

ROLE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES IN THE ENFORCEMENT OF THE OUTLAWRY OF UNCONSTITUTIONAL CHANGES OF GOVERNMENT: THE NIGER COUP AS A CASE STUDY*

Abstract

In order to confront the challenges posed by unconstitutional changes of government especially, the debilitating effect on the consolidation of democratic governance in Africa, regional and sub-regional organizations in Africa have taken bold steps to outlaw unconstitutional changes of government and established mechanisms for its enforcement. Despite the above, African countries continue to experience unconstitutional changes of government. The attempts by regional organizations to implement their stand on military coups have yielded little positive results and, in some cases, have left analysts in a quandary as to the efficacy of the outlawry and the enforcement measures. The most recent military intervention in the governance of Niger exposes the challenges especially, in situations where there is internal popular support for change. Therefore, this paper interrogates: the rationale and the efficacy of the outlawry of unconstitutional change of government and the enforcement measures thereof against the background of the factors that trigger unconstitutional changes of government; the constitutionality of the intervention by regional/external forces to restore the constitutional status-quo; the challenge of sovereignty and the prospects of achieving the objective of democratic consolidation by the outlawry of unconstitutional changes of government and regional enforcement thereof. The article adopts the doctrinal methodology and relies on the theories of social change, functionalism and collective security. It concludes that the enforcement of the outlawry of unconstitutional change of government is no doubt a right step in the right direction towards promoting democratic consolidation in Africa but this is not enough. The solution lies in the institutionalisation of democratic governance by addressing the African leadership challenges and institutional weaknesses that militate against good governance and socio-economic development.

Keywords: Democratic Governance; Enforcement; Sovereignty; Unconstitutional Change of Government

1. Introduction

At the dawn of independence, the people of Africa had hoped for democratic, strong, united, egalitarian and prosperous states. The hope of realizing this lofty dream was dashed as democracy as practiced in most African countries became bedeviled with a chain of several and mutually reinforcing shortcomings or factors that deprived the citizens of the benefits of democratic governance. These factors include: leadership ineptitude and impunity; corruption and various forms of electoral fraud and irregularities; lack of internal democracy; institutional weakness especially, lack of strong and independent electoral management bodies; unwillingness of the incumbents to hand-over power or the penchant for tenure elongation; bad governance; to mention but a few. The above factors, coupled with mismanagement of the economy, resulted in political instability and conflicts, economic retardation and aggravation of poverty. As a result, most African states continue to be ranked poorly in international democracy indices as elections generally fall short of requisite standards of credibility. Thus, Africa remains classified as the poorest continent in the world in spite of being the most richly endowed in terms of human and natural resources. The situation is such that more than half of the people of African countries live in absolute poverty, that is, on less than one U.S dollar per day in the face of intractable internal political conflicts and insecurity.

The African governance problems are accentuated by the failure of the ruling elites to address properly the challenges of plurality, the structural or constitutional imbalances and institutional weaknesses bequeathed to them by their colonial masters. For instance, the constitutional structures established by the exiting colonial masters did not adequately address issues of power distribution, ethnic nationalities, religious and cultural differences. Institutional weaknesses are particularly evident in the lack of capacity of the electoral bodies as a result of lack of independence and poor funding which make it difficult for them to effectively implement the constitutional provisions, electoral laws and guidelines intended to promote democracy, elections and good governance in Africa. The judicial institutions are equally weak and lack the necessary independence to adjudicate on electoral disputes fairly and impartially while the neutrality of the security agencies in carrying out their electoral duties cannot be guaranteed due to undue political influences. The implication of this state of affairs is that the citizens are bound to be disappointed and disillusioned with the promise of democracy as the best form of government that can accelerate socio-economic development and promote the wellbeing of the people.

The above challenges continue to negatively impact on the consolidation of democracy and good governance, thereby making Africa's socio-economic developmental goals remain a tall dream. It is argued, that the ensuing frustration and anger provide actual or ostensible reason for the people to clamour for change of government even if by

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unconstitutional means. In other words, the conditions which compel the people to clamor for change also provide the justification and trigger for the actualization of unconstitutional change of government. Whether such abrupt changes ultimately constitute the panacea to the people's frustration remain questionable. However, the general understanding based on past experiences, is that such unconstitutional changes have not succeeded in institutionalising good governance neither have they produced the desired improvement on the socio-economic life of the people. Rather, more often than not, they have only succeeded in truncating democratic consolidation in the countries that have experienced military coups.

Thus, in order to confront the challenges posed by unconstitutional changes of government especially, the debilitating effect on the consolidation of democratic governance in Africa, regional and sub-regional organizations in Africa have taken bold steps to outlaw unconstitutional changes of government and established mechanisms for its enforcement. Despite the above, African countries continue to experience unconstitutional changes of government. The attempts by regional organizations to implement their stand on military coups have yielded little positive results and, in some cases, have left the international bodies in a quandary as to the legitimacy of their enforcement measures.

The problem of the efficacy of the efforts of regional organisations to enforce regional standards especially, the restoration of the constitutional *status-quo* when such abrupt changes occur have usually been confronted by the challenge of State sovereignty as well as the existence of the background factors that trigger unconstitutional changes of government. Against the above background, the efficacy of the outlawry of unconstitutional changes of government and the prospects of achieving the objective by coercive enforcement measures are analysed. This is undertaken with special focus on the outcome of the recent unconstitutional change of government in the Republic of Niger vis a vis the measures taken by the ECOWAS with a view to compelling the military junta to immediately restore the country to constitutional order.

In addressing the above issues, the work is outlined as follows: section 1 is this introduction; section 2 deals with the explanation of the key concepts; section 3 examines the constitutionality of the intervention of ECOWAS in order to enforce the outlawry of unconstitutional change of government in the Republic of Niger and the challenges. Section 4 analyses the impact of the intervention and the lessons therefrom in the aftermath. Section 5 is the conclusion and recommendation.

2. Conceptual Clarifications

Democratic Governance

Democratic governance is the derivative of the idea of democracy. Therefore, to better understand the concept of democratic governance, an understanding of the concepts of 'democracy' on the one hand and 'governance' on the other is fundamental.¹ First, it must be noted with regard to democracy, that it is a universally accepted way of life but without a universally accepted definition. Accordingly, the concept has been variously defined and explained depending on one's context, circumstance or ideological inclination. In the context of this paper, it is presented as a form of government in which the power to govern is derived from the people either by direct referendum (direct democracy) or by means of elected representatives of the people (representative democracy).

In the simplest and popularly accepted expression, democracy is best defined as 'government of the people by the people and for the people'.² From the above definition, it is apparent that the epicenter of democracy is 'the people', to whom sovereignty belongs and from whom government should derive all its powers and authority to govern. Therefore, their participation in the democratic process is imperative, if they have to determine their political destiny by themselves. Thus, the hallmark of a true democracy is rule by the consent of the people, which must be determined by their affirmative votes in a free, fair and credible election in accordance with the constitution of a country, which itself, must have been a product of a democratic process.³

With regard to the concept of governance, this has various dimensions, including its social, political and economic ones. It operates at every level of human enterprise, be it the household, village, municipality, nation, region or globe. In a nutshell, governance can simply be defined as the process of decision-making and the process by which decisions are implemented (or not implemented) by those in authority. This is why the concept can be used in several contexts such as corporate governance, international governance, national governance and local governance. In this chapter,

¹ OE Nwebo, *Political Parties and Promotion of Constitutionalism and Democratic Governance in Nigeria: The Challenge of Internal Democracy*, Owerri: Imo State University Press (2021) pp. 16-18.

²A. Lincoln, in his famous speech called *the Gettysburg Address a 'monumental act'* (19 November 1863). available at: <<http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>>, accessed 5 May 2017.

³See OE Nwebo, *Political Parties and Promotion of Constitutionalism and Democratic Governance in Nigeria: The Challenge of Internal Democracy*, op. cit. (n 9).

the term is generally used in the sense of the governance of nation states or regional or sub-regional organizations of nation states.⁴ In this context, the Mo Ibrahim Foundation defines it as the provision of the political, social and economic public goods and services that a citizen has the right to expect from his or her state and that the state has the responsibility to deliver to its citizens.⁵ The above definition is apt in the context of democratic governance in this article.

Based on the above, democratic governance, otherwise sometimes referred to as good governance is presented in this article as the key to development.⁶ In this sense, it is simply defined as governance based on fundamental democratic principles and satisfies the developmental needs and aspirations of the members of the society. Democratic governance therefore, emanates from a legitimate government that is, a government that is constituted in conformity with the constitutional process. The government does not act arbitrarily, but manages a country's economic and social resources in a transparent, accountable and responsive manner to achieve developmental goals.⁷ It implies the democratic use of political, economic and administrative powers at all levels of government to deal appropriately with the problems facing a country. Democratic government is therefore a government that promotes participation and inclusivity and operates within constitutional constraints at all levels of governance, be it local, state, national or international. Thus, it provides a veritable platform for citizens' participation in governance and accountability of public officials as a foundation for the consolidation of democracy and socio-economic development.

However, though constitutionalism is the foundation of democracy having regard to the fact that the constitutions of states make provisions for the qualifications of the candidates to contest for elective political offices, the process of their election and the control of their conduct in office, as Fombad⁸ argues, sometimes democracy can be used to undermine constitutionalism. This is possible in circumstances where the ruling party uses its numerical voting power advantage in parliament to enact a law amending the constitution to achieve parochial political ambition,⁹ or that is oppressive or violates a constitutional provision.¹⁰ These can give rise to democratic reversal or the decline of democracy and demand for change even by unconstitutional means.

Enforcement

The term enforcement can simply denote the act of enforcing; the act of giving force or effect to, or of putting in force; a forcing upon the understanding or the will: ensuring observance of or obedience to the laws or decisions by the application of stringent measures.¹¹ In the context of this work, enforcement is used to indicate the act of the application of the enforcement mechanisms or measures established by international organisations in order to ensure that the provisions of their treaties and other instruments are complied with by member States, including diplomatic efforts, imposition of sanctions, military intervention and other enforcement measures.

Sovereignty

Sovereignty as a concept can be defined as 'the absolute, supreme and ultimate dominion and authority of a political state subject to no higher power, expressed within its territory in full self-government and in complete freedom from any outside influence'.¹² However, as we argue in this work, membership of international organizations and their obligations thereby may constitute an obstacle to full political control of state activities and the rights of the citizens. Max Huber, Arbitrator in the *Island of Palmers Arbitration* case described territorial sovereignty as signifying independence to a portion of the globe in 'the right to exercise therein, to the exclusion of any other state, the functions of a state'.¹³ The exercise of the functions of the state which is hallmark of the existence of territorial sovereignty includes the exclusive right to law making and enforcement of law and order within a state's territorial jurisdiction or

⁴United Nations Economic and Social Commission for Asia and the Pacific, available at: <www.unescap.org/sites/default/files/good_governance.pdf> {accessed 20 September 2016}..

⁵Mo Ibrahim Foundation, available at: <www.moibrahimfoundation.org>, accessed 20 November 2015.

⁶ Democratic Governance-The Key to Development, *The Concept of Democracy and Governance* <<https://cuvillier.de/public-file>> (accessed 2 December 2016).

⁷ See the report of the United Nations Development Programme [UNDP], 2004.

⁸CM Fombad 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) *The American Journal of Comparative Law*, Volume 55, Issue 1.

⁹For instance, an attempt to achieve tenure elongation contrary to the provisions of the constitution was made in Nigeria in 2007 by the then Obasanjo's government, which almost succeeded but for the effective mobilization of support against the move by the civil society leading to the party's' defeat in parliament.

¹⁰This will tantamount to tyranny of the majority whereas the idea of entrenching democracy is to avoid any form of tyranny by the rulers.

¹¹ <https://www.wordnik.com/words/enforcement> (accessed 18 December 2023).

¹²'What is sovereignty? Definition and meaning' www.businessdictionary.com/definition/sovereignty.html (accessed 12 July 2017).

¹³ See *The United States of America v. Netherlands* see *Year book of the ILC*.

territorial boundaries. Accordingly, International relations are based on the principle of sovereign equality of all states.¹⁴

Thus, going by the logic of sovereignty, a state is sovereign to the extent that it monopolizes the exercise of governmental authority at home, rejecting the right of foreign states or other external actors to impose their own laws from the outside or in any other manner interfere in its domestic political order. Sovereignty therefore means the exclusive legal authority of a government over its population and territory, independent of external authorities.¹⁵ This implies that the application of international instruments meant to promote constitutionalism and democratic governance in states must necessarily derogate from the concept of domestic jurisdiction in its absolute terms. However, this study argues that since regional organizations are created in accordance with international instruments, once a state party ratifies the instrument, it has thereby agreed to be bound by the terms of same. Therefore, the state party can no longer plead its sovereignty as a bar to international involvement in its domestic affairs based on the provisions of the instrument.

Unconstitutional Change of Government

The concept of unconstitutional change of government is a phrase used to describe various forms of change of government by unconstitutional means and therefore illegal. In other words, it can simply be defined as a change of government effected otherwise than in the manner provided for in the constitution of a country which if successful amounts to a revolution. A revolution on the other hand, simply connotes a sudden, radical or complete change of system, established social order or mode of doing things. In the context of this work a revolution has a legal or juristic connotation, which is different from the meaning generally ascribed to it as the change phenomenon. In this connection, a revolution can be described as an abrupt political change not within the contemplation of the constitution, which may be brought about by violent or peaceful means. What is important is that a constitutionally established government has been overthrown and replaced by a new one, with a new set of rulers and a new form of government in violation of the constitution.¹⁶

In the apt explanation by Munir,¹⁷ a revolution is generally associated with public tumult, mutiny, violence and bloodshed, but from a juristic point of view, the method by which and the persons by whom a revolution is brought are wholly immaterial. The change may take the form of a *coup d'etat* by a political adventurer or it may be by persons already occupying leadership positions. Equally irrelevant in law is the motive for a revolution, as far as there is a destruction of the constitutional structure which may be prompted by a highly patriotic impulse or by the most sordid of ends.¹⁸

The above explanation assumes that there must have been a constitutional democratic government in place before the occurrence of a revolutionary change. Thus, irrespective of the form or motive, a change is in law a revolution, if it annuls the existing constitution and the annulment is effective.¹⁹ By necessary implication, if the attempt to overthrow the constitution fails, those who sponsor or organize it are liable to be tried for the crime of treason under the criminal law of the state. On the other hand, if the revolution is successful in the sense that the persons assuming powers under the change can successfully require the inhabitants of the country to conform to the dictates of the new regime, then the revolution itself becomes a law creating fact because thereafter its own legality is judged not by reference to the annulled constitution but by reference to its own success.²⁰ Therefore, for a revolution to be said to be successful there must be an abrupt political change which is not within the contemplation of an existing constitution which destroys the entire legal order except what is preserved by the new constitutional order and the Government must be effective.²¹

Against the above background, unconstitutional changes of government have been comprehensively defined under Article 23 of the African Charter on Democracy, Elections and Governance to take various forms, that is, to mean the following illegal means of accessing or maintaining power:

1. Any putsch or *coup d'Etat* against a democratically elected government.
2. Any intervention by mercenaries to replace a democratically elected government.
3. Any replacement of a democratically elected government by armed dissidents or rebels.
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. Any

¹⁴ See Articles 2(1) and 2(7) of the United Nations Charter.

¹⁵ It must be noted however that the principle of sovereignty cannot prejudice the application of enforcement powers under article 2 (7) of the UN charter.

¹⁶ See generally, OE Nwebo, *Critical Constitutional Issues in Nigeria*, Owerri: Joe ManKpa Publishers (2021) pp.141-145.

¹⁷ Chief Justice Muhammed Munir in *The State v Dosso* 1958 PLD at 538.

¹⁸ As above.

¹⁹ See OE Nwebo, *Critical Constitutional Issues in Nigeria*, op. cit. n 16 above.

²⁰ Fieldman, *Revolution in Pakistan*, Ch.11. pp.533 -9 culled from Nwabueze, B. O., *Constitutionalism in the Emergent States*, infra p 233. See also, OE Nwebo, *Critical Constitutional Issues in Nigeria*, as above, n 15 at p.142.

²¹ *Ibid*, p. 534.

amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

Among the various forms of unconstitutional change of government, *coup d'état* is the most notorious in Africa and is the one that often engages the attention of the African regional organizations and their leaders. This is understandable in that it is this form of UCG that affects the security of the tenure of the African incumbent political leaders in power whether they are truly democratic or not. However, there are UCGs in the form of counter coups against military governments who, though came into power unconstitutionally have purportedly legitimized their position after a successful putsch or coup.

3. The Unconstitutional Change of Government in the Niger Republic and the Role of the Economic Community of West African States

Niger Republic is one of the members of the Economic Community of West African States (ECOWAS).²² It is one of the francophone countries located in the Sah of the West African sub-region. Recently, there was military coup in the Niger Republic in violation of the country's constitutional order and the ECOWAS Supplementary Protocol outlawing any unconstitutional change of government in any member state of the community. This immediately prompted the ECOWAS Authority of Heads of State and Government²³ to put in motion the enforcement mechanisms including threat to military option in line with its Protocol in order to restore constitutional order. Analysis of the enforcement measures applied against Niger by ECOWAS in this case, the challenges and the impact in the aftermath are the main focus of this section.

In the build up to the military coup in Niger Republic, the situation was that despite the fact that the country has some of the world's largest uranium deposits, Niger is one of the poorest countries in the world.²⁴ In terms of ranking, Niger is the 7th largest supplier of uranium in the world and also 7th among the world's poorest countries. Approximately 10 million people (41% of the total population) is said to live in extreme poverty while 40% of the state budget consists of foreign aid.²⁵ Not surprisingly, Niger ranks 189th out of 191 countries in the 2022 UN Human Development Index, coupled with the continuous deterioration of the security and economic situations of the country. This background no doubt implies that the people are not enjoying democracy dividends with no solution in sight. Under that type of condition, the people of Niger are bound to be disappointed with the performance of the ruling elites and would not mind a change of government even by undemocratic means.

Thus, on 26 July 2023, a group of soldiers calling themselves the National Council for the Safeguarding of the Country (CNSP) delivered a statement shortly after detaining President Mohamed Bazoum, and said they took the step due to the 'deteriorating security situation and bad governance.' It is significant to note the junta was welcomed with massive celebration in the streets of Niger making them heroes of what should have been regarded as a treasonable act.

The ECOWAS Heads of State and Government rose to the occasion and responded promptly in line with their powers of the relevant ECOWAS treaty/Protocols. Thus, at the extra ordinary Summit held on Niger on 30th July 2023 immediately condemned such unconstitutional takeover of democratically elected government and called for the immediate reinstatement of the dethroned President Mohamed Bazoum, while putting in place several sanctions against the military leaders including threat of the use of military actions as a last resort. The military junta was given one-week ultimatum for the restoration of constitutional order in the Republic of Niger.

The coup did not also go down well with the international community who saw the situation as an attempt to truncate the consolidation of democracy which should not be allowed to rear its ugly head. In a swift reaction, and in support of the actions taken by the ECOWAS Authority the international community unreservedly condemned the action of the junta which they saw as a coup attempt and as well called for the immediate release and reinstatement of ousted President being detained under the orders of the military junta and for the return to constitutional order. Some members of the international community including the United States, Germany etcetera, also not only condemned the coup but also imposed one form of sanction or the other against Niger.

At the expiration of the one-week ultimatum, the junta remained intransigent and rather warned ECOWAS against the risk of any attempt to militarily intervening in the internal affairs of Niger while asserting their sovereignty. However, following the review of the situation, the Authority decided as follows:

²² Sometimes, in this article referred to as 'the Community'.

²³ Sometimes, in this article referred to as 'the Authority'.

²⁴ <https://www.nationsonline.org/oneworld/niger.htm> (accessed 18 December 2023).

²⁵ <https://www.aa.com.tr/en/africa/niger-one-of-poorest-countries-in-world-struggles-under-economic-sanctions/2961325> (accessed 18 December 2023).

A. Reiterates its strong condemnation of the attempted coup d'etat and the continued illegal detention of President Mohammed Bazoum, his family and members of his government. B. Further condemns the condition in which President Bazoum is being detained and hold the CNSP fully and solely responsible for the safety, security and physical integrity of President Bazoum, members of his family and government. C. Uphold all measures and principles agreed upon by the extra ordinary Summit held on Niger on 30th July 2023. D. Underscore the determination of the ECOWAS authority to keep all options on the table for the peaceful resolution of the crisis. E. Enforce all measures in particular border closures and strict travel bans and assets freeze on all persons or groups of individuals whose actions hinder all peaceful efforts aimed at ensuring the smooth and complete restoration of constitutional order. F. Warn member states who by their action directly or indirectly, hindered the peaceful resolution of the crisis in Niger about the consequences for their action before the community. G. Call on the African Union to endorse all the decisions taken by the ECOWAS authority on the situation in Niger. H. Further call on all partner countries and institutions including the United Nations to support ECOWAS, in its effort to ensure a quick restoration of constitutional order, in conformity with its normative instruments. I. Direct the President of the Commission to monitor the implementation of the sanctions. J. Direct the Committee of the chief of defense staff to activate the ECOWAS standby force with all its elements immediately. K. Order the deployment of the ECOWAS standby force to restore constitutional order in the Republic of Niger. L. Underscore its continued commitment for the restoration of constitutional order through peaceful means.

The subsequent developments in Niger in the aftermath raise the questions as to the impact of the actions taken by the Authority, 6 months after and whether the ECOWAS achieved its objective in intervening in the situation in Niger, to wit, the restoration of constitutional order and if not why. The state of play in Niger so far is that the military usurpers remain intransigent and the government of the day remains in effective control despite the sanctions and the threats of military option which the Authority insists remains on the table as a last resort. Rather the people of Niger remained supportive of the new military government in the face of the hardship occasioned by the sanctions imposed on the country. In another development, the Niger Republic junta was said to have sued the Authority of Heads of State and Government of ECOWAS and two others at the ECOWAS Court. The applicants had *asked the court to declare the measures taken by the Authority of Heads of State and Government of ECOWAS during its extraordinary sessions of July 30 and August 10, 2023, allegedly aimed at restoring constitutional order in the Republic of Niger, illegal. They argued that the sanctions imposed by the Authority of Heads of State and Government of ECOWAS, led by Nigerian President Bola Tinubu, had caused adverse effects on the Nigerien people, including shortage of food, medicine, and electricity, due to the closure of borders and cut off of electricity supply by Nigeria. The applicants asked the court for interim court orders to compel the Authority of Heads of State and Government to suspend the sanctions immediately. They further argued that Niger was treated unequally and unfairly compared to the other three member states (Mali, Burkina Faso, and Guinea) that also experienced coup d'état in recent years.*²⁶ The respondents – Authority of Heads of State, the Mediation and Security Council, and the ECOWAS Commission objected to the inadmissibility of the application and asked the court to reject the applicants' request. It argued that coup d'état was not recognised in a democracy and that the junta lacked the legal capacity to approach the court for interim measures, which robs the court of the jurisdiction to examine their request, adding that the democratically elected President Mohamed Bazoum has a pending case before the court in which he is challenging the legitimacy of this same junta. The ECOWAS Court of Justice in its ruling on 7th December 2023, dismissed the substantive suit and the request for interim measures holding that an entity resulting from an unconstitutional change of government, and not acknowledged by ECOWAS as a government of a member state, inherently lacks the capacity to initiate a case before the court with the aim of obtaining benefits or reprieve. The Court explained that the Republic of Niger, as currently controlled by the military junta, lacked capacity before the Court, making the substantive application *prima facie* inadmissible.²⁷

4. Analysis of the Impact of the Application of the Economic Community of West African States' Enforcement Mechanisms to Restore Constitutional Order in Niger

The recent military intervention in the governance of Niger Republic exposes the challenges of the enforcement of state constitutionalism and democratic governance by regional organisations. In this connection, this section analyses the viability of the outlawry of unconstitutional changes of government and its enforcement by regional organization like ECOWAS especially, in a situation where there is internal popular support for such change. The case of the Republic of Niger is very significant in that, this is the first time in recent years that ECOWAS has ordered the use of force to restore constitutional order following a successful *coup d'etat*. In the aftermath, hard lessons can be drawn

²⁶ <https://www.naijanews.com/2023/11/23/niger-republic-junta-drags-tinubu-others-to-ecowas-court/> (accessed 18 December 2023).

²⁷ <http://www.courtecowas.org/2023/12/07/ecowas-court-declines-to-grant-request-for-interim-measures-in-suit-brought-by-niger-against-the-ecowas-authority-of-heads-of-state-and-government/> (accessed 20 December 2023).

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regarding the viability of a threat of the use of regional military operation as a means of consolidating democracy by ordering the restoration of the constitutional order after the fact. Thus, this section focuses on analysing the efficacy of the role of ECOWAS in restoring democratic governance *vis a vis* the use of external military force.

It is often generally claimed by democrats all over the world, that the best military government remains worse than the bad civilian government. This claim gives the impression that when the military strikes, the objective is to ascend power illegitimately for selfish reasons thereby undermining democracy. However, the claim becomes highly contestable in situations where there is obvious, excruciating and intolerable oppression of the citizenry by elected leaders who themselves undermine democracy and every constitutional means of changing the government is made impossible. The argument is that the military can be attracted to intervene in the politics of a country in extreme circumstances when the democratically elected leaders become dictators, fantastically corrupt by becoming conspicuous looters instead of leaders while living conspicuous ostentatious life in the face of abject mass poverty, insecurity and abuse of all democratic principles with impunity, sometimes with foreign collaborators. In this type of scenario, the intervention cannot be to undermine democracy but to stop the undermining of democracy by the ruling elites, which might be ignited by popular uprising against bad governance. In any case, our core objective is not to rationalise military intervention *per se* but to rationalise the efficacy of regional military intervention or threat of military intervention and imposition of sanctions aimed at the restoration of constitutional order, drawing lessons from the Niger experience.

In this connection, it is submitted that a case study of the recent coup in Niger and the response of the ECOWAS in the aftermath demonstrate that the outlawry of unconstitutional change of government and the enforcement thereof without more cannot guarantee the sustenance of democratic governance without more. Arguably, even with the military government the country is facing economic crisis and may have not removed the people from poverty and hardship, but this may be due to regional and international sanctions following the military coup on July 26. However, it appears that the impact though hard, has not deterred the military junta and indeed the people of Niger.

It is instructive to note that until the 64th ordinary session held on 10 December 2023, the Conference of Heads of State when the Commission of ECOWAS finally suspended Niger Republic as member, it had considered the situation in Niger as a coup attempt and continued to consider Mohamed Bazoum the President of the Republic of Niger.²⁸ This means that before then ECOWAS' decision-making bodies and members of Bazoum's government were authorised to represent Niger in ECOWAS' statutory meetings. However, following the decisions taken at the summit of heads of state and government at the 64th ordinary session, Niger now remains suspended until constitutional order is restored.

It was also reported that ECOWAS leaders at the meeting in Abuja asked the military junta of Niger, which came to power in a coup on 26 July, to release the deposed president Mohamed Bazoum in exchange for the lifting of the sanctions imposed on the country. The leader of the junta, Omar Abdourahmane Tchiani, was said to have reiterated that Mr Bazoum would not be released. However, a proposal to lift the sanctions in exchange for shortening the duration of the transition period, currently set at three years was said to have been accepted without specifying the duration.

The clear implications of the outcome of the 64th ordinary session held on 10 December 2023 are first, that Mohamed Bazoum's government had effectively been overthrown by a military coup. Secondly, that the leader of the junta, Omar Abdourahmane Tchiani has been recognised as being in effective control as the *de facto* leader of the government of the Niger Republic. Thirdly and most significantly that it appears that ECOWAS has relaxed its hard stand of insisting on restoring the *status quo ante* and the threat of military option to enforce its decision on the Niger situation and is focusing now on the diplomatic option. This latest stance confirms the Authority's recognition of the fact that the Niger coup amounts to a successful revolution. Hence, in line with international principle, a successful revolution begets its own legality and this is what happens where a coup is precipitated by popular uprising or mass protest against bad governance. Thus, whenever the society becomes disequilibriumed and dysfunctional and ruling elite's re-synchronising actions aimed at averting revolution fail, either as a result of the inadequacy of their reformist or concessionary measures, or outright intransigence or insensitivity to the demand for change, the ground is thereby set for a successful revolution.²⁹

²⁸<https://www.premiumtimesng.com/news/headlines/651760-ecowas-finally-suspends-niger-republic.html> (accessed 18 December 2023).

²⁹ OE Nwebo, *Law and Social Justice in a developing Society: A Critical Approach* (1995), Owerri: International Universities Press, p 172.

5. Conclusion and Recommendations

This article has demonstrated that in this contemporary era of globalization and diplomacy and international cooperation, there is no longer any absolute national sovereignty especially when member states by treaty agree to collectively uphold common or shared fundamental democratic principles and norms. Therefore, it is strongly argued that States are no longer in exclusive control of their security and the means of violence in their domestic jurisdictions. Accordingly, sovereignty of states is constrained by their obligations under multilateral treaties to which they are parties, by the principle of *pacta sunt savanda*.

On the other hand, it cannot be gainsaid, that democracy is not a perfect system of government or a finished product meant to be enjoyed without nurturing. In other words, democracy is always an unfinished product in the process of constant, reformation, refinement and improvement based on continuous learning process based on international standards and subject to local political circumstance, experience and experimentation. Against the above background, it is submitted that ECOWAS Heads of State and Government are justified to intervene in the Republic of Niger in order to promote or enforce the sustenance of constitutionalism and democratic governance particularly, in order to ensure the restoration of constitutional order.

Admittedly, an attempt to truncate democracy by any form of unconstitutional change of government is outlawed, not only under national constitutions but also under international instruments in order to promote constitutional engineering to maturity. However, in situations where there is obvious, excruciating and intolerable oppression of the citizenry by elected leaders who themselves undermine democracy and make every constitutional means of changing the government is impossible, the military option becomes attractive. The argument is that the military can be attracted to intervene in the politics of a country in extreme circumstances when the democratically elected leaders become dictatorial, fantastically corrupt by becoming conspicuous looters instead of leaders and living ostentatious life from the proceeds of embezzled or siphoned public funds. This is even more compelling in the face of abject mass poverty and misery, insecurity and abuse of all democratic principles with impunity by the powers that be, sometimes with foreign collaborators and with no solution in sight.

The lesson that can be drawn from the Niger experience is that the outlawry of unconstitutional change of government and the enforcement thereof at both national and regional levels are crucial, but these are not enough. National governments and regional organisations must as a matter of priority take urgent steps to address the major factors that promote democratic reversals or decline and which also motivate and fuel coups in Africa. The deficit of good governance is compounded by the lack of internal cohesion or political instability due to the existential failure of the ruling elites to properly address the challenges of diversity as well as lack of strong democratic institutions to enforce the rule of law and lack of vibrant civil society groups to hold the government accountable. Thus, the challenge of bad or weak leadership and the consequent failure of the elected leaders to deliver on their campaign promises to provide democracy dividends after acquiring power is a major factor which must be addressed. It is therefore recommended, that the only viable antidote to unconstitutional changes of government remains the institutionalization of democratic or good government.