallelism of forms, if the social status of the founding ancestor is superior to that of the leader, consequently, the charismatic legitimacy of the founding ancestor is de facto imposed on that of the current leader, whose main mission is to continue the reign of the founder. This is the logic inscribed in almost all traditional African societies are inscribed, where the founder remains in the collective consciousness, an incomparable and unassailable hero whose supremacy is not debatable. The historical and charismatic legitimacy of ancestral law gives it an authority superior to that of other rules of social conduct. It is also important to note the important role that myths play in justifying and explaining institutions and rules of social conduct. They ensure, to a certain extent, the continuity of the exclusive will of the founding ancestor such that, as Zapka put it, "institutions based on myths cannot be questioned by men."[14]

In most pre-colonial African societies, ancestral law, like an unwritten custom, remains inscribed in the collective memory that perpetuates it from generation to generation. Thus, when men disobey this legitimate will of the founding ancestor, they renounce the ancestral pact. This act of high treason can sometimes lead to their permanent banishment from the political community. In pre-colonial Africa, where metaphysical and religious considerations occupied a considerable place, the founder was considered a god or a benevolent being who watched over his society. This encouraged good deeds and punished misconduct, because any anti-social act was not only an attack on the living but also, and above all, on the spirits of which the founding ancestor is a part. Political leaders, especially contemporary African leaders, must be inspired by this example of strict respect for the law, because no one is above it. This vision seems to be contradicted in fact, since as things stand, some African leaders believe that the constitution is the expression of their will rather than that of the people. Now, the constitution, at the foundation of institutions is, in truth, the expression of the general will. In defining the "general will", Jean-Jacques Rousseau rightly conceived it as: "The unanimous decision taken by the people in order to satisfy the common good. This desire is the result of a deliberation during which everyone can express their point of view on public affairs. It is necessarily fair and indisputable insofar as, after the deliberation stage, it receives the approval of all. Adopted by the entire people, it expresses above all a superior will that goes far beyond individual interests. It finds its concrete form in the laws." [15] Thus, respect for the conduct dictated by ancestral law testifies to the superiority of the latter as the fundamental law and stands as the basis of the balance of society and the cornerstone of the legal order.

14 Zakpa, *Histoire du droit et des institutions*, 67.

15 Nay O. 2004. *Histoire des idées politiques* [History of political ideas]. Paris: Armand Colin/ Dalloz, 284.

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THE UNDENIABLE SUPERIORITY OR LEADERSHIP OF ANCESTRAL LAW IN THE LEGAL ORDER OF PRE-COLONIAL AFRICA

In African institutions, given that ancestral law lays down the fundamental principles of the organisation and functioning of society, other laws, in particular those of the chief, seem to play a secondary role in social regulation and management. Consequently, ancestral law enjoys undisputed autonomy and permanence, hence the requirement that infra-ancestral provisions be in conformity with it.

The autonomy and permanence of ancestral law with respect to other laws

The term autonomy can generally be understood as the state of what is autonomous, that which does not obey a law or a rule of another. It is therefore the first standard, the fundamental standard. This is where ancestral law was before colonisation. Moreover, the latter would later negatively influence ancestral law by completely calling it into question with regard to metropolitan legal principles, as the famous Senegalese writer Cheikh Hamidou Kane points out in his book *L'Aventure ambiguë* (The ambiguous adventure),[16] where the Great Royal encouraged her people, the Diallobé, to let their offspring attend the Western school.

Indeed, like a compass, the ancestral law can only guide the laws that Come after it in order to conform their spirit to that of the founding ancestor. As a result, for as long as possible, ancestral law will be inscribed in the collective consciousness in order to become one with the history, philosophy, religion, culture and sociology of these peoples. In Africa, moreover, at this level of our thinking, it is rare, and even very rare, that the foundations of a society are completely called into question in the form of a clean slate by the descendants of an ancestral lineage. Moreover, the will of the founding ancestor is sacred, as is the founding pact of the community. It would therefore be absurd, in Africa, that individuals would deny their origins were it not for the nebulous colonisation that succeeded in distorting the black man through the policy of assimilation. Martinican writer Aimé Césaire echoes this in his book, *Cahier d'un retour au pays natal* (Notebook of a Return to the Native Country),[17] where, for socio-political dividends, the black man aspires to Western culture. It was the assimilation policy of the metropolis, which was part of the colonial strategy, if the native, indeed, preferred to assimilate himself to the metropolitan in order to have the status of citizen and thus benefit from civil and political rights. On the other hand, for the colonist, the granting of citizenship to French subjects, as opposed to citizens, is indeed the culmination of a process. It is a question of really rewarding those subjects who clearly have a real interest in Western culture. This is mainly due to the fact that the natives learn to read and write the French language correctly. All of these strategies are rooted in the sacrosanct principle of the "civilising mission" (*mission civilisatrice*). If with Western logic, the same causes produce the same effects in our present approach we can note that if ancestral law is

16 Kane CH. 1961. *L'Aventure ambiguë* (The ambiguous adventure). Paris: Julliard.

17 Césaire A. 1939. *Cahier d'un retour au pays natal* (Notebook of a Return to the Native Country). Paris: Vollonté.

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far superior to the other norms subordinate to it, then the latter must imperatively conform to the former.

The conformity of sub-aboriginal provisions with aboriginal law

In this section, we find again the spirit, previously developed, through which logic imposes on the law of the head not to violate the ancestral law. Thus, the law of the chief and the other infra-ancestral laws would benefit, in a dynamism of constitutionality of the laws, from conforming to the ancestral law because of its undeniable leadership. Not everyone can be considered an ancestor. According to Séraphin Néné Bi: "The quality of ancestor is not given to all the deceased. There is a relationship between ancestry and social, legal or religious status. "[18] In Africa, recognised and deserving ancestors benefit from the recognition of society. As invisible beings, they enter into metaphysical logic and cults are dedicated to them. For example, among the Akan, especially the Abron, the Agni and the Baoulé, the yam festival is the ultimate occasion to celebrate the founding ancestor.

The desired conformity here reflects the idea that no law should call into question that of the founder. On the contrary, it must be in harmony with ancestral law at the risk of being removed from the African legal order. This state of affairs reinforces the rule of law, in which the law always prevails. Here, the spirit of the constitutionality of laws prevails. It also justifies respect for the elder or the birthright, which is one of the fundamental characteristics of pre-colonial African society. In the same vein, it seems appropriate to appreciate the true value of the same spirit that characterises American institutions, particularly through the Constitution of 1787 which, after two hundred and thirty-seven years, has undergone only twenty-seven amendments.

However, more and more in Africa, there are arguments that question the rule of law sometimes through proposing all-out changes to the constitution. In Sub-Saharan Africa, for example, these constitutional changes have taken place almost after every coup. The military, as soon as they take power, systematically attack the constitution, not only to try to justify their advent on the political scene, but also and above all to demonstrate to national and international public opinion the weaknesses of the fallen power. Moreover, under the empire of single-party states, that reigned from independence in the 1960s through the 1990s—that is, for nearly three decades—constitutional changes were very frequent. They were considered to be single-party states, because the head of state, who was also the head of the party in power, was confused with the state itself, in the image of the pharaoh in Egypt. It was in 1990 that single parties officially ceased to appear in most African states with the advent of political pluralism following a notable speech by French President François Mitterrand in La Baule, France.[19] The justification for these changes was also simple, because they testified to the strength and sovereignty of the heads of

18 Néné Bi, *Histoire du droit et des institutions méditerranéennes et africaines,*103.

19 Mitterand F. 1990. "Mitterrand at the France Afrique de la Baule summit: helping Africa", Institut national de l'audiovisuel (National Audiovisual Institute), 20 June. Online at: ina.fr.

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state, veritable "dinosaurs" who seemed to have everything under control. They were strong men who manipulated their constitutions at will, an eloquent sign of their great power. In French-speaking Black Africa, heads of state "made the rain and shine" because they had the power of life and death over almost everything.

CONCLUSION

Respect for the rule of law through the supremacy or leadership of ancestral law teaches us a lot of lessons about pre-colonial African society marked by the spirit of the rule of law. Today, this situation is more or less relegated to the background in many African countries, where the race for political power or longevity in power favours the change of constitutions. Clearly, some African leaders are insidiously manipulating constitutions with a view to enjoying the benefits of political power in the long term. These unsavory attitudes have sometimes been at the root of unconstitutional changes since the great independence of African countries in the 1960s. It was to denounce this congenital malaise that United States President Barack Obama, speaking before the Ghanaian parliament in 2009, advised Africa and Africans on the urgent need to have strong institutions rather than strong men. Africa is capable of meeting the present challenge of building and consolidating the rule of law if, and only if, the current rulers agree to look in the rearview mirror of pre-colonial African political history.

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