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**AFRICAN CONFERENCE ON CONSTITUTIONAL PROCESSES**

**REPORT ON THE OUTCOMES OF THE CONFERENCE**

## FOREWORD

Africa is in the process of entering into a new era of constitutional development based on shared values and principles stated in the Constitutive Act of the African Union, the African Charter on Democracy, Elections and Governance which were recently adopted, and the numerous pertinent Declarations and Resolutions adopted by the relevant meetings of the African Union.

All these legal instruments aim at promoting and consolidating participatory democracy and constitutional development in Africa through the adoption, implementation and the protection of inclusive constitutional processes normally expected to contribute to the creation of a favourable climate for the establishment of the principle of responsibility of leaders to their people, through regular transparent elections, free, sincere and just in a context of multiparty politics and the development of a system of checks and balances based on a true separation of executive, legislative and judicial powers.

It is in this context that from November 24 to 27, 2008, the African Union Commission in collaboration with International IDEA organized a conference on African Constitutions in Cotonou (Benin) to discuss fundamental and urgent issues facing Africa in its efforts to promote constitutionalism. This important conference which brought participants together from Africa, from countries of the South and from the rest of the world underscored the view to strengthen south-south cooperation aimed at sharing and comparing different experiences and teachings of constitutional processes.

The conference was meant to highlight the recent fundamental political changes that Africa has experienced since the coming into effect of the Constitutive Act of the African Union in 2000, and the adoption of the African Charter on Democracy, Elections and Governance in January 2007.

The four main objectives of the Conference were the following:

- To establish an Africa network for sharing experiences and expertise in the constitutional domain ;
- To discuss fundamental values and principles that should guide constitutional development in Africa;
- To favour continental integration through constitutional development;
- To support south-south cooperation and experience sharing.

This work is a recording of the outcomes which were adopted in the context of the Conference. The introduction part seeks to cover the historical and contemporary context of the conference. In a first part, speeches made during the protocol opening ceremony of the conference are recorded. Interventions of experts will then be presented in line with the programme of conference. The conference report will be reproduced as well as the speeches made during the closing ceremony of the works of the conference.

## INTRODUCTION

### I. THE CONTEXT

The concept of the Constitution as a body of laws relating to the devolution and the exercise of political power of the State, and to the guarantee of citizens rights and duties is not unknown in African societies. In fact, historical evidence shows that fundamental charters existed in the pre-colonial African empires, which even if they were not written, regulated life in these politically organized societies.

In fact, it is the colonial system that came to profoundly undermine all internal judicial and constitutional coherence of these traditional models, while imposing its unilateral perspective of constitutionalism that was to be taken up later by African States at the time of their achievement of international sovereignty.

Actually, constitutionalism in this Eurocentric vision is a foreign phenomena to the history, the culture and even to the sociopolitical environment of African States in so far as it translates a vision that is instrumental to the constitution which is considered just expression of international sovereignty and a source of legitimacy of the powers of the new governments.

As a result, most of the Constitutions of post colonial African States suffer a certain lack of internalization. In fact, on the one hand they were conceived or even imposed by the old colonial powers who, in some cases, went as far as making it conditional to their accession to independence of their colonies. On the other hand, they were designed by western experts who, very often had no appreciation of African realities. Finally, adopted and implemented in the absence of any involvement of citizens in the constitutional process, they do not sufficiently take into consideration the different categories of society such as children, women, the aged and persons with disabilities, who have eventually become more and more visible in the African public space. All these factors explain the similarities of constitutions among most African states.

Misunderstood and misappropriated by the people, these constitutions have shown their objective limit. In fact, in most of the cases, they have not been able to prevent Coups d'états and other non democratic devolution of power faced by African countries over the decades following national independence.

Confronted by recurrent crises of legitimacy and coming under the double pressure of their new born civil societies and of international public opinion in the decade of 1990-2000, African political systems manifested their will to adopt to new democratic political systems founded on constitutionalism and multiparty systems in order to cater for exigencies and democratic demands expressed by the African peoples, namely the adoption of norms and appropriate mechanisms for holding pluralistic elections, free and loyal, as well as the establishment, strengthening and perpetuation of State rights and good governance.

These constitutions adopted according to inclusive process in the context of national conferences or by wide consensus therefore appeared to be responses to the exigencies and demands for participation in public life of all political and social actors. However, even if these African constituencies intended that these constitutions reflect the realities of the African continent, they also took care to integrate universal constitutional norms in them.

The new constitutional apparatus consists of a vast trail of laws and principles ranging from human rights and democracy up to the institution of mechanisms and institutions of control, promotion and protection of basic rights in support of more responsibility on the part of governments resulting from regular, transparent and pluralist elections. To this effect, a whole constitutional engineering is deployed with the view to construct and perpetuate a culture of constitutionalism, peace and tolerance.

For a long time, the OAU abstained from casting glances at the internal functioning of member States for the sake of respecting the sacrosanct principle of non-interference in the internal affairs of States and had devoted all its energies to addressing the common challenges of the continent, like the dismantling of the last vestiges of colonialism and apartheid in South Africa and the crucial issue of the fight for the economic development of the African continent.

From the time of the questioning of authoritarian political systems, and the coming in of new democracies in the 1990's, the OAU / AU believed it had to come along with this historic turning-point in order to help the States and African people to anchor and integrate the culture, the values, rules and principles of democracy in a better way.

It is in this context of support for the democratic process prevailing in Africa that the OAU and later the AU adopted numerous declarations and decisions, among others, the following:

- the African Charter on Participation of the People in Development in 1990;
- the Algiers Declaration on the Protection of Basic Freedoms and Human Rights and the Strengthening of Democratic Institutions in July 1999;
- the Durban Declaration on Principles Regulating Democratic Elections in Africa in 2000;
- the Lome Declaration of July 12, 2002 on the Framework of OAU Reaction to Un-constitutional Changes of Governments;
- the African Charter on Democracy, Elections and Governance of 2007.

The Constitutive Act and the various declarations and charters mentioned above, especially the Charter on Democracy, Elections and Governance prescribe respect for the Constitution and promote adherence to the State of law, to separation of powers, to independence of the power of the judiciary, to political pluralism, to gender equality in political processes, to regular organization of free transparent and fair elections and to the guarantee of basic human rights.

More precisely, the Charter on Democracy, Elections and Governance reiterates and reinforces engagements of member States of the Union to development, to democracy and peace in a consolidated and legally binding document in which member countries commit themselves to building solid institutional and cultural foundations for the blossoming of democracy, of sustainable development and peace. In this regard, the Charter commits the Member States of the African Union to institutionalize democratic, social, economic and political governance. The Charter also places emphasis on the commitment of the Union to encourage Member States to develop democratic principles, and particularly human rights, the sanctity of human life, the State of law and good governance, the promotion of gender equality and of social justice in order to ensure balanced development.

In the same vein, the Charter reproofs impunity, political assassinations, acts of terrorisms and other subversive activities and rejects and condemns all anti constitutional change of governments and all

constitutional manipulations of governments to entrench themselves and undermine democratic changes.

Finally, the Charter encourages States to have democratic constitutions which define the driving rules and principles of political pluralism, the strengthening of good governance and the respect for human rights. In the logic of these declarations, the African Union condemns all forms of anti-constitutional change of governments and the manipulation of constitutions by ruling governments in order to maintain themselves in power indefinitely.

The objectives and principles of the Constitutive Act of the African Union expressed in the various declarations and decisions of the continental organization aim at promoting democratic values and institutions, grass-roots participation, respect for democratic principles, human rights, the State of law and order and good governance.

These developments provide possibilities for the building of democracy, for managing diversity, and for providing representative and inclusive political processes. Constitutions are becoming instruments of social transformation and of economic emancipation of their populations and a basic element for the promotion of human security and international responsibility.

With the increase of roles and the higher demand for constitutional regimes, constitutional development in Africa has not escaped challenges in its implementation given the insufficient resources, the lack of qualified executive personnel, the manipulation of constitutions by political elites, the resistance or the total disregard for binding constitutional principles by certain governments, or inversely, their scrupulous observance of certain clauses particularly favourable to them, but which often engenders political conflicts, becoming sources of social disorder.

It is in this context that the African Union invites leaders in the executive, the judiciary of African States, civil society organizations, experts and intellectuals and other Africanists to this historical continental Conference on African Constitutions, for a deep reflection on the complex and sensitive theme of the concept and definition of the constitution and on the gains of constitutionalism in contemporary African political systems.

To this effect, the Department of Political Affairs of the African Union Commission organized a preparatory workshop on African constitutions on the 5<sup>th</sup> and 6<sup>th</sup> of November in Brazzaville (Republic of Congo). This important meeting saw the participation of eminent personalities coming from different regions of the continent, among who were experts in constitutional law, civil society organizations, and national institutions on human rights, national organs responsible for organization of elections, and the Institute for Democracy and Electoral Assistance (IDEA).

1. The objectives of the Brazzaville workshop were the following :

- to share best practices in the context of the promotion of constitutionalism in Africa;
- to proceed to evaluation of the strengths and weaknesses of African constitutions;
- to define relevant strategies in order to reinforce constitutionalism in Africa;
- to develop a work document for the organization of the Conference on African constitutions planned for 2008
- to determine the terms of reference of this important continental meeting.

2. The Brazzaville workshop resulted in the following recommendations :

- involve all social categories, namely women, children, the aged, people with disabilities in the process of development, adoption and revision of constitutions.
- Formulate constitutions in a language accessible to all citizens and translate it in all national languages.
- Organize educational campaigns intended for people at the grassroots to simplify the constitution in a manner that is understandable and can be appropriated by all.
- The constitution ought to be negotiated by all segments of society in order to secure a national consensus.;
- Putting effective operational structures in place to avoid delays between the constitution and its application;
- The need to put an end to constitution manipulations which undermines democratic alternation;
- To include teaching on the constitution in school programmes in order to promote a better understanding and participation of citizens in constitutional matters in order to build a culture of constitutionalism;
- The call for prompt ratification of the African Charter on Democracy, Elections and Governance adopted in January 2007 by the Conference of Heads of States and Governments of the African Union.

## II. OBJECTIVES OF THE CONFERENCE

Africa has to find solutions to its own problems and discover alternative solutions from its past experiences, taking its particular constitutional history, social, ethnic and economic difficulties, into account, and the challenges posed by globalization and by the free market. All these processes of construction ought to take the aspirations of the people for a better life, the powerful resurgence of democracy on all the continent, the need to prevent or contain the conflicts in many regions in Africa, and the changes introduced by the Constitutive Act of the African Union into consideration. Therefore the initiative to organize an African conference on constitutions could not have come at a better opportune time. The conference will address, the following matters among others issues:

- *The implementation of existing democratic constitutions:* The provisions of the constitution must be applied and the citizens ought to have the impression that their national constitution is a true reflection of their aspirations and a real protector of their rights. An effective application of good constitutions will in turn lead to democratic responsibilities of regimes vis a vis its populations, to promotion of the State of law and order and guarantee the rights of citizens. It will lead to the support of social harmony and internal peace, the promotion of peaceful exchanges and will help promote peace and security given the State of law and order. The Conference will endeavor to identify appropriate mechanisms for a sound implementation of both existing and future constitutions. Moreover, the Conference will have to diagnose the causes of constitutional crises in Africa without leaving out all the factors likely to undermine the exercise of democracy with regard to constitutional issues, especially the lack of appropriation of

constitutions, political party systems, and the organization of elections, the separation of powers and the assurance of the rights of citizens.

- *Sharing of comparative experiences:* The Conference will enable one to document and draw lessons from the rich and recent constitutional experiences in Africa, to develop a body of practical and insightful experiences, to identify the key issues capable of helping to stimulate a future constitutional development from a standpoint that is essentially African in the formulation of constitutions based on the imperatives of peace, security and a common commitment to the African Union. Organized in this manner, regional and sub-regional consultations and dialogues on constitutionalism and democracy in Africa will greatly help in this undertaking. The Conference will deal with initiatives aimed at promoting constitutionalism and democracy on the continent in order to understand African constitutions from a historical and comparative perspective in terms of their development, their adoption, their implementation and their outcomes.
- *Evaluation of the impact of the Constitutive Act of the African Union:* The realization of the African Union was a long term convergence of national constitutions on the key issues of democratic representation, of security and of law. The constitutive Act of the African Union has become part of national constitutions and of the laws of member States. The African Union protocol seeks to strengthen different citizen rights and State responsibilities. In this regard, African constitutions will have to be reviewed to facilitate emancipation of the African people, and to this effect, be harmonized with the important mission of contributing positively to the eventual integration of the African continent.
- *Creation of a network of knowledge on constitutionalism in Africa:* The Conference will have to promote initiatives aimed at diffusing knowledge in order for Africans to arrive at a better understanding of the provisions of their constitutions; at putting in place a comparative network of constitutional experiences that are useful for Africa; at identifying and creating a network that brings major political decision makers and expert constitutionalists from all over Africa together; at identify the key issues that can contribute to stimulate the future of constitutional development in Africa, capable of supporting regional and continental integration;
- *To promote South-South cooperation:* The conference will develop experience sharing on the constitutional process of the South and in the whole world.

More precisely, the Conference will seek to :

- rethink constitutionalism in Africa;
- to take stock of the best constitutional practices;
- to strengthen and uplift the authority of constitutions on the continent
- to consolidate democratic and electoral processes on the continent in order to promote peace and stability;
- put an end to manipulation of constitutions by political leaders;
- research on processes and activities that will contribute to the integration of the continent.

### **III. EXPECTED RESULTS**

The follow results are expected from the Conference :

- to re-establish faith in the constitution among the African populations by their inclusion in the process its development and revision;
- maximize involvement, participation and adherence of the Africa populations in constitutional initiatives and reforms in order to enable them to know and understand better the meaning of constitutional provisions.;
- to promote and protect constitutional freedoms and rights, and democratic values on the continent;
- to root constitutionalism and democracy on the continent, especially political transitions towards multiparty political governance beyond adoption and respect of the code of conduct of good governance, decentralization and the sharing of powers;
- internalization and harmonization of international and regional norms for better sharing of best constitutional practices;
- sensitization of States for prompt ratification of the African Charter on Democracy, Elections and of Governance to confer effectiveness on it.
- create regional and sub regional network of constitutional practitioners and experts for a more sustained exchange of knowledge, experiences, practices and perspectives on constitutional matters beyond documentation and the dissemination of information and materials across the continent.
- reinforcement of capacity of constitution operating personnel through teachings, training workshops and seminars on the subject of constitutions.



# **REPORT OF THE AFRICAN CONFERENCE ON CONSTITUTIONAL PROCESSES**

## **I. INTRODUCTION**

The African Conference on the constitutional processes jointly organized by the African Union Commission and the International IDEA was held at the Palais des Congrès in Cotonou (Benin) from the 25<sup>th</sup> to the 27<sup>th</sup> November 2008. Present in the meeting were the representatives of Member States, the African and international organizations, the academics and experts invited.

## **II. OPENING CEREMONY**

The opening ceremony of the conference was graced by the presence of His Excellence Jean Marie Ehuzu, Foreign Affairs Minister of the republic of Benin, who performed the official opening of the meeting. The opening ceremony has been marked by speeches made by representatives of the International IDEA and the African Union Commission.

### **Address by Mr. Vidar Helgesen, Secretary General of International IDEA**

Mr. Helgesen was very pleased about the partnership with the African Union Commission (AUC) and said that the Conference was of particular importance because it would facilitate the strengthening of democratic practices and the promotion of participation in constitutional processes. He said it was normal that Benin should host the Conference in view of its own experiences on constitutional processes.

Mr. Helgesen said it was clear that constitutions become instruments of democratic processes. He also said that the constitution is not only a legal instrument, but it has become an essential instrument to promote democracy. He then stated that the Conference would help to establish a network on Constitutionalism in Africa and would provide a basis for exchange of experience across Africa and between Africa and other regions.

Stressing the importance of the participation in the constitutional processes, Mr. Helgesen concluded his remarks by stating that such participation is essential to the emergence of a "new constitutionalism. He also noted that the Conference will serve as a basis for promoting new approaches and establishing operating principles of a new constitutionalism. He also reiterated the commitment of the International IDEA to work closely with the AUC and regional organizations for the promotion of the consensus that could be established during the conference.

### **Address by His Excellency, Mrs. Dolly Joiner, African Union Commissioner for Political Affairs**

After welcoming the delegates, Commissioner Joiner said that the Conference was organized jointly with the AUC and the international IDEA. She has specified that the Conference has been a follow-up Workshop on Constitutions held in Brazzaville in 2007. The Commissioner also stated that she appreciated the partnership between the AUC and the International IDEA and expressed her hope that the joint activities undertaken by the two organizations will be realized through this Conference.

The Commissioner further noted that the Conference would serve, among other things, as the basis for reflection on the ratification of the African Charter on Democracy, Elections and Governance, and

promoting African integration through constitutions and constitutionalism. The Commissioner Joiner has particularly stressed the need to ensure that values are built on the basis of commitments between people. She added that in many cases, an imposed constitution or a constitution imported from other contexts does not meet the realities and is often a source of internal conflict: that is what the African Union Commission is trying to avoid

The Commissioner Joiner has urged delegates to address, during this Conference, discussions with innovative thoughts and to give special attention to conclusions that will be selected. She then stated that such an initiative is necessary to allow the Conference to meet the challenges and constraints that have been engendered by earlier constitutions and constitutionalism.

### **Opening Remarks by His Excellency the Minister Ehouzou Jean-Marie, Minister of Foreign Affairs of the Republic of Benin**

The Minister began his speech by welcoming the participants at the Cotonou meeting and stating the honour of the government to have the Benin chosen by the AUC and IDEA to host the International Conference on constitutional process. He observed that the choice of Benin is appropriate because of its history on the constitutional processes. The Minister also welcomed the transition from OAU to the AU while welcoming the new impetus from Member States for the building of democracy and related issues.

The Minister Ehouzou was very pleased of the AU approach which allowing through this effective legal instrument, which is the African Charter on Democracy, Elections and Governance, to define a set of minimum standards on democracy and governance for Member States. He urged all Member States representatives and participants to take this opportunity to reflect on future efforts to be undertaken within the framework of strengthening the integration and the democracy over the continent.

### **III. TEMATIC PLENARY SESSIONS.**

The work took place in five thematic sessions with presentations followed by interactive discussions among participants.

#### **First Session: The participation in the constitutional process**

##### **A. Summary of discussions**

The participants shared their visions and experiences on the challenges of constitutionalism in Africa. It was noted in this respect that Africa has a rich history in the process of constitutional strengthening and has a number of useful experiences in democratization.

The effective participation of Africans in the process of constitutional strengthening is fundamental to the constitutional development of common values and to ensuring effective implementation of constitutions. The constitutions may actually serve as a basis for innovation and social engineering to mobilize communities around a common target. The process of participation appears as a determining factor in the acceptance and legitimacy of constitutions.

But it was noted that one of the main challenges of the continent is to ensure that the constitutions reflect the views of the people and that of all groups, especially the most vulnerable groups such as women who are not often taken into account. The positive experiences of the world show the importance and value the constitutional processes.

## **B. Recommendations**

As a result of presentations and discussions, participants at the conference on continental constitutional processes have made the following recommendations

1. The constitution should be a legal instrument for the promotion of democracy
2. The constitution should address the concerns of the populations since imposed constitution or imported ones from other contexts do not address national realities and are often the source of internal conflicts.
3. The constitution should promote an inclusive political culture incorporating the aspirations and expectations of all social categories, particularly the most vulnerable groups like women who are often not reflected in the process of constitutional strengthening.
4. The inequity existing in some African constitutions between man and woman as a hindrance to development and social emancipation, constitutions must ensure that men and women have the same rights and duties.
5. The gender equality as well as the participation of women and other vulnerable groups to constitutional processes are essential for having inclusive constitutions. Section 4 L of the Constitutive Act of the African Union states that equality between men and women is a basic principle of the creation of the AU. Accordingly, the AU member states must ensure that this principle is enshrined in the constitutions and that the Protocol of the AU on the Rights of Women in Africa be ratified by all Member States and that all political parties affirm the principle of equality between men and women in their constitutions.
6. In order to support the process of encouraging the constitutions more effective exchanges of information, sustained ideas and intellectual contributions on existing African constitutions and the constitutional experiences of other countries and regions of the world must be taken into account in constitutional processes.
7. Basic knowledge about constitutions and constitutionalism in Africa must be improved and other research initiatives established as soon as possible to assist Member States to enhance capacity-building of the constitutional actors.
8. The creation of a knowledge network on Constitutionalism in Africa should, in this regard, help to promote cooperation and sharing of experiences on the constitutional processes in the south and around the world.
9. States should internalize and harmonize the international and regional standards in their constitutions for best sharing and best understanding and integration of best constitutional practices by the national populations.

10. The constitution drafted according to an inclusive process should always be approved by the people as a result of regular, transparent and sincere referenda.

11. States and communities should be aware that constitutional development is not an isolated event but an ongoing process that involves resources mobilization for the institutions involved.

## **Second Session : Implementation challenges**

### **A. Summary of discussions**

The Constitutions that are best developed in accordance with a participatory and inclusive process and that take into account national interests widely shared by all social strata can only provide the proof of their effectiveness, which is one of the conditions of their legitimacy, if they have been smoothly implemented. Also, participants should unanimously agree that the implementation of constitutions is not only a national responsibility that involves all the institutional, political and social role players, but also a long-term process that involves learning reforms and a continuous and active engagement of all the actors. They therefore require a good knowledge and good practice of standards, rules and mechanisms of the constitution, a sustained vigilance of all stakeholders, and appropriate adjustments as well as an unwavering commitment of all political and non-political actors.

This implementation process requires a continuous monitoring and must include initiatives to ensure ongoing exchanges between Member States. These initiatives serve to promote constitutional and basic development practices to ensure that an effective national education be included in the content of the constitutions.

Generally speaking, participants felt that the constitution, as a reflection of collective will, implies for its collective implementation, a collective will of all governing institutions and all segments of the population. They have become aware of the financial implications of the implementation, inter alia resorting to referendum, training, awareness and capacity building of people, the involvement of the independent institutions of the government. They have agreed for all these reasons that the responsibility of the national implementation could benefit from regional and international assistance to help facilitate the adoption of the constitution by all citizens

### **B. Recommendations**

Taking into account the concerns expressed during the discussions, the recommendations below have been articulated:

1. For a successful implementation, the constitution must be drafted so as to be understood by people with a best awareness of it in order to ensure effective compliance.
2. In the process of implementing the constitution, states must establish structures to supervise the implementation of the constitution and allocate to enough resources.

3. Constitutions should apply a best distribution of power, a best organization and a best control of the State through the establishment of a multiparty system with free and transparent elections to guarantee the State power democratic alternation.

4. Constitutions should reflect the aspirations of the peoples, reduce or eradicate the injustices and political inequities through the adoption of a fair electoral system, including funding of political parties and election campaigns, a greater presence of women and other disadvantaged or marginalized groups on voters lists whose order of presentation of candidates is based on the alternation man - woman to give women more chance of access to political institutions.

### **Third session: Strategies and structures for the strengthening and implementing the African constitutions**

#### **A. Summary of debates**

The third session of the conference gave rise to exchanges of African and other Southern African countries experiences on structures and strategies for strengthening and implementing the constitutions. In general, participants felt that, as the Constitution is both a fundamental law and a social contract, it is important to develop appropriate strategies so that their implementation and application do not slip remarkably. In addition to the strategies provided by the Constitution itself, the good practices of other countries must be taken into account in the implementation process.

But the participants agreed that the success of these strategies requires a prior popular appropriation of constitutions through a sustained and permanent dialogue between all the institutional and social actors on the proper functioning of the state. The participation of the population is therefore crucial in this process for a smooth undertaking of constitutional issues.

#### **B. Recommendations**

**The following recommendations were made following discussions.**

1. The teaching of the constitution must be generalized to raise the constitutional awareness of citizens and enhance their capacity in terms of ways and means and strategies for the implementation of their constitutions.
2. Education and awareness should allow the identification of the interests of all social organised groups with no marginalization: decentralized powers, associations of civil society - the religious, ethical groups - the political parties and their roles. The groups identified could achieve their ambitions while knowing that there are interests that they do not have to negotiate.
3. Documents and other legal instruments of a constitutional nature must be translated into national languages, reproduced, popularized and disseminated so that people understand them in order to develop properly the interplay between the rights and the social realities.
4. States must identify, support and strengthen state (judiciary, legislature) and civil (institutions supporting democracy) institutions as well as other actors involved in the

observation, supervision and monitoring of the implementation of these constitutions.

#### **Fourth session: The protection of the constitution and the African Constitutional integration**

##### **A. Summary of debates**

During the fourth session of the conference, participants carried out a thorough examination of strategies and structures for the protection of constitutions and stressed the need to articulate focuses on the establishment of institutions and mechanisms allowing buy-in and marking the responsibility of the government. The separation of the executive, the legislature and the judiciary in this regard is seen as a guarantee of the rights enshrined in the constitution and therefore the perpetuation of the constitution. In this respect, they are of the opinion that the bicameral system contributes to the effective protection of the constitution, provided that the chambers are not controlled by one political party and that the redistricting should be adapted. In the same vein, an independent judiciary helps protect constitutions provided that it is accessible, that the appointment of the judge does not fall within the discretion of political authorities and that the referral to the constitutional court obeys to more flexible procedures.

Turning then to the prospects of African integration through a constitutionalist approach, the participants noted the obstacles hindering the dynamic constitutional integration. They recognized that the integration process will be long and probably difficult to implement, especially as the constitutions of the States do not often envisage limitations or waivers of sovereignty in view of the African integration.

##### **B. Recommendations**

Participants agreed on the following recommendations.

1. Development requires the stabilization and security of individual and collective economic situations justified by an effectively implemented and strictly protected constitution.
2. The independence of judges should be guaranteed by giving them adequate resources to enable them to fulfil their mission in the conditions of perfect fairness and, in particular, to better combat corruption that plagues many African countries.
3. Political parties and civil society associations should start advocating and lobbying for the inclusion of the provisions that meet the aspirations of the people in order to contribute to the improvement of the quality of the constitutions that will be easier to implement in these conditions.
4. An early warning system should be implemented to detect and, if necessary, to sound the alarm in case of difficulties in the implementation through mechanisms (petitions) and civil society organizations for the promotion and protection of democracy and human rights.
5. These prerequisites must nevertheless take into account the fight against poverty, illiteracy and ignorance of rights and duties that slow or hinder democratization efforts.

6. More attention should be paid to the improvement of economic, social and cultural rights in order to cultivate the necessary conditions for the development of citizens who are better prepared to know, implement and protect the constitution.
  
7. It is necessary to establish frameworks for permanent exchanges between not only political parties but also civil society organizations for a dialogue on the constitutional issues to preserve or, where appropriate, to suit the needs and concerns of people.
  
8. To increase the chances of success of these actions, meetings should be held regularly both in urban and rural areas in order to strengthen peace, governance and enhance democracy.

## **Fifth session: Unconstitutional changes of government**

### **A. Summary of discussions**

During this final session of the conference, participants agreed that during the decades following the independence of African States, the coup was a classic mode of accession to political power. This unconstitutional process of power devolution has led to conflicts and crises in Africa that have absorbed resources that could be used to meet the challenges of education, health and, in general, the challenges of development.

Recognizing the African Union action in the framework of supervision, support and consolidation of democratic progress on the continent, they acknowledged that the African Union adopted on 30 January 2007 an African Charter on democracy, elections and governance, which condemned in Section 23 all methods of unconstitutional change of government together with all the constitutional amendments affecting the validity of democratic alternation.

### **B. Recommendations**

Following the debates and discussions on Unconstitutional Changes of Government in the light of the African Charter on the Democracy of Elections and Governance, the following recommendations were made.

1. It is imperative to have a legitimate national representation embodying national diversities to move African integration.
  
2. To improve the African integration, a constitutional system with a judicial system and political independent system of each other must be held in all Member States. A
  
3. greater participation of all stakeholders (parliamentarians, constitutional courts, civil society organizations, etc.) to discussions on the strengthening of constitutional processes in Africa and other regions of the world should be insured.

4. The African Union should be equipped with fairly convincing means of pressure to enforce the condemnation bills against countries that do not respect constitutional rights.
5. It is necessary strengthen our capacity to assist and the regulation elections by the African Union in addition to national efforts.
6. In the same vein, the skills of the African Court for Human and Peoples' Rights should be extended to the electoral issues by acknowledging election cases in the Member States as a last resort, after exhaustion of national attempts.
7. Actions must be carried out to Member States and all State and non State actors to raise awareness on the need to ratify the African Charter on Democracy, Elections and Governance.

## **CLOSING OF THE CONFERENCE AND ADOPTION OF THE REPORT**

The formal constraints have prompted the organizers to proceed with the official closing ceremony of the conference before the examination and adoption of the report of the conference.

The closing ceremony, which was chaired by His Excellency Désiré Adadja, Minister of Communication and acting Minister on behalf of His Excellency Jean Marie Ehuzu, Minister of Foreign Affairs, was graced by the presence of Judge Robert Dossou, Presiding Judge of the Constitutional Court of Benin.

A vote of thanks to the President of the Republic of Benin Dr. Yayi Boni, the representative institutions and the people of Benin was adopted by the participants who expressed their deep gratitude for the hospitality filled with warmth and the resources that have been made available in favour of the holding and success of the first African conference on the constitutional processes.

The African Union Commissioner for Political Affairs, HE Mrs. Julia Dolly Joiner, welcomed the democratic progress observed all over the continent. She reiterated the determination of the continental organization in ensuring that the democratic gains made in Africa are not only maintained but strengthened.

In his closing remarks, the Minister Désiré Adadja expressed his hope to see the conclusions and recommendations of the Cotonou Conference on African constitutions mapping out encouraging prospects that offer to the African Union the opportunity to continue making efforts in the context of improving the constitutional provisions on the continent. Regarding this ideal, the Minister hoped that the judicial protection of African constitutions will become a reality on the continent and will be achieved through respect for constitutional standards by political actors, civil society, the national armed forces, the courts and all the African people to avoid, as far as possible, unconstitutional changes on the continent.

After the formal closing session of the conference, participants discussed at length on the draft report they have adopted with amendments incorporated in this version.

**Cotonou, 27 November 2008**



## Appendices :

**The following papers given as open speeches and presentation made in various sessions.**

### OPENING SPEECHES

The opening ceremony of the African Conference on constitutional processes was graced by the presence of His Excellence Jean Marie Ehuzu, Minister of Foreign Affairs of the Republic of Benin who proceeded with the official opening of the meeting. The ceremony was marked by speeches from representatives from International IDEA and the African Union.

#### I.1. SPEECH BY MR. VIDAR HELGESEN

*Secretary General of International IDEA*

- Excellencies, ladies and gentlemen, it is an honor for me and for International IDEA to join you here today for this important conference on constitutionalism in Africa. I am sure discussions over the next days will lead to some important steps forward on developing mechanisms for strengthening democratic practice as well as enhancing participation in the critical exercise of constitution building across the region.
- This conference on constitutionalism in Africa presents us with more evidence of the increasingly important role constitutions are playing as crucial building blocks for democracy throughout the world. *Today* we are witnesses to the fact that the nature of constitutions has changed as have the processes in which they are developed. Indeed, *today we are* observing new and broader roles for contemporary constitutions –they are no longer just a political and legal tool, but also a tool for enhancing democratic development.
- Over recent years much probing has gone into what constitutes good practice in this field, not only in terms of substance, but also in the approach to the process of constitution making and subsequent implementation. International IDEA, as a body of member states representing all regions of the world, is very interested in supporting this effort. In fact, for several years now, International IDEA has been supporting knowledge development and regional dialogue in this area. Building on this experience, and on the request of relevant stakeholders, IDEA is now actively involved in supporting constitutional reform processes in countries as diverse as Nepal, Ecuador and Bolivia.
- In Africa, IDEA’s commitment to supporting the implementation of the African Union Charter on Democracy, Elections and Governance, includes a specific emphasis on constitution building as part of the joint plan to implement the Charter. This conference is a first step towards implementing our joint commitment. It is also an opportunity for the region to develop a community of expertise and practice that draws on national and regional experience in Africa, and from other regions in the global south; as well as an opportunity to share expertise in African constitutionalism with other regions of the world.
- While serious challenges persist across the continent, many positive lessons in this field have been identified and reapplied time and time again. Most African nations embarked on their journey to democratization through constitutional reform and constitution building. The practice of dialogue and participation comes to mind as a specific lesson learnt from this process of transformation and is a key development in the history of constitutionalism on the continent. In contrast to past practice, more and more countries have opted for participatory and inclusive constitutional dialogue.

- Political participation is also about tolerance and equality of voice between diverse groups and citizens. It is about structured dialogue through frequent exchanges between citizens and elected leaders. It is about how leaders and officials make decisions that reflect obligations of accountability and transparency. It is also about gender equity and respecting differences. These normative and structural components of political participation are reflected in International IDEA's work. More importantly, they are at the heart of the afore-mentioned Charter on Democracy, Elections and Governance which has as one of its main objectives the promotion of the necessary conditions for citizen participation in public affairs.
- The underlying principle of all of International IDEA's work in supporting democratization is national or local ownership. In this light, participation in constitution building is imperative as it is the means by which traditionally marginalized groups can access political and social life. Across the continent, we remember high turnout for hearings organized by constitutional reform bodies. In South Africa, it is well known that some 2 million submissions were received from citizens many of whom were newcomers to the political mainstream. In other countries, it was observed how even the absence of fully functional state institutions in remote corners did not dampen a yearning of citizens to be included in framing their constitution.
- Participation is therefore a clear message that Africa is sending to well wishers around the globe. Participation in democratization, in development, in constitution building and in conflict resolution are the messages that International IDEA is picking up as we support the AU and individual member states to work towards the goals that they have set for themselves.
- This conference is an opportunity to carry forward the emerging consensus on operating principles into this key component of democracy. Analysts who speak of political participation in constitution building have described the outcomes as a "new constitutionalism". A consensus that emerges from this conference on operating principles for this new constitutionalism in Africa will undoubtedly be very well received and appreciated. On behalf of International IDEA, I wish you the best in your deliberations and look forward to working with the African Union and other regional and sub-regional bodies in sustaining this democratic momentum.

Chairpersons of institutions of the Republic;  
 Madam Commissioner in charge of political Affairs of the African Union;  
 Members of the Commission of the African Union  
 Excellencies, members of the Diplomatic Corps and  
 Representative of International organizations;  
 Dear Colleagues;  
 Honorable invited guest;  
 Ladies and Gentlemen,

### **1.3 SPEECH OF HIS EXCELLENCY, THE MINISTER JEAN-MARIE EHOZOU**

*Minister of Foreign Affairs of the Republic of Benin*

First of all, on behalf of the President of the Republic, the Head of State, Head of Government Dr Boni YAYI, the people and the Government of Benin, I would like to welcome you to Cotonou for this continental Conference on African constitutions.

I would also like to seize this opportunity to express my appreciation to the African Union Commission for their choice of Benin to host this meeting of which the theme, of a fundamental importance for Africa, registers within the framework of efforts of African leaders for the promotion democracy in the continent.

I am equally pleased to express my satisfaction to the leaders of the International Institute for Democracy and Electoral Assistance for the major part they took in the organization of these meetings.

By my voice, the people Benin express their full gratitude to you, and find the proof of the esteem they enjoy on your part in this confidence you have place in them.

Ladies and Gentlemen,

It is not redundant to emphasize that as a basic law, the Constitution determines relations between powers, consecrates basic rights of individuals and groups, especially equality of all before the law, individual and collective liberties, freedom of unions, the right to form and join political parties and to freely chose its leaders, to mention but a few.

In the name of observing the sacrosanct principle of non interference in the internal affairs of States, the Organization for African Unity, for a long time, has refrained itself from casting glances on the internal functioning of member States .

It has rather devoted all its energies at addressing the common challenges to the continent such as dismantling of the last vestiges of colonialism and apartheid in South Africa and to the crucial issue of the fight for economic development.

Since the loss of credibility of authoritarian political systems and the advent of the democratic process following the national conferences held on the continent, the African Unions has undertaken to come along with this movement with the aim to assist States and the African people to root and integrate the culture, the values, the rules and principles of democracy in their daily experiences.

In this regard, several norms have been decreed the most significant of which are :

- the African Charter on grass-roots participation in development of 1990;
- the Algeria declaration on the protection of basic freedoms and human rights, and the strengthening of democratic institution in July 1999;
- the Durban declaration on regulatory principles for democratic elections in Africa of 2000;
- the Lome declaration of July 12, 2002 on the framework for OAU reaction to anti constitutional changes of Government;
- the African Charter on democracy, elections and governance.

These norms reiterate and reinforce the commitment of member States of the Union to build solid constitutional and cultural platforms for the promotion of democracy, sustainable development and peace on the continent.

They commit member States of the African Union to institutionalize democratic, social, economic and political governance and highlights the commitment of the African Union to encourage member States to develop democratic principles, human rights with specific emphasis on the sanctity of human life, the rule of law, and good governance, the promotion of gender parity and social justice to ensure a balanced development.

**Ladies and Gentlemen,**

As you can notice, much effort has been made at the normative level for the grounding and development of the democratic process for which the key remains the constitution as a law relating to the devolution and the exercise of political power, and the guarantee of citizens rights and responsibilities.

At this stage, it is important to take stock regarding the implementation of all these texts.

I also want to thank the initiators of the present meeting which is offering the opportunity to our leading executives, parliamentarians and judiciaries of our countries, to civil society organizations, to universities, African experts and intellectuals and to other Africanists to take a deep reflection on the ways and means of putting the constitutions of our States to the service of the democratic process and to the development of the continent.

I am persuaded, that the Cotonou meeting will not fail to outline perspectives of respect for the Constitution by member States of the African Union for democracy and good governance as the basis for poverty reduction, the promotion of sustainable development, the establishment of a representative Government and for a strong civil society aimed at ensuring grass-roots participation in the political process.

My ardent wish is that the present meeting makes it possible :

- to rethink constitutionalism in Africa,
- to determine the best constitutional practices;
- to strengthen and uplift constitutional authority on the continent;
- to consolidate democratic and electoral processes

Convinced that the present meeting will produce conclusions and recommendations suitable for supporting the strengthening of constitutions as the basis for maintaining stability, peace, security and for the development of our States, I declare the Conference on African constitutions open.

Full success to your deliberations.

# **PARTICIPATION IN THE PROCESS OF CONSTITUTION DEVELOPMENT : THE BEGINING OF AN INCLUSIVE POLITICAL CULTURE ? LESSONS AND EXPERIENCES OF THE DRC**

**El Hadji MBODJ**

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*Former Law Expert of the United Nations of the European Union in DRC.*

## **INTRODUCTION**

In the eyes of many Africanist observers, the recurrent legitimacy crises, often badly negotiated, is one major flaw of the post colonial African State which is always seeking to stabilize itself for more than four decades after independence.

The causes of this disaster are numerous, but for the purpose of this meeting, we will reiterate on the perversion of constitutionalism in the post-colonial States. Whereas constitutionalism experienced its second wave with the accession of the former colonies to the world of international sovereignty, its perversion in Africa is strongly noted. The Eurocentric view of the game of politics had deeply undermined the coherence of the judicial and institutional systems which were in force before colonial penetration. No one can deny the existence of organizational principles and the control of political power in the pre-colonial empires and kingdoms, principles limiting at the same time the absolute authority of governors who could not allow themselves to do just what they pleased.

From light centuries, the inherited tradition of declaration of rights makes of the law the expression of the common will as expressed in parliament after legislative elections. The omnipotent Parliament could do anything, especially as it was the only political institution to proceed directly from the social body. Moreover, at the time when political parties had not invaded the political arena, the elected was connected demographically to a constituency with which it was in osmosis. He defined himself, soul and conscience, in terms of the interest of his voters for whom he was a spokesperson in Parliament, regardless of the legal fiction of representation which theoretically placed him out of the reach of influence of those he represented.

The « constitutional fetishism » (Maurice A. GLELE) that seized independent African States drove them to rest the whole legitimacy of power on the constitution without giving attention to the conditions of its development, adoption, and more especially to its coercive vocation. This constitutionalism has experienced three waves in Africa.

The first generation corresponds to constitutions inherited from independence. They were originated, and even imposed by the former colonial powers, who, in some cases went as far as making them conditions of accession to independence for their colonies. Even the African States of “Westminster” tradition found themselves in the “magic” of written constitutions adopted from conferences prior to their independence.

These first generation constitutions were technically developed by western experts, who, very often had no knowledge of the realities of Africa, and were adopted and even implemented in the absence of any involvement of the citizens in the constitutional process. Hence, these constitutions that were generally modeled on those of former colonial authorities without really taking the national context into consideration were applied in a semi-identical manner in all the countries coming from the same

colonial regimes. Herein lies the similarity of constitutions in most of the African countries. It is therefore not surprising to see existing constitutions not understood, and not appropriated by the populations given their limited objectives, to the extent that in most cases, they have not been able to prevent coup d'Etats and other non democratic methods and procedures of devolution of power.

The second generation considered themselves a reaction to the inadequacies and gaps of the first constitutions by fetching their essence on State environments to translate concerns linked to the consolidation of the State and the strengthening of the nation. Unfortunately, the political context of the times (1965-1989/1990) was characterized by military eruptions in the devolution of power and the development of military and civilian dictatorships. The constitution, which was the work of African and western experts, had to merely serve to legitimize a power that suffered from a notorious lack of democratic legitimacy.

Under the double pressure from their new civil societies and international public opinion during the decade 1990-2000, African political systems came to discover a third generation of constitutions based on constitutionalism and multipartism . In this regard, Benin was a pioneer to this new wave of constitutionalism with the experience of sovereign national conferences that was going to oil-stain almost everywhere in Africa. That was the end of the era of imposed constitutions and the beginning of a culture of an inclusive participative culture in the process of constitution development. Can one speak in this regards, of the beginning of a culture participation in the development of constitutions?

The question deserves to be put in this way because the national appropriation of constitutions is an aspiration of the populations whose involvement leads to reinforce the legitimacy of constitutional norms - an expression of the will of a whole social body. In the light of that experience, we consider that involvement in constitutional work paves the way forward to a lasting solution based on a general consensus of all actors.

The resolution of the Congolese conflict with the establishment of a new democratic order in Democratic Republic of Congo underlined the importance of inclusiveness in the development of norms for exiting crisis and enables lessons to be drawn from participation that clearly appears to be a fundamental requirement of the new democratic governance.

## **I. THE INCLUSIVE PROCESS OF CONSTITUTIONAL DEVELOPMENT**

There were two main phases in the process on managing the Congolese crises:

- the first was the signing of the general and inclusive Agreement of December 17, 2002 which was a peace agreement on the basis of which a transition constitution was adopted.;
- the second phase covered the transition period having enabled the adoption of a constitution establishing a new democratic order in the DRC.

If in these two phases, there is reason to adopt an inclusive process, all that remains is the intensity and the quality of different involvements.

### **A. THE DEVELOPMENT OF A TRANSITIONAL CONSTITUTION**

The transition constitution that was adopted by the negotiators of the Democratic Republic of Congo (DRC) is an interesting example of a practical application of a legal category which will have proved

its effectiveness even if it had not yet included the categories officially dictated by classic constitutional doctrine.

This Constitution was considered with the view to address the resolution of the Congolese crises by determining a very effective method of handling issues, namely the recourse to rights as a value of refuge, in order to get the DRC out of its recurrent legitimacy crises, even if this right does not stem from the will of the people. The actors of the political negotiation process were very conscious of the trade-offs of this legal instrument called the constitution with the understanding that lawyers and politicians make of the constitution.

Also, this constitution is not a constitution of the people as they took no part in its formulation and adoption. It had been negotiated and signed by groups (the Government of the DRC, RDC, RCD, the MLC, political opposition, and civil society) and labeled (the RCD/N, the RCD/ML and the Mai Mai) who had not been officially mandated by the Congolese people, but by combating and non combating political forces. Their Preamble begin by *“We, delegates of the Groups and Entities (1) at the inter Congolese dialogue”*, and not by *“We, the delegates of the people”*. The Congolese people are therefore not the sovereign body who “has expressed no normative will whatsoever” to paraphrase Olivier CAYALA (2).

The parties at the negotiations were assisted a team of international experts and experts from the parties in conflict.

International involvement in the constitutional process found its basis on the fact that the transitional Constitution facilitated by the international community, preceded internal negotiations before the latter intervened to ensure mediation.

The team of international experts had developed the first version to serve as a basis for constitutional negotiations. The " martyr text" was then sent in the first week of the month of January 2003 under the good auspices of the Office for political affairs of the United Nations to the Groups and entities for consideration and amendments in order to permit the exercise consensual options that are not likely to alter, in letter and in spirit, the political agreement of Pretoria.

It is worth noting that the reaction of the actors was positive, portraying in our opinion, the infatuation of the Congolese actors for constitutionalism and their determination to rigorously formulates the organization and the functioning of the transitional regime.

Accompanied by his legal advisor, Niasse the Mediator undertook a tour in the first ten days of the month of February 2003 in the DRC to consult the groups and entities in order to make a sketch of the future terms of the Constitution of the transition. For the Special Envoy of the UN Secretary General responsible for reinitiating the inter-Congolese dialogue, this involved presenting, explaining and clarifying the plan of approach in order to bring out the quintessence of the draft transitional constitution and, consequently obtain opinions, suggestions, and amendments from parties.

Besides political meetings of the Mediator, the international constitutional expert had work meetings with experts from the groups and entities in order to better contextualize the concerns of political parties.

The parties to the inter Congolese negotiations subsequently met in Pretoria at end of the month of February, 2003 for the technical finalization of the Draft Constitution bearing the considerations of groups and entities.

In order to facilitate the raising of consensual options, and as a result a national appropriation of the constitutional process, it was agreed to leave the responsibility of writing the provisions of the constitution to national experts, with the international experts coming in only to help overcome difficult obstacles that could stumble the parties. And so did all the parties have the freedom to introduce, to improve, and in some cases, even to remove some provisions from the text upon examination, in a strict respect for global and inclusive clauses of the Accord.

The transition constitution of the DRC was adopted on the 6th of March, 2003 in Pretoria, and adopted at the same time as the other instruments of the transition on the 1st of April, 2003. It came into effect on the date of its promulgation by President KABILA (3), on the 4<sup>th</sup> of April, 2003.

Certainly, this transitional constitution is devoid of all democratic legitimacy, but in term of effectiveness, it has both “entry” or “departure” legitimacy and a “performance legitimacy”(4). Its merit lies in having made it possible to manage the transition in peace by bringing the groups and entities, which till then were at war, together in a context of agreement. The constitution had the value of a shelter in that it was the only legal instrument through which the political actors recognize each other including the Congolese people who were determined to come out of that long unending transition coming right up to 1991. Moreover, it enables a harmonious management of the transition in an atmosphere of peace that enabled the DRC to endow itself with a democratic constitution.

## B. FORMULATION OF A DEMOCRATIC CONSTITUTION

The formulation of a constitution capable of establishing a new democratic order in the DRC appeared to be an absolute priority of the transition regime. Besides transitional institutions, this burning issue of the Constitution also called for the involvement of social actors in the formulation process in order to boost national appropriation. The International Community was also in an interested party because wrong orientations can pull back the country into violence and prejudice all the energy deployed this far to reestablish peace in this country.

Likewise, the overall objective of the constitutional process was to stimulate interest and a buy-in of social actors in general and political actors in particular in the historic work of building a modern State of law in the DRC, from practical experiences, political realities and positive cultural traditions of the Congo, all this in the light of universal principles of human rights and democracy.

It is remarkable to note, that contrary to the prevalent practice in a number of African States, the constitutional process took place in the absence of executive power. The State President was excluded from the institutions vested with the power to take initiatives in constitutional matters and institutional actors responsible for driving the process. The general and inclusive Agreement and the transitional constitution allowed the intervention of three institutional actors in the formulation of the democratic constitution.

- the Senate, responsible for developing a draft Constitution ;
- the National Assembly which adopts the Constitution;
- the people who approve the Constitution through a referendum;

The basic work emanated from the Senate which had instituted a constitutional commission for the purpose of preparing a draft version. This phase was delicate to the extent that the actors in the transition considered that the time had come for them to take charge of their own destiny after a transitional constitution which had been imposed on them. The reports that the constitutional commission was deliberating with national and especially international experts were very difficult;



that explained the blockage of the process of April, 2004 to October 2004. The intervention of the EISA-RDC was decisive in improving relations between the technical team and the politicians. Seminars on constitution development organized by EISA first for national experts and then for international experts served to settle to situation and establish a climate of confidence that made it possible for the process to be moved forward very fast. A constitutional retreat between members of the constitutional commission and the national and international experts at Kisangani helped to produce the first structured version of a draft constitution serving as basis for constitutional dynamism.

The text was then brought to the knowledge of the social actors, the civil society in particular in order to get observations, remarks and contributions from all segments of the society. The contribution from the international community, especially the UNDP, the European Union, the UNDP, EISA, USAID, the CONRAD ADENAUER foundation, the Belgium Cooperation, the University of Liege was remarkable. Meetings and workshops with national and international experts on the draft constitution were organized with the assistance of international financial partners, and the potential risks to post-transition stability were identified in order to recognize the major challenges of Congo after the election, and to clarify the position of institutions and their roles in order to highlight the factors of stability and sustainability to be guaranteed through rigorous mechanisms of constitutional review.

On their part, the Senators launched an explanation campaign of the text in their various locations along with questionnaires aimed at integrating the concerns of all levels of society.

At the beginning of January 2005, the constitutional commission of the Senate was in possession of three instruments for the development of a draft version of the Constitution for submission to the Plenary of the Senate.:

- the Kisangani text, prepared by the editing committee assisted by national and international experts ;
- proposal of the draft Constitution from the College of experts of the Senate;
- the result of the national consultation undertaken by the Senate on the basic options for the future Constitution.

To better realign the transition chronologically, it was organized from the 2<sup>nd</sup> to the 5<sup>th</sup> of February, 2005, an inter-institutional seminar bringing the institutions of the transition together (Presidential space, the government, the Senate, the National Assembly, the CEI and international partners. Following these meetings, the actors on the transition agreed on a time table in view of the adoption of the draft Constitution by the Senate and the voting of the draft Constitution by the National Assembly.

The Plenary of the Senate commenced the review text of the constitution on the 24<sup>th</sup> of February, 2005 and adopted the draft Constitution on the 17<sup>th</sup> of March 2005 in accordance to the transitional constitution by 74 votes against 1 and 26 abstentions. The text was sent on March 23<sup>rd</sup>, 2005 to the National Assembly which commenced a process of adoption of the draft constitution right from March 29<sup>th</sup>, 2005 with close to 150 members of parliament registered for an in depth general debate.

As the process advanced, it was obvious that the resolution of the questions raised by the text in the course of the review became more and more the business of political organs of the international institutions involved in the management of the transition. Each group or entity had its own vision of the constitutional organization it was seeking to put in place. On its part, the international community, anxious about post transition conflict, solemnly invited the Congolese leaders to assume their historic responsibility by adopting a legal text capable of building the foundations of a real democratic Republic. That is how the UN, through Mr Jean-Marie GUEHENNO, Deputy Secretary General

responsible for peace missions clearly stated the anxiety of the International Community at that important moment of the transition by declaring on the waves of RFI: “Unbalanced Constitutions lead too often to renewed violence”(Le Potentiel of 30<sup>th</sup> April 2005).

A consensus among Congolese political actors made it possible for the Plenary of the National Assembly to adopt the draft Constitution by a vote of 348 against 5 and 8 abstentions on the 13<sup>th</sup> of May, 2005. by integrating alternative proposals of articles sent in by the international community for a true democratic Constitution in the DRC.

The referendum was effectively organized on the 18<sup>th</sup> and 19 of December 2005 in an atmosphere of calm and transparency. It approved the draft constitution on a strong majority of 14 780 075 counts of votes over 25 021 703 registered voters, that is 86.31%. The Constitution was promulgated on the 18<sup>th</sup> of February, 2006 by President KABILA in the presence of witnesses of the peace process, international partners and the symbolic panafricanist represented by the President.

## **II. LESSONS TO LEARN FROM PARTICIPATION**

Lessons can be drawn from the Congolese constitutional experience to strengthen the democratic nature of constitutional processes in Africa.

### **A. THE EXCLUSION OF THE EXECUTIVE FROM THE CONSTITUTIONAL PROCESS**

It is quite common for any observer to notice that constitutional reviews in African political regimes essentially rest on the power of the executive, particularly the President of the Republic. Parliament is not often affected by constitutional modifications to the extent that parliamentary powers are practically the same as opposed to the executive which is always seeking to spread its tentacles over the political society.

In the new regimes characterized majoritarian phenomenon where the head of State, particularly in some countries, is statutorily the president of the majority party, the constituent Assembly is domesticated if not purely and simply turned into instrument constitutional initiatives of the president without even thinking. The projects of constitutional review is therefore situated in the context of strengthening prerogatives because it is difficult for find a head of State so selfless that he would accept to be unseated voluntarily from his enormous privileges. Moreover, following the example of the United States and Benin, the ideal is to remove from the Head of State, his power of initiative in matters regarding the constitution and that constitutional revisions be the sole prerogative of the assemblies and of the people.

### **B. FORMULATION OF CONSTITUTIONS BY PARLIAMENTARY ASSEMBLIES**

The formulation is a technical phase of writing the Constitution but for which the political implication are fundamental to the extent that the written constitution determines and conditions the whole institutional game of the State. It is for this reasons that in the democratic tradition of formulation , this work is generally entrusted to an assembly or a convention capable of being elected exclusively or instituted to this effect for the purpose of writing the constitution. In this regard, South Africa offers an example of an elected constituent assembly mandated to prepare the democratic constitution that

effectively takes the country out of apartheid. The people can only intervene downstream to make pronouncements on the text prepared by the assembly that had not been elected previously.

The advantage formulating constitutions by assemblies essentially resides at the level of consensus that undergirds the decisions adopted. Negotiation and compromise reinforce the quality of the decision which is a product of a collective and not the expression of an isolated leader. The decisions are discussed, amended and enriched by all the members of the collegial organ. The transitional constitution and the final constitution have been the work of a collegial organ that was a framework for the expression of divergent wills, but also the synthesis of aspirations that can be considered as common to the society. This compromise often borders on a shaky balance that can affect the esthetics of the text but brings lasting solutions as soon as they emerge as a product of national consensus.

### **C. ADOPTION OF REVISIONS OF THE CONSTITUTION BY A MIXED ASSEMBLY**

To a large extent, the source of the decline in parliamentary assemblies is the majoritarian phenomenon which in itself, is not always anti-democratic once it is the product of a transparent, loyal and regular elections. If, following an election, the people send in a strong majority, it is doubtlessly because they intend to confer a parliamentary blank sheet to the majority in parliament who can then act on the institutional machinery. Nevertheless, this phenomenon becomes a real misappropriation of the game of democracy is the result of a falsification of the electoral game. Pluralism in the absence of a majority for the executive contributes doubtlessly to the strengthening of the parliamentary institution and makes of the general will, a real synthesis of individual aspirations. As a result, it is advisable to act on the electoral machinery to enable elections to permit a choice that is free, effective and conscious of voters who see parliament as a true place where the national conscience is objectively deployed. The fight against manipulation of constitutions, a major concern of the AU in its Charter on democracy, elections and governance, is at this cost.

### **D. POPULAR APPROPRIATION OF THE CONSTITUTION**

The constitution is the prescriptive translation of concerns, expectations and requests of the society. It must be inclined towards the people and not towards the power which it is supposed to limit. It is the people that give life to a constitution, feeding and reinforcing and protecting it. In the final analysis, it is the person that legitimizes a constitution. Therefore, the people's role should not be imaginary or made up. The citizens must also know and understand the constitution in order to identify with it and protect it from all kinds of threats. The general public should therefore be involved in all constitutional works done by way of inquiries, survey forms, information sessions and awareness campaigns in order to inclusively appeal to the people in matters of fundamental constitutional transformations. Resorting to referendum should be systematic for any substantial constitutional modification.

### **E. INTERNALIZATION OF UNIVERSAL CONSTITUTIONAL STANDARDS**

The constitution of DRC was experienced several international influences yet without becoming an internationalized constitution. External influences are not a bad in themselves if they contribute indeed to solve conflicts and establish a democratic system. The systematic rejection of external influences and the turning in on oneself make it difficult to adapt to the demands of globalization or regional

integration which increasingly calls for a standardization of legal systems. Internalization implies adaptation of the standards to the specific environments of the States in question.

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### **Participation and diversity in the constitutional process: women and other vulnerable groups**

By: **Mrs. Marcelline GBEHA AFOUDA**, *Vice President, Constitutional Court of BENIN*

Ladies and Gentlemen,

First of all, I would like to thank the organizers of this important event for their kind invitation to take part in this African conference on the constitutional process.

I must say that it is quite flattering for me that IDEA, i.e. International Institute for Democracy and Electoral Assistance, should associate to the debate on the theme “Participation and diversity in the constitutional process: women and other vulnerable groups”, a debate which, I hope, will be undoubtedly rich and fruitful for all of us taking into consideration the assembly herein present. Your contributions and observations will thus be highly appreciated!

Ladies and Gentlemen,

1- The doctrine identifies two principal phases in the constitutional process: the formulation process of the constitutional bill and that of its adoption.

During the first phase and in general, it is the responsibility of a constitutional commission to elaborate a pilot study of the bill, which is subjected to the critical opinion of all social strata. On the basis of amendment and observations collected, the constitutional commission presents the text of the draft constitution.

The bill is thus worked out and followed by the second phase. It is again submitted to the various protagonists for the purpose of knowing if the provisions of the text answer their major aspirations and can be considered as a fundamental law. This phase is also that of the campaign during which political parties, associations and all other structures come into play for the adoption or the rejection of the draft constitution by means of a referendum.

2- The question we should answer is that of the participation of women and the least represented groups in these two phases.

3- It would not be possible for me to make an exhaustive study here of the situations in all the countries, because time would not allow it. In addition, I would like to restrict my speech to the case of Benin which is also not so different from that of other African countries.

4- Today, it is rare find countries with constitutions that do not grant equal rights to all Human beings. In Benin, there is no more discriminations based on sex, race and religion at the constitutional level. And yet, questions about the place of the women in our societies are always raised. Our presence here testifies to this in more than one way, since we want to address the participation of the women in the constitutional processes.

5- Regardless of their diversity, the philosophy or the ideology that sustained them, the successive fundamental laws in Benin have all guaranteed individual and collective freedom to citizens. A provision which can be found in all constitutions is: *“The Republic ensures equality to all before the law regardless of origin, race, sex or religion. It respects all beliefs”*. (Constitutions of 26 November 1960, 11 January 1964, 11 April 1968, Charters of 1 September 1966 and 26 December 1969).

6- Even the fundamental law of the revolutionary inspiration of the People’s Republic of Benin, adopted on 26 August 1977 by the National Council of the Revolution manifested an unquestionable evolution in the recognition of women's rights. Indeed, it stipulates in its article 124: *“Women, in the People’s Republic of Benin, are, by law, equal to men politically, economically, culturally, and socially and in the family...”*

7- The Constitution of 11 December 1990 of the democratic era also did not depart from the rule. The Constitution specifies that *“The State ensures equality to all before the law regardless of origin, race, sex, religion, political opinion or social position. Men and women are equal by law. The State protects the family and particularly the mother and the child. It takes care of the handicapped and the elderly...”* Many of its provisions recognize and protect the economic, social, cultural, civil and political rights of the citizens just as the rights of third-generation.

8- The guarantee of the rights and protection of groups conventionally regarded as vulnerable or marginalized i.e. children, the handicapped and etc. results from these constitutional provisions in the sense that they do not make any distinction between individuals. All are fully-fledged citizens, enjoying the same rights and are compelled to abide by the same obligations.

9- If it is admitted, as mentioned above, that the constitutional process refers to all activities relating to development proceedings and passing of a constitutional bill, it is necessary to question whether these various constitutions had an effective participation of women. Are the rights which they recognize and to which they pledge really the result of the struggle of women organizations or minority groups in Benin, in search of a more equal society? Or on the contrary is the recognition of these rights quite simply resulting from an imitation by men, who are the main or only writers of these laws? About the French-speaking African countries, did not Albert BOURGI state that “given that the ties with France is very strong, the political and legal culture of the new African Leaderships will be French more than anything else,... all this contribute to explain why the first African constitutions were generally, except for alternatives, a simple transfer of the text of 1958.” in France. Did the Dahoméen and Beninese people clearly speak on behalf of women?

### **I - The constitutional process of the Fundamental Law of 1977 and the participation of vulnerable groups.**

10- In Benin Before 1990, even if women organizations existed, it is not clear that they were as active in the constitutional process as one could expect.

Following the proclamation of the People’s Republic and the establishment of the People’s Revolutionary Party of Benin (PRPB) in 30 November 1975, increasingly many voices arose in support of the adoption of a constitution that is in conformity with the realities of the moment. This request was particularly imperative during the national seminar on the revolutionarization of justice that was held in Cotonou from 23 January to 12 February 1976. When Advocate Robert Dossou, in his presentation on “Marxism, Rights and Justice” before the Plenary meeting of the Seminar, on 28 January 1976, stressed that the various constitutions of socialist States reflect the sequential steps of development, the Dean Nathanaël MENSAH, Chairman of the seminar, pointed out that “in the name

of socialist legality the Seminar envisaged that a People's Revolutionary Constitution be formulated, to be the source of all the bills to be passed and providing a model for addressing Beninese Revolutionist Rights, to establish state-sponsored institutions and determining their functions and their structures protecting rural and urban workers, promoting access for to the broad working masses to decisions of governing bodies, making provision to ensure the Party monitors the organization of all citizens, decisions and systems of execution.”. The draft of a fundamental bill was thus formulated. It was officially announced in May 1977 and finally adopted by the National Council of the Revolution in 26 August 1977.

11- Did women really take part in the drafting of this law? What was their assessment during the discussion of this law at the National Council of the Revolution? The objective remarks on their participation in this process do not seem easy to make.

12- The fact remains that in accordance with the Leninist Marxist ideology which marked the revolutionary period, (from 1972 to 1989), the democratic centralism commanded the popularization of the draft texts within the various social strata, namely, craftsmen, fishermen, farmers, intellectuals, women organizations, etc. The drafts of the texts were subjected to a popular debate organized through seminars and other large gatherings to collect observations and suggestions from all socio-professional groups.

The Organization of the Revolutionary Women of Benin (OFRB), the Organization of the Revolutionist Youth of Benign (OJRB), which were the only federations of women and young people of the revolutionary era, were in fact an emanation of the fundamental law of 1977 and, certainly, did not play a significant part in the development process of the aforesaid the law.

13- On the other hand, what about their involvement in the development of the Constitution of 1990?

## **II - The constitutional process of the Constitution of 1990 and the participation of the vulnerable groups.**

14- At the end of the 1980s, the administrative and economic fabric of Benin collapsed with a growing poverty of the population. The social situation was deteriorating considerably. The International Monetary Fund imposed drastic measures on the country through a structural adjustment program. Students and civil servants called for indefinite general strike to claim for payment of wages and scholarships which were frozen and ended up sinking the State into decay. In spite of the Government policy of appeasement, the protests toughened up. Then the demands of the people quickly gave way to political criticism of the regime. The movement was reinforced with the involvement of the Catholic Church which published a pastoral letter denouncing the drifting of the authorities. The country was paralyzed. At that point of time, the leaders resolved to call a national conference to consider another mode of society and to establish new institutions. This great gathering, henceforth named as “Conference des Forces Vives de la Nation”, gathered together more than 500 delegates representing organs of the State, political parties, trade unions, churches, associations, the army, in short, all strata of the society.

15- Thus, Benin initiated the national conference which will be tried out by twelve countries or so in Africa, paving the way for a return of constitutionalism on the continent.

16- One of the important resolutions of the conference is to create a legitimate State and a pluralist democracy. It was necessary to start a new constitutional process and to endow the country with another Constitution which will reflect all the new aspirations.

17- The turpitude memories of years of authoritarian power led the forces of change to pay a more close attention to the development of new constitutional rules. The objective was to create a new institutional body vouching for the stability of the powers and the establishment of a legitimate state.

18- The development process of this new law was not exempt from the traditional process.

19- Indeed, following the general debate during the National Conference on the main trends (choice of the constitutional regime and the preferred electoral system), the compilation of the draft was entrusted to a constitutional commission.

20- The proposed text was submitted to an examination to the High Council of the Republic which launched an education campaign for the people at all structural levels of the State, socio-professional groups and categories including the army.

21- The pressing need for breaking away from the past was a powerful engine of mobilization and involvement of the various groups in the awareness campaign, who were concerned that all would give a plenary significance to the regained freedom under the new era of democratic revival.

22- Drawing lessons from the mistakes of the past, the citizens reasserted their “fundamental opposition to any political regime based on the arbitrary, dictatorship, injustice, corruption, misappropriation, regionalism, nepotism, seizure of power and personal capacity” and; affirmed their determination to create a legitimate State of pluralist democracy in which basic Human rights, public freedom, human dignity and justice are secured, protected and promoted as the necessary condition for a true and harmonious development of each Beninese.

23- The draft was re-examined and corrected taking into consideration proposals and suggestions and again submitted to the High Council of the Republic. The final text adopted by that institution was subjected to the referendum of the Beninese People on 2 December 1990. The Law n° 90-032 bearing to the Constitution of the Republic of Benin was promulgated on December 11, 1990.

24- During the whole process, women and the other groups were certainly represented at the National Conference, but it had been admitted that they were quite not present in the continuation of the work. No woman was a member of the constitutional Commission entrusted to draw up the text of the pilot study, only one of the twenty seven members counted sat in the High Council of the Republic.

25- Effectively, the constitutional process itself, with regard to the proportion that they represent, formally made record of only insignificant minority women participation among the authorities who were in charge of the work. However they did not lack competences. Remarkable actions were taken, but very few women were noticed. It rather remained a men business as indicated earlier.

26- Women constitute approximately 52% of the Beninese population, according to a survey published by the National Institute of Statistics and Economic Analysis (INSAE) within the framework of the Institutional and Management Capacity Building Program (PRCIG); and actually they have just started be involved in the campaign phase of the constitutional amendment bill, however, under the leadership of the political parties directed by the men who inviting people to vote for or against the aforementioned project.

27- One would have thought that with the rights thus acknowledged in the new Constitution, there would be a better involvement of women and marginalized groups in the *res publica*. These beautiful proclamations on basic, civilian and political rights are still facing less noble realities. The news portrayed many examples of practices contravening their good and effective implementation.

28- Their representation status hardly grew. At the decision making level and since the democratic revival, women have always been under represented. Thus, for illustrative purposes, currently, 9 out of a total of 83 women elected deputies sit in the National Assembly, 2 out of the 9 are Advisors to the High Council of the National Broadcasting and Communication Board, and 2 out of the 7 Advisors in the Constitutional Court, 6 Ministers in the consecutive governments since 2005, lately the number of women went down to 4 despite the increase in the number of portfolios to 30.

29- Within the political parties, women are poorly represented in the steering committees. Very few are at the top position on the lists of candidates for elections.

30- I am pleased, after this report which is far from being honourable, to say some few words on the battle of women and other groups in the daily implementation of the Constitution of 1990, henceforth considered as the last bastion against the past failures and which must be able to ensure the respect of fundamental freedoms and the good performance of established pluralism.

### **III - The fight for effective implementation of the rights guaranteed by the Constitution.**

31- Conscious of the value of the weapon they have for the establishment of a legitimate State of law in the country, and of their fate, women are involving themselves more in the decision-making process to achieve a better social justice.

32- They understood that engagement in associations is essential at the constitutional level to defend the fundamental rights of citizens and to limit the attempts at restriction of their rights. The role of associations in these debates is fundamental at all levels, and this is why they exist today on all fronts by means of their relations with organizations such as NGOs, political parties and trade unions working along with men to defend their view of rights. In some respects, they remain representatives and/or partners that cannot be ignored.

33- Acting and influencing changes in favour of women are the creed of the beneficial effect of these associations, of NGO networks run by women today who are responsible for activities that are very much appreciated on the ground, in all the fields, for the promotion of women rights for sustainable development and social peace. They show their support to the Leaders or disapproved of them whenever actions are taken in disregard of gender issues.

34- Can one say that they are winning in this struggle?

The answer is mitigated, because if it is true that some of their actions were successful, yet others did not get to any result owing to economic, cultural and sociologic inertia.

35- To the credit of their struggle, one can recall very relevant actions today. Every Beninese still has in mind the multiple women demonstrations for:

- the outcome of passing the bill n° 2002-07 of 7 June 2004 with regard to individuals and family (it was a difficult process, as the majority of men, and certain members of parliament of the National Assembly were reluctant to have it adopted),
- the campaign “Do not touch my Constitution” initiated by a woman, led to the general mobilization in order to prevent the leaders from initiating proceedings modifying the circumstantial situation of the Constitution of 11 December 1990 in 2004.

Beninese also remember:



- a first, then a second female candidacy for presidential elections of March 2001 and 2006,
- actions of chairwomen of institutions, women opinion leaders. The list is unending.

36- However, beyond these "successes" remains nevertheless and, alas, always, an undeniable reality, that of the worrying marginalization of women in the Beninese society in general and in the political life in particular.

37- Antiphony remains the same with regard to the causes and there is almost nothing yet to cut off from the long litany. The analysts are unanimous to affirm it: some socio-cultural inertia still maintain women in a situation of marginalization; its under representation is the consequence of the inherited education whose cardinal virtues are: obedience, tenderness, respect, modesty, reserve. Illiteracy, the low level of girls' education, poverty, family responsibilities, male chauvinist perception, the pejorative perception of the expression "to be in politics", the absence of democratic culture, and even the nature of the relations among women themselves, etc worsened the situation even more.

38- But whatever the explanatory factors and the obstacles, it is from now on acknowledged and recognized that the development of our countries cannot be achieved without the effective presence of women in the of decision making arena, be they political or economic.

39- The Beninese Government understood it so well that since then, its commitment was followed by actions aiming to improve the socio-economic and political factors. The decision to have free education for girls, in nursery and the primary education, the promotion of national languages and recently the decision to create a national women institute intended "to capitalize" the efforts of women who represent more than 52% of the country's population are inter alia other measures to praise. (That institute will be a framework of meetings and experience sharing among women. The essential missions of it will be to contribute to the promotion of human rights, especially those of women, and to fully enjoy the fruits of the development of Benin). The adoption of the relative laws to sexual health and reproduction, with regard to repression of female genital mutilation practices, repression of sexual harassment, the protection of victims, and many other actions still remain the concern of political leaders for a better future of women and vulnerable groups.

40- Women must be aware of the fact that being labelled as enslaved is unacceptable. Men must stop upholding this contradiction between democratic principles, basic freedoms which they preach and claim with the fate that they have in store for women, especially within their political parties. Serious structural reforms must be undertaken by the Leaders of these parties for a significant representation of women.

These claims should not be regarded as favours, but rather as a requisite for the recognition of women competences.

41- The international community must continue to support women struggle and no longer compromise on the question of their representation in international institutions: gender approach.

42- The world will never come to stability if women continue to be ignored. Does not one say that women are for men what the right foot is for the left foot?

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## EXPERIENCES FROM ASIA-PACIFIC

## CONSTITUTION MAKING IN ASIA-PACIFIC: A COMPARATIVE NOTE

*By Surya Dhungel*

New constitutions are prepared when a country decides to move towards a 'fresh start', either due to regime changes or because an independent new nation has been born. New constitutions are also drafted as a part of the democratic reform process. Reportedly, more than 200 new constitutions have been produced in the world by countries at risk of internal violence (or post-conflict transition) between 1975 and 2005. Traditionally, constitution making in the Asia-Pacific, or elsewhere in the world, was an elite-driven process that mainly focused on drafting a supreme legal framework for governance and state institutions, allocating powers to each organ and outlining their interrelationships and determining citizens' rights. There was hardly any reflection of social dynamics and the people had little direct engagement in the preparation of constitutional texts.

Modern constitution-making generally passes through three different stages: preparatory, draft formulation and consultation, and adoption and promulgation. In post conflict countries, however, it is a complex blend of peace building and constitution formulation processes that entail constant negotiations and deliberations on issues amongst competing political forces and diverse social groups, all representing conflicting interests. Hence, constitution-making is an innovative 'social engineering' process involving both technical and non-technical hands, inclusive of traditionally marginalized groups, in order to resolve national political problems and emerging social issues and to respond to the demands and aspirations of the common people. The end product of such negotiations and agreement should be a legitimate legal document acceptable to all. The emergence of modern constitution-building has therefore led to participatory and inclusive constitutionalism that ensures the ownership of a country's citizens both in substance and process.

Most of the constitutions in Asia, including that of Japan, India and Singapore, which were drafted in collaborations with experts or expert committees and commissions, have survived for decades, despite immense challenges- due simply to the serious political will of committed national leaders and the creation of strong democratic institutions to oversee implementation. Constitutions survive when national wisdom prevails to bridge the gaps in democracy, development and nationalism and introduce timely reforms. Successful legislative and judicial tools were developed in the USA and India for reforming constitutions through amendments and legal interpretations. Whereas, many constitutions formulated in the same fashion during the same period in many countries, including Pakistan, Sri Lanka, Nepal, Myanmar and Thailand, did not last, due to prevalence of authoritarianism and lack of functional democratic institutions. In young democracies, an absence of people's ownership and allegiance to constitutional texts are said to be the main reason why citizens never came forward to defend the constitution whenever its integrity was seriously threatened. It is not a surprise then, to see Thailand draft nineteen successive constitutions one after another within a period of just seventy years. Nepal, too, is attempting its seventh constitution in just six decades.

In recent years, since the early eighties, the experiences of modern constitution making, especially in countries like South Africa, Rwanda, Kenya, Balkans, etc. have set new examples of participatory constitutionalism. These countries have successfully demonstrated the engagement of the common people in the drafting process through innovative interactions that promote national ownership of the constitution itself, and the constitution-building process.

To streamline the modern constitutional roadmap, 'fundamental constitutional principles' are drawn in advance through consensus of leaders, parliamentarians and legal experts. Some scholars have blamed the constitution-drafters in Iraq for failure to promote the participation of the people in the process and 'losing out on an opportunity.' The extraordinary example of the Constituent Assembly of South Africa entertaining nearly two million public submissions during the constitution-drafting process has been repeatedly referred to in Nepal. Nepal, like South Africa, has constituted an inclusive Assembly of 601 representatives to draft a new constitution as part of the peace process to end a 13 year-long armed

conflict staged by Maoist rebels who have entered into mainstream politics. Failure to logically conclude the constitution building effort for restoring peace and democracy in Nepal could mean: revival of conflict again.

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Dr. Dhungel is a Constitutional Lawyer, & Senior Partner of Nepal Consulting Layers, Inc, Nepal. *Reflections of views expressed by prominent scholars, such as KC Wheare, Nick Haysom, Vivian Hart, Yash Ghai, Jennifer Widner, Jonathan Morrow, Kristi Sammuels, Rajeev Dhawan, Peter Russell, Surya Dhungel, Bipin Adhikari, Purnaman Shakya and Bhimarjun Acharya in their writings on the constitution-making may be found in the note ([suryadhungel@gmail.com](mailto:suryadhungel@gmail.com)).*

## **CHAPITRE III: THE CHALLENGES OF IMPLEMENTATION**

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### **EXPERIENCES FROM AFRICA**

**By Winluck WAHIU**

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### **EXPERIENCES FROM LATIN AMERICA: THE CONSTITUENT PROCESS IN ECUADOR**

**By Maria Paulo ROMO**

Within the framework of the South – South cooperation, at a moment in which many African countries are undergoing constituent processes or facing the challenges of political reform, the recent experience of Ecuador in this regard could prove to be useful.

Ecuador, with 12 million inhabitants, is located in Latin America, within the Andean region. Our Republic is not a young one (when compared to those of the African continent); we gained our independence from Spain 200 years ago and our first constitution goes way back to 1812, when on February 15 the “Quiteña Constitution” was put forward. In this regard, the independent process, that had begun years before in our country through the Patriotic Groups and the Liberation Army, gave way to the first Proclamation of Independence on 10 August 1809 and to the Battle of Pichincha on 24 May 1822.<sup>1</sup> The Constituent power was not institutionalized until 1830, during the sessions of the National Constituent Assembly.

From here onwards the development of Constitutionalism in Ecuador began, during which an important amount of constitutions (and constitutional reforms) came about, governing our republican life:

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<sup>1</sup> N. SALTOS, *Ecuador: Poder Constituyente y Asamblea Nacional Constituyente*, Available at: <http://www.voltairenet.org/article144486.html>, as of 7 Noviembre 2008.

- <u>1812 Quiteña</u>	- <u>1897 Ecuatorian</u>
- <u>1820 Cuencana</u>	- <u>1906 Ecuatorian</u>
- <u>1821 Great Colombian</u>	- <u>1929 Ecuatorian</u>
- <u>1830 Ecuatorian</u>	- <u>1945 Ecuatorian</u>
- <u>1843 Ecuatorian</u>	- <u>1946 Ecuatorian</u>
- <u>1845 Ecuatorian</u>	- <u>1967 Ecuatorian</u>
- <u>1851 Ecuatorian</u>	- <u>1978 Ec. coded in 1984</u>
- <u>1852 Ecuatorian</u>	- <u>1978 Ec. coded in 1993</u>
- <u>1861 Ecuatorian</u>	- <u>1978 Ec. coded in en 1997</u>
- <u>1869 Ecuatorian</u>	- <u>1979 Ec. coded in 1984</u>
- <u>1878 Ecuatorian</u>	- <u>1979 Ec. coded in 1996</u>
- <u>1884 Ecuatorian</u>	- <u>1998 Ecuatorian</u>

Though this prolific amount of diverse constitutions may be surprising for some, there are several explanations, the most important of which is that in our legal and political tradition, the constitutions have been especially looked upon as a social pact (more as a social pact/contract than a legal body) and therefore, the drafting of a new constitution has always been the result of a new relationship among the social and political forces.

The present day Constitution in force in Ecuador, was drafted from the end of 2007 up to the first half of 2008. For the first time in this long history of constitutional changes, a draft prepared by the Constituent Assembly was adopted by a general referendum.

This latest process is especially important because, it is, *de jure* and *de facto*, the most inclusive of our history. Never before had there been such a large participation of young adults and women; of the indigenous and Afro –Ecuadorian sections of our population and never before had a constitution presented wider rights and protection than this one. To this one might also add the intense participation of the citizens of our country during the drafting and ratification of our Constitution.

During its political history, Ecuador has been characterized as a pioneer in many of the issues that involve human rights. It was the first Latin American country to recognize women's right to vote (1929); the first to propose the widening of the concept of citizenship of children (1998) and one of the first to include in its constitution the rights of the original indigenous peoples as stated in Convention 169 of the ILO.

Delving into some details of this latest constitutional process of Ecuador, it can be seen that:

After a long period of political instability (for the last 10 years no president has reached the end of his term), President Rafael Correa responds to the aspirations of different progressive sectors of the country and proposes the convening of a Constituent Assembly. The traditional political elite, majority in the National Congress, refused to support this proposal and therefore, a convening for public consultations took place where 82% of the voters proved to be in favour of the creation of a Constituent Assembly<sup>2</sup>.

It must be underlined that to be eligible as representative for the Constituent Assembly, priority was given to guaranteeing electoral rules that would allow participation on an equal footing, without any privileges to the economic powers of Ecuador. To achieve this objective equal public financing was guaranteed to all participants and private expenditure for campaigning through the mass media was forbidden. The lists were to include 50% of women and their location was to be sequential and alternate.

The Assembly met for eight months, during all this time transparency, citizen participation and listening to the people was a priority. Thousands of proposals were received and around 100 000 Ecuadorians visited the headquarters of the National Assembly. Public television networks broadcasted the different debates live. The result: a constitution of 444 articles (very long according to some) in which different sectors feel acknowledged and included.

Among the characteristics of the new Constitution are:

- Ecuador is defined as a "lay State" thus guaranteeing the separation between Church and State and reinforcing the idea of public governance following lay ethic norms and not any given religious beliefs.
- An extensive charter on the rights of the people is included, covering not only those put forward in international charters on human rights but also including the right to resistance, water as a human right and special rights regarding nature.
- Human rights especially sensitive regarding women are acknowledged: the right to a life free from violence, sanctions for domestic violence and violence regarding gender; the right to expeditious

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<sup>2</sup> On 15 April 2007 the public consultation was held.

- justice and free legal advice in the cases of family rights, domestic violence and sexual violence; sexual and reproductive rights; the recognition of labor rights related to maternity and breastfeeding and the recognition of domestic work as productive work.
- Universal social security, guaranteeing the contributions of the state to social security for housewives or persons that carry out non paid domestic work.
  - The concept of the State of Rule of Law changes in favor of a Constitutional State of rights and justice, questioning the principle of legality, to privilege the supremacy of rights and of the constitution.
  - Ecuador is declared a territory of peace; the installation of foreign military bases is forbidden as well as the presence of foreign military forces within the national borders.
  - The cultural and ethnic diversity is acknowledged declaring Ecuador to be a “multinational” state with the further inclusion of a special chapter on community rights (indigenous peoples and Afro-descendants).
  - Greater order and equity is established regarding the territorial organization and the decentralization of the political power.
  - Participative democracy mechanisms are established besides the traditional mechanisms of the representative democracy.
  - The Constitutional text promotes social development through the concept of living well or *sumak kawsay* (concept of indigenous cosmovision).
  - A Constitutional Court is created as well as recourses to demand constitutional rights.
  - And, in particular, the Constitution states very differently the participation of the State in the economy, this being the largest problem of our democracy: poverty and inequality.

In Ecuador, as in all countries of Latin America, we have had democratic regimes for the last 30 years approximately. We have multi-partisan parties, elections are free and periodical y in almost all our countries presidential re-elections are forbidden. But all these requisites that today are the center of debates in the African continent were not sufficient. As stated in the 2004 report of the UNDP on democracy, the most important question regarding our systems is: “How much poverty can democracy take?” In these last years we have seen in Latin America that an ever increasing number of persons are ready to renounce to a regime of freedom in exchange for better economic and working conditions. So this is our first and foremost challenge: to prove that economic development and the guaranteeing of rights and liberties are directly connected and one can not make do without the other.

Finally, in reference to the challenges of its implementation being debated at present, I would like to point out some, according to our experience:

1. That all citizens know and feel the Constitution as their own, that it belongs and represents them and that they know their rights to be able to demand them
2. That knowing the Constitution, it shall not generate unreal expectations given the real possibilities of our States and regarding the time it takes to establish the institutional fabric. Most changes are not automatic; the population has to be aware of this.
3. Another challenge is who is to implement the Constitution. The training of political and administrative cadres cannot be underestimated; their participation is vital for the implementation of the changes proposed in the constitutional texts.
4. The constitution cannot solve all complex issues. It is not going to happen. The constitution offers a framework of principles and rights to allow us to continue the debates regarding the controversial and complex issues that exist in our countries.

To end, the search is not just to for a Constitution. In many cases – also in our countries – the constitutions serviced dictatorships and de facto governments. The search is for democracy, sustained in a Constitution that is to be ours, belonging to a country and its inhabitants, that reflects its present and the history of its struggles and above all, that it involves all, being a Project of all.

#### **CHAPITRE IV: STRATEGIES AND STRUCTURES FOR REINFORCING, IMPLEMENTING AND PROTECTING AFRICAN CONSTITUTION**

##### **AFRICAN EXPERIENCES: THE CASE OF THE DEMOCRATIC REPUBLIC OF CONGO**

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The constitution formulation process in DRC went through several steps resulting in the promulgation and adoption of a constitution since February 2006 currently in force. With regard the participation of the population in the process it is noted that:

1. A consultations of the population by Senators that had been designated after the inter-Congolese dialog. This consultation was centered essentially was on vital and sensitive issues such as type State; system of government ...
2. Then the drafting followed and was compiled by a very limited group composed of constitutional commission members whose discussions resulted in the very first draft of the constitution;
3. The draft prepared in this manner was distributed stakeholders of Civil Society, Political parties; and all others in order to bring in contributions and possible corrections. To this level, advocacy and of lobbying actions were essential. These actions positively influenced improvement of the process.

4. The enriched and improved draft was adopted by the Senate and transmitted afterward to the National Assembly. Also at this level, political parties and especially civil society intervened to influence outcomes and to maintain their gains
5. Several months after the debate in the National Assembly, the adopted draft was transmitted to the same actors that had the advantage of being in close link with the populations that adopted it by referendum.

## **DISCUSSIONS AND CONCLUSIONS**

Given that the Constitution is at the same time a *Fundamental Text and a social contract* is imperatively important to set up strategies so that its implementation does not depart significantly from its application. Besides prescribed strategies, the Constitution itself makes it imperative for population participation to be key to this process. The experience of EISA in DRC prescribed initial actions such as:

6. Setting up of a permanent framework of exchanges for political parties to encourage dialog on issues the running of the State, including issues related to the constitution related. This framework is implemented in the capital and in provinces and meets at the beginning of each month.
  7. Setting up of a permanent Framework of dialog between the newly elected officials, the population (represented by Civil Society Organisation). This framework called "DAY OF SOCIAL DIALOG" gives an opportunity to the participants to discuss constitutional issues raised by the people and of which difficulties of understanding are sometimes resolved.
  8. This strategy is therefore permanent in order to consolidate peace efforts as well as the consolidation of democracy.
  9. Actions that bring the elected officials (MPs and Senators) and the stakeholder leaders of the Civil Society face to face
  10. In order to ensure the success of these actions, meetings are regularly organised both in the capital and in the provinces. This is a way to contribute to peace reinforcement, governance and increase the participative democracy

COTONOU 26<sup>th</sup> November, 2008

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### **Strategies and structures for the protection of the Constitution protection: Responsible institutions**

By SANGO ABOUBAKAR. Responsible for research at the Centre for democratic Governance

Burkina Faso

### **Introduction**



Modern political power is essentially characterised by its institutionalisation. It is this characteristic that distinguishes it from traditional power. Institutionalised power means that it is no longer the prerogative of an individual. Institutionalised power means henceforth that it is the institution that holds political power and it is in the name of this institution that power is exercised. Describing the phenomenon of the institutionalisation Philippe Ardant writes: "If there is a constant in the history of politics, it is of course its continued institutionalisation. From absolute leader of the first human groups, through power substantiated on his courage, his skilfulness or his wisdom, all the way to the present parliaments legitimised by election and subject to restrictive and complicated rules<sup>3</sup>". In addition, At this point, institutionalisation means setting up of structures and of mechanisms, organizing and framing the governance and struggles caused by its conquest, its control, its defences. The rules of the game were little by little substituted by simple power relationships. Imitated, repeated behaviours, to which we conformed almost by instinct, became traditions, customs for which compliance becomes mandatory, and one day, for more of safety and certainty, these rules were recorded in texts format of which modern constitutions are the last stage<sup>4</sup>". Thus, the institutionalisation of political power appears to be a legal operation having for effect to detach the power from the very same person that holds it, in order to have an appropriate, autonomous and sustainable statute distinct from the king's wealth and outrunning the life time of the person who holds it, to become a function and not a prerogative of the prince. To further signal this depersonalisation, the power statute will be defined in a document called constitution.

The constitution can be defined in two different approaches: material and formal approaches. As per the material approach, the constitution is a set of rules aimed for State power organisation and functioning. In the formal perspective, the constitution can be defined as the fundamental Law, meaning a set of norms of which its legal value is superior to those of other legal norms and of which authority is guaranteed by the existence of a constitutionality monitoring operated by a constitutional jurisdiction. The constitution serves therefore to limit political power. As means of limitation, it organises the exercise of political power by the determination of jurisdictions of different powers within the State and relations that these different authorities have amongst them and by the recognition of fundamental rights.

After their independence, all African States adopted constitutions. In this way, they assert their commitment to the values of constitutionalism. But very quickly the constitutionalism declined due to the predominance of a single party system and exclusive regimes. From 1990, we are witnessing a revival of constitutionalism on the African continent

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<sup>3</sup> Ardant, P.H. (2004). "Institutions politiques et droit constitutionnel", Paris, LGDJ

<sup>4</sup> Idem

In fact, since early 90s, most of the African countries revived constitutionalism in favour of democratic processes and the adoption of new and very substantial Constitutions in terms of rights and liberties. The adoption of these progressive texts had raised hope of a democratisation of African societies in which the rule of law and fundamental rights guaranteed by the Constitution would be respected.

But after several years of experience, the outcome remains trivial in terms of progress accomplished. In general, and in terms of expectations, the African constitutionalism is facing several challenges, including weak legitimacy of constituent processes and in Constitutions; the resurgence of the "negro – African" presidentialism that causes the failure of powers separation and balance of powers principle, hence paving the way to many abuses; the lack of independence, accessibility, the vulnerability of judges and the weak contribution of constitutional jurisdictions to constitutionalism progress; weakness of opposition parties and institutional anti establishments. Reasons explaining this situation are various: limited impact of Constitutions on citizens' real life, often negative perceptions of African populations towards Constitutions due to the fact that they do not sufficiently reflect needs, concerns and cultural values of citizens, manipulation of constitutional and electoral rules, etc. In many States, we witnessed a presidentialisation that causes the failure of powers separation and balance of powers principle, hence paving the way to many abuses. The lack of independence and the weak contribution of constitutional jurisdictions to constitutionalism progress show as well the failure of African constitutionalism. This is the same with regard to Civil Society, with its weaknesses and its inability to weigh efficiently on constitutionalism. Lastly, in many countries, leaders attempt to hang on in power by manipulating democratic game rules.

That will lead to a devaluation of the constitution as means of limitation of political power. More and more, African citizens are wondering on the capacity of the constitution to limit power. For most of Africans, the constitution has changed to be a means of domination and not of limitation.

Such being the case, the constitution is a means of limitation of power; it will not be something else than that. For it to play efficiently its role of limitation, it is necessary to protect it. In this regard, what roles institutions play in the constitution protection? How to organise institutions so that they contribute to constitution protection? We apprehend here institutions in broad view; meaning we include organic institutions as well as mechanical institutions.

For us, the constitution protection can be assured through reinforcement of effectiveness of structures designated for its protection (II) and to re-engineer on the issue of power separation (I).

### **I. Protection of constitution according to the mechanism of separation of powers: Strengthening of the balance of powers**

Before showing to what extent separation of powers allows the protection of the constitution, it seems important to us to present in first instance separation of powers by indicating its meaning and justification

#### ***A. Notion: meaning and justification of separation of power***

Every modern democratic State is based on power separation principle. The symbolic force of this principle is such as what the 1789 French Declaration on human rights provides in its clause 16 that "*every society in which... powers separation [is not] determined, has not got a Constitution*". This principle which has its origin in lights philosophy; implies the distinction of three functions: legislature, executive and judiciary corresponding to three powers, legislative, executive, judiciary, exercised by distinct organs: parliamentary, President or Prime Minister Jurisdictions<sup>5</sup>.

However, in practice each power is not isolated in its attributions<sup>6</sup>: Separation of powers, be it responsive or (as in the case of parliamentary systems) or rigid (in the case of presidential systems), does not mean isolation of powers, which could result in State paralysis. It necessary implies collaboration, given that duties of different powers are incomplete and that powers do not remain stationed in domain assigned to them. Thus:

- government overlaps into Parliament attributions, through its regulatory capacity that allows it to set general and impersonal rules; in addition, parliament can delegate to government, for a certain time, the power to take orders in matters raising Parliament competence ;

- parliament decides less than it monitors adopted laws that in general rule originate from Governmental or inspired by the executive. Besides, Parliament has increasingly focused in monitoring government's actions. The legislator can anyway overlap into judiciary when by an amnesty law it obliterates jugements and penalties pronounced by Justice;

- With regard to the judiciary, it is probably the one that the independence is the more violated in most of the countries. In fact, in many States, Justice is not considered as a true power, but a simple authority, a tail of State machinery.

Justification is based essentially on two arguments<sup>7</sup>: a theoretical argument according to which in a representative democracy there is a risk of misappropriating national sovereignty by representatives, which representatives could identify themselves with sovereign, if the representatives' organ possesses the entirety of power. But also and especially on a practical argument, according to which powers

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<sup>5</sup> Loada, A. and Ibriga, L. (2007). "Droit constitutionnel et Institutions Politiques", Ouagadougou, Press Africaine, p.65

<sup>6</sup> Idem

<sup>7</sup> Idem

separation is an excellent means to enable the emergence of good governance, to protect citizens freedom against tyranny.

For powers separation to be an effective instrument of constitution protection, it is necessary that powers attributions within the constitution be balanced.

### **B. Power separation allows protection of the constitution: requiem for a necessary balance**

Power separation allows the constitution protection in the logic that it assures the protection of fundamental rights; and when attribution of powers is conceived in the sense of checks and balances as it is done by American constituents. This reduces power abuses significantly.

To better apprehend powers separation as a means of human rights protection, it is necessary to align it in the perspective of clause 16 relative to human and citizen rights declaration of 1789.

Clause 16 of this declaration provides that: "Every society in which neither right are guaranteed nor power separation determined does not possess a Constitution". In this perspective, power separation appears as an essential corollary in the protection of natural human rights: in fact, mutual monitoring exercised by three powers guard against attempts on individual fundamental rights violations. At the same time, power separation constitutes an obstacle to despotism and temptation to personal power, since no one can concentrate on himself the entirety of Sovereignty attributions.

Moreover, perceived in the sense of checks and balances, power separation allows the protection of the constitution, because each one of the powers has monitoring and cross action means so that none of them will abuse of its prerogatives. More than the respect of different powers' attributions, it obliges them to negotiate and make reciprocal concessions. Thus by the weight and counterweight game, one can succeed in protecting the constitution.

In spite of some potential of power separation, it is necessary to point out that in most of African countries the dominance of presidential system and the weakening of parliament, added to vicious effects due to majority issue have contributed in the erosion of power separation. The collaboration required in powers separation had been transformed in executive power domination. In fact, most of African constitutions in 1990s are characterised by strong preponderance of executive power. Thus, the head of State, invested with public trust, reigns without sharing executive power and through a dominant party extends his authority on legislature and judiciary. We are far from the situation proposed by Montesquieu. It is the absence of a correct balances between different organs that expalains indeed the threats on the constitution. The president of the republic, having a comfortable majority, can review the constitution the way he likes. In both upstream and downstream, he is convinced that he will not face any opposition. It is necessary therefore to re-engineer African

constitutions so that beyond the idea of functional separation of powers, each power will have means to exercise pressure on others without necessarily paralysing the country's governance. It is at this price that power separation will indeed contribute, in most of African countries, to the constitution protection. Power separation will contribute to the constitution protection by weight and counterweight game only when it is able to contain abuse attempts in all aspects. Whereas, in most African countries, the organisation of power by the constitution is done in favour of the executive. Thus, parliament cannot use its financial power to exercise pressure on the executive. The constitution of BurkinaFaso, in section 120 provides that " suggestions and amendments concerning the budget act tabled by members of parliament are inadmissible when their adoption would have as consequence, either a decrease in public revenues or an increase in publique spendique, unless they are accompanied by a publique revenue increase proposal or equivalent economies". In addition, the executive can avoid parliament opposition concerning budget issues based of clause 103 paragraph 2 which provides that "project proposals can be put in force by order if parliament did not pronounce itself within sixty days after submission of the project and considering that financial year is ending. In this case, government summons an extraordinary session to request the ratification. If the budget is not passed at the end of extraordinary session, it is in last resort enforced by order". This provision is also found in clause 80 in the constitution Ivory Coast.

In addition to imbalance established by the constitution, it is necessary to point out on vicious effects due to majority issue. In fact, we note these days that supporter phenomenon or majority issue moves towards down and out of the theory of powers separation, when government (that controls the administration, police and army, as well the judiciary) is issued out of the majority party in parliament. From this perspective, power remains concentrated in the disposal of the majority party and of its leaders, who can thus exercise a dictatorship that respects powers separation principle.

In this case, to make more meaning to power separation, it is important to imagine mechanisms that will allow containing the majority phenomenon. Certainly, we can rely on the line development of democratic parties to split in order to expect that the executive power will encounter oppositions within its majority, but it will be better if we could imagine legal mechanisms that can temper vicious effects of the majority phenomenon. In this regard, we consider that in combining ballot system with a wise cutting of electoral districts, we could succeed in reaching a supporter system in which political parties will be brought into balance. In addition, we can reach that level by establishing a balanced bicameral system within parliaments. This second solution could be effective if only the lower house is protected against the supporter phenomenon. More precisely, this lower house called senate will have to be the house of dynamic forces of the nation. The designation criteria of these dynamic forces must be done in rigorous ways to ensure their independence vis- à- Vis political parties. It is at this price that power separation will contribute efficiently to power protection.

But considering inherent limits of this mechanism, it is important to propose other institutions or structures that can further assure the constitution protection including the principle of powers separation. Amongst these institutions, constitutional justice occupies a place choice.

### **I. Protection of constitution from the perspective of structures: necessity of reinforcing them**

One of the characteristics of African constitutions in 1990s lies in the fact that they have in most cases instituted constitutional courts or counsels in charge of assuring their protection. (A). besides, some and a limited number of them assign popular initiative as a procedure of citizens participation in the constitution review. They thus indirectly anticipate a social protection of the constitution (B).

Nevertheless, it is important to note that the effectiveness of these protection modalities is relative

#### **A. The constitution protection by the constitutional judge: virtues of a guardian angel**

November 08 1977, president Valery Giscard d'Estaing in an address to French constitutional counsel defined a rule of law in this way: "As opposed to "police State" in which arbitrariness prevails, a "rule of law" is one that in it every authority, from the lower to the highest, is exercised under monitoring of a judge, whom ensures that the concerned authority respects the entirety of competence and content rules, to which it is bind". President Giscard, in doing this, recognised the primacy of the constitutional judge and his role of custodian. In the rule of law, the constitutional judge, through constitutionality monitoring of laws, is not only concerned with the violation of the constitution by any law but again but again that every authority intervenes in the limit of its competency. By doing so, he protects the constitution not only from the standpoint of freedom but also in the perspective of institutions.

From the standpoint of freedom, the constitutional judge plays an important role. Thus, in France the constitutional judge has succeeded in protecting fundamental rights through constitutionnalisation of proclaimed freedom in the human and citizen rights declaration of 1789: freedom to go and to come (CC of 19 and 20 January 1981), residence inviolability (CC of December 29 1983), property rights (CC of January 16 1982), equality before the law (CC of 27 December 1973). In Benin, monogamy predominance principle was adopted after a decision by the constitutional court of that country which was based on the constitutional principle of non-discrimination to invalidate the first mounting of the law on persons and families code.

Furthermore, by an impudent interpretation of constitutional provisions, the constitutional judge can protect the constitution against unbinding amendments. This is just what the Beninese judge did in 2006 when he had to pronounce judgement on constitutional law relating to the extension of members of parliament term. In fact, in a meaningful recital, the Beninese constitutional judge has asserted: "considering that this term of four years (of MPs) is a constitutionally established situation, and the result of national consensus through the national dynamic forces conference of February 1990 and

enforced by the constitution in its preamble which asserts a fundamental opposition of Benin's people against ... power confiscation; that even if the constitution provides procedures of its own review, the determination of Benin's o people has created a rule of law and a pluralist democracy, the safeguard of legal aid and national cohesion requiring that each amendment takes account of ideals that lead to the adoption of the constitution of December 11 1990, including the national consensus, constitutional value principle; that consequently, clauses 1 and 2 of the constitutional act n°2006 – 13 adopted by national assembly in June 23 2006, without respecting the above mentionned constitutional value principle, are in contrast to the constitution; (...)".

From the viewpoint of institutions, constitutional judge can monitor in ensuring that each power respects its competency as assigned by the constitution. . Nevertheless, it is necessary to recognize that constitutional justice in Africa is not sufficiently dynamic and independent except for the Beninese constitutional judge that truly plays a custodian role and whose virtues are enshrined in the doctrine. This performance by the Beninese constitutional judge partly explains the relative stability of the Benin's constitution but this has also saved Benin from several political crises. That is why, it seems important to us to reinforce the effectiveness of African constitutional justice. This can start firstly by competency extension of the constitutional judge, including monitoring of constitutional acts and the overall ordinary acts relative to fundamental rights. Secondly, like in Benin to enlarge the saisine of the constitutional judge to all citizens and severally to every Member of Parliament. In addition, in order to bypass vicious effects of the majority fact on the independence of constitutional judges, it is necessary to widen the basis of institutions and authorities designating judges. To this effect, the example of Niger can constitute a model. Lastly, in order to reinforce more judges' independence, it seems important to appoint them for more or less long term without a possibility of reappointment. For instance, judges can be appointed for a non renewable term of nine years.

Nevertheless, it is important to note with us that the quality of text is not necessarily a pledge of effectiveness. In fact, the personality of judges determines also the effectiveness of these institutions.

Independent, impudent and original constitutional judges in the constitution interpretation constitute the effective constitution guarantor. But, attention need to be paid so that that judge's monitoring does not lead to a judges's government, constitutional jurisdictions do not surrogate into political representation and leaders. If virtues of the constitutional judge make him to be a custodian angel, temple custodian, it is necessary to point out that people as social shield contributes also to the constitution protection.

#### A. Constitution protection by citizens: social shield or the social protection

By social protection we mean the constitution protection exercised by citizens themselves either individually or in the associative framework. To this effect, citizens can use possibilities offered to

them by the constitution to withstand against aggravated infringement touching the constitution. For instance, in the case of BurkinaFaso, citizens can make use of two mechanisms to protect the constitution. This is, a popular initiative regarding constitutional amendment issues and the mechanism of civil disobedience. In fact, the popular initiative mechanism enforced in clause 161 of the June 02 1991 constitution which stipulates that "the constitution amendment initiative belongs conjointly to:

- to the President of Burkina Faso
- to members of the National Assembly

- to the people when a fraction of at least thirty thousand (30.000) persons having voting right, submit a petition to the National Assembly containing a written and signed suggestion". In this perspective, citizens can constitute a shield against infringement touching the constitution particularly with regards to unbinding amendments. In this way, citizens can submit suggestion's bill in order to reverse regressive amendments of the constitution. Definitely, this mechanism is not often used by citizens but it can be an effective means against continuous amendments of the constitution in Africa. Nevertheless, it is a mechanism not prescribed in all African constitutions. For example, this is the case of Benin, Mali, Ivory Coast, etc.... Because of the potential that contains this mechanism, and in the current African context, it would be interesting to resort to advocacy in countries where this mechanism is not enforced to facilitate its adoption.

In the same perspective, the 2000 constitution of Ivory Coast by enforcing in clause 77 the right of association, right of defense, human right, to transfer constitutional judge acts relating to civil liberties allow the Civil Society to participate in the constitution protection.

The success of this mechanism necessitates a well organised Civil Society and well informed about constitutional issues, for abandoned individuals and preoccupied by the concern to find a solution to their daily challenges and almost ignorant of the existence of this mechanism, cannot use it validly. This is doubtless because of this reason that the Center for Democratic Governance in partnership with Open Society Initiative for West African has just elaborated a code of good procedure of constitutional amendments to the intention Civil Society organisations. The code has the following objectives:

- Promote adhesion and respect of universal values and principles of democracy by States in the West African sub-region.
- Promote the creation of favourable conditions to facilitate citizens' participation, individually or through intermediary bodies (political parties, Civil Society organisations etc.).
- Proposing provisions allowing the reduction of political manipulation risks of constitutional amendments processes that handicap the consolidation of West African democracies.



- To promote the creation of necessary conditions for useful and relevant constitutional amendments for democracy consolidation and countries development in the sub-region.

In the perspective of this code implementation, we assume that Civil Society organisations can use the mechanism of popular initiative to strengthen the code's impact. Notwithstanding the absence of this mechanism in some countries constitutions, Civil Society organisations can contribute to constitution protection through whistleblowing activities. For instance, the case of ELAN in Benin is enough to illustrate the capacity of social body to protect its constitution.

Civil Society can as well use the mechanism of civil disobedience to protect the constitution. Civil disobedience is the resistance of a people against a government that accedes to power by coup d'Etat, this is prescribed in constitutions. Of course the exercise of this right is restrictive considering the fact that it is essentially limited to cases of putch and coup d'Etat. But nothing prevents Civil Society organisations to have a broadened conception of this right exercise. Therefore, in our opinion the social body can disobey system that carries of the attained engrave to the constitution.

## **Conclusion**

African constitutions are characterised by their instability. This instability contributes to their belittlement as means of political power limitation. These findings show how much it is important to protect the constitution. But how to protect it? We tried to find an answer to this question all along this presentation. We find that a well reflected powers separation allows the constitution protecting. But considering inherent limits in this theory, it would be interesting to reinforce the effectiveness of constitutional justice. Give weapons to the constitutional judge to make him a true custodian of the 'temple'. In addition, we came to the idea that citizens could constitute a true shield against threats that weigh on constitutions using legal means offered to them in constitutions.

Nevertheless, it seems essential to underline that these mechanisms will not suffice without the elite collaboration. This concerns the role of elites. For us, elite consensus on constitutional rules is an essential condition for their perpetuation. In reality, constitutions instability translates the disagreement of political elite rules that govern the exercise of political power. In addition to elite consensus, it appears important than constitutions reflect positive values of African societies, that populations find themselves in these constitutions and infused within them. In any case as says Dominique Rousseau "the constitution success is the result of a transaction, relation between what the rule of law offers in terms of formalisation, neutralisation, objectification of political issues and what actors aspire to for a given moment.

## **UNCONSTITUTIONAL CHANGES IN AFRICA, THEIR IMPLICATION FOR PEACE AND SECURITY**

By **Noël MOUKALA, Chairman of RENAF**

*An African Conference on constitutional processes was held under the auspices of the African Union in Cotonou (Benin) from the 24<sup>th</sup> to the 27<sup>th</sup> November. The RENAF has been represented by its chairperson M. Noël Moukala.*

*He has taken the floor to speak about unconstitutional changes in Africa, their implications for peace and security. He also made several proposals to the African Union, including:*

- *The need to equip the African Union with a broad power judicial system responsible for monitoring elections and managing electoral contentions in African countries.*
- *The coup should be defined as a crime that may not be altered by any prescription*
- *That the Pan African NGOs should work with the African Union to move beyond the diplomatic barriers and avoid giving the impression of being much more concerned with the fate of heads of states than with that of the populations*

**Noël Moukala, Cotonou the 27<sup>th</sup> November 2007**

In a dramatic manner , Africa has always suffered the political and social destabilization due to globalization.

Several African states have inherited a shaky sovereignty that has been frustrated by the domination of multinationals and cultural adjustment policies that have ended up reducing it to nothing.. In several African countries, the government has become a fiction from which people seek to take advantage, and coup d'état a mode of access to power.

### **Historical background**

Upon the arrival of the first explorers, circa 1400 AD, African societies were organized; there was a perfect harmony between peoples. At that time, Africa had about 600 millions inhabitants. Approximately 200 years later, with various cooperation and trade, Africa (800 millions inhabitants) was going to be subjected to slavery. Millions of Africans of all walks of life would be the subject of a disgraceful trade called triangular trade, mostly deported as slaves in the new world.

Subsequent wars and raids in Africa were very fatal for people. The population growth became negative: from 800 millions people before slavery to 124 millions people by 1924. The social fabrics and societies in advanced decay in these new states divided into colonies and zones of influence in 1912 at the Berlin Conference were deteriorated. The instigators of this conference have just recalled the need to prevent the extinction of people, to justify the division of Africa regarding their public opinion. Finally, with the advent of the independence, the new sovereign states would very quickly have to address problems caused by slavery and colonization.

- Constitutional disorder
- Ethnic civil wars
- Lack of serious policies to move towards harmonious development.

Colonized long time ago, most African countries gained their independence in the early sixties. The constitutions of these newly born states were based on those of the colonizers' states. Many of the new leaders of these countries had a policy approach close to that of the colonist in the way they run the country and their perceptions of democracy. They tried their best to respect the constitution. The first free and transparent elections in Africa had little ethnic connotation

Due to the euphoria created by the past decolonization, many states faced problems having their origins in the way in which Africa was divided into colonies.

The Africa was divided without worrying about the homogeneity of the people living on the land.

### **Inappropriate constitutions**

Democracy, as it was practiced in the West, would quickly meet its limits in these states made from scratch. The first electoral contentions arose two years after the independence.

One of the parameters that legislators did not take into account in the drafting of constitutions is the fact that in Africa people voted mostly according to ethnic preference and not for the platform, be it best!

Since it was a deliberate attempt to bypass the constitution, wishful thinking of ethnic wars arose.

### **Rule on this issue within the African Union**

These types of actions that can be described as a coup d'état are contrary to the Lome declaration on unconstitutional changes of government and the principles enshrined in the Constitutive Act of the African Union.

Article 2.4 of the African Charter on Democracy, Elections and Governance had prohibited, rejected and condemned any unconstitutional change of government in any Member State. This is considered now as a serious threat to stability, peace, security and development.

#### *Issues raised*

Have things changed so far?

Does Africa run the risk of facing a new tragedy like that Rwanda faced because of changes or attempts of unconstitutional changes?

These have, perhaps, prevented several countries to fall into civil war?

### **Some examples**

Examples abound currently in Africa.

Currently, there are several hot spots and other potential hot spots in Africa. A more careful study of these hotbeds of tension shows that all have the same origin: unconstitutional changes. Blaming only the politicians as solely responsible for this disorder would be ridiculous.

Most African constitutions are not appropriate to Africa. The deal on how the population has to vote should be a prerequisite before the establishment of a constitution.

African Countries that opted for Marxism Leninism as a political system (Algeria, Congo) with a system based on the dictatorship of the people have not been models of civil peace either. Fortunately, solutions exist throughout this maze. The future establishment of a united Africa should solve the problem.

It would be easy to redefine a new electoral map and encourage people to be interested in candidate's platforms rather than their ethnic origins.

### **Implications**

As the management chart of the AU most often shows, a good part of the Union's resources are used for conflict resolution in Africa.

Darfur, Somalia, and DR Congo are among others the current areas of recurrent conflicts in Africa. With the risk of extension into the neighbouring states, these wars threaten the peace and security in their respective sub regions.

### ***Human consequences***

The human drama as it is seen in Africa is first and foremost one of the consequences of the unconstitutional changes. Entire populations are trapped in what can be described as open-air prisons. Genocides are committed; massacres are being perpetrated against destitute populations.

### ***Ecological consequences***

The case of Kivu reminds us: protected species are in danger in areas where insecurity pervades.

### ***Economic consequences***

No economy survives since all foreign currency is used to buy weapons.

To cope with these conflicts, these countries are forced to sell off natural resources to acquire weapons, squandering by so doing the funds that could have been used to strengthen the economy, education, health, etc.

They are also obliged to take on debt and suffer at the same time the pressure of multinational companies who have helped them. The interest of the latter is to continue the war in order to derive maximum profit of these repeated wars.

### ***Conclusion***

Preventing unconstitutional changes in Africa is an absolute necessity. It is a priority of the time within the African Union. Unfortunately, there is a lack of means to implement this policy: verbal sanctions have never frightened African dictators, especially when they are imposed by his peers who came to power in the same way.

### ***Recommendations***

- We propose to enhance the deterrent force of the African Union to member countries.
- Any unconstitutional change of government should be defined as a "crime that cannot be altered by any prescription"
- To entrust to the African Union the complete organisation of elections and all legal aspects related to these elections (this proposal arises out of the complexity mentioned yesterday during the debate on delays noticed in the amendment of the national constitution in this sense)
- Establish or strengthen if there is one a high Constitutional Court to resolve electoral disputes
- To try to bypass the diplomatic barriers that limit the AU activities by often getting the support of pan-African NGOs which do so?
- Avoiding giving the impression that the African Union is more concerned with the fate of the heads of state than that of the populations

Thank you for your attention.

## CHAPTER V. CLOSING REMARKS

### SPEECH MADE BY MRS JULIA DOLLY JOINER

*The African Union Commissioner for Political Affairs*

### SPEECH BY THE MINISTER OF COMMUNICATION OF THE REPUBLIC OF BENIN



#### **African Conference on Constitution Building**

Conference Organisers: African Union and International IDEA

**25-27 Novembre 2008**

**Cotonou, Benin**

#### **PROGRAMME**

Monday, 24 November

##### **Participant Arrival**

Tuesday, 25 November

<b>12:00 – 15:30</b>	<b>Registration</b>
<b>13:00 – 14:30</b>	<b>Lunch</b>
<b>14:30 - 16:00</b>	<b>Free time</b>
<b>16:00 - 17:00</b>	<b>Opening Session</b>

- **Chair:** H.E. Mr. Jean-Marie Ehouzou, Minister of Foreign Affairs, Republic of Benin
- **Address:** H.E. Madam Julia Dolly Joiner, Commissioner for Political Affairs, African Union Commission
- **Address:** Mr. Vidar Helgesen, Secretary-General, International IDEA

- **Opening speech:** H.E. Mr. Jean-Marie Ehouzou, Minister of Foreign Affairs, Republic of Benin

**17:00 – 17:15**      **Coffee break**

**17:15 – 19:00**      **Session 1: Constitution Building Processes Today**

1. **Chair:**            S. Kofi Date-Bah
2. **Presentation:** African Constitutions Today: Challenges and Perspectives of Constitutionalism in Africa against the Background of the African Charter for Democracy, Elections and Governance – Nacer Eddine Ghozali
3. **Presentation:** The Beginning of an Inclusive Political Culture? Lessons Learned – El Hadji Mbodj
4. **Presentation:** Participation of Women and Other Vulnerable Groups - Claire Marcelline Gbèda Afouda
5. **Presentation:** Experiences from Asia-Pacific – Surya Dhungel
6. **Plenary Discussion**

Wednesday, 26 November

**09:00 – 10:30**      **Session 2: The Challenges of Implementation**

- **Chair:**            Chernor M. R. Bah
- **Presentation:** Experiences from Africa – Winluck Wahiu
- **Presentation:** Experiences from Asia-Pacific – Sona Khan
- **Presentation:** Experiences from Latin America: The Case of Ecuador – Maria Paula Romo
- **Plenary Discussion**

**10:30 – 11:00**      **Coffee break**

**11:00 – 12:30**      **Session 3: Strategies and Structures for Reinforcing and Implementing African Constitutions**

- **Chair:**            Constant Gnacadja
- **Presentation:** Constitutions: Best Practice in Africa – Alpha Condé
- **Presentation:** Constitutions: Best Practice in Latin America: The Case of Brazil – Torquato Jardim
- **Plenary Discussion**

**12:30 – 13:30**      **Lunch**

- 13:30 – 14:30**      **Free time**
- 14:30 – 16:00**      **Session 4: Strategies and Structures for Protecting Constitutions**
- **Chair:**            Nagoum Yamassoum
  - **Presentation:** Institutions of Accountability – Aboubakar Sango
  - **Presentation:** Judicial Protection of Constitutions – Isabel Fremone Omal
  - **Experiences from Latin America:** Experiences from Latin America - Daniel Zovatto
  - **Plenary Discussion**
- 16:00 – 16:30**      **Coffee break**
- 16:30 – 18:00**      **Session 5: Prospects of African Integration through Constitutionalism**
- **Chair:**            Abdelaziz Sebaa
  - **Presentation:** Prospects of African Integration through Constitutionalism - Ibrahima Kane
  - **Plenary Discussion**
- 20:00**                **Gala Dinner (Palais des Congrès)**

Thursday, 27 November

- 09:30 – 11:00**      **Session 6: Addressing Unconstitutional Changes of Government**
- **Chair:**            Théodore Holo
  - **Presentation:** Implications for Peace and Security – Noël Moukala
  - **Plenary Discussion**
- 11:00 – 11:30**      **Coffee break**

**11:30 – 13:00**      **Free time**

**13:00 – 14:00**      **Lunch**

**14:00 – 16:00**      **Closing Session:**

- **Chair:** Amb. Emile Ognimba, Director, Political Affairs Department, African Union Commission
- **Examination and adoption of the conference statement:** El Hadji Mbodj
- **Vote of thanks**
- **Address:** H.E. Madam Julia Dolly Joiner, Commissioner for Political Affairs,  
African Union Commission
- **Closing speech:** H.E. Mr. Jean-Marie Ehouzou, Minister of Foreign Affairs, Republic of Benin, or his representative

\* \* \*



Foreword.....

Introductory chapter.....

Address by Mr. Vidar Helgesen

Address by Mrs. Julia Dolly

Address by the Foreign Affairs Minister of Benin

Conference Report

Appendices:

- i. Conference Agenda
- ii. Written documents on political remarks, opening sessions and presentations

Topics discussed:

- 2. African Constitution Today : Challenges and perspectives of Constitutionalism
- 3. In Africa against the Background of the African Charter for Democracy, Elections

And Governance

- 5. Participation in the making of the constitutions:  
The beginning of an inclusive political culture? Lessons learnt from the experience of the  
DRC

.....

- 6. Participation and diversity in the constitutional process: women and other vulnerable groups

.....

- 7. Experiences from Asia-Pacific: Constitution Making in

Asia-Pacific: A Comparative Note

- 8. The Challenge of Implementation:
- 9. Experiences from Africa
- 10. Experiences from Asia-Pacific
- 11. Experiences from Latin America:
- 12. El proceso constituyente en el Ecuador
- 13. Strategies and structures for the Implementation of African Constitutions:  
Case of the Democratic Republic of Congo
- 14. Best Practice in Latin America : The Case of Brazil

15. Strategies and structures for the protection of the constitution:  
responsible institutions
16. Judicial Protection of Constitutions
17. Prospects of African Integration through Constitutionalism
18. Unconstitutional changes in Africa, their implication for peace and security

The Conference Report

Closing remarks by the African Union Commissioner for Political Affairs

Closing remarks by the Minister of Communication  
of the Republic of Benin .....