

Part III

Constitutions and constitutionalism: which process for legitimate governance?

As a source of power, the constitution is unavoidably confronted with issues of legitimacy and legality. It represents what one might call the hinge on which all the diverse sources of legitimacy hang, the keystone of a true social contract. However, in Central Africa, like in most African countries, the rise of constitutionalism brings with it many paradoxes. It may have eased progress in matters of democracy and human rights but its practice has nevertheless contributed to misleading the potentiality of the constitutional texts and has undermined the trust between populations and political leaders. Participants to the meeting accordingly called for a constitutional renewal allowing for constitutions to be able to play their full part towards legitimate governance.

Constitutionalism under fire

In Central Africa, like elsewhere, the existence of a constitution is not enough to make the political power it has yielded legitimate. A participant had no qualms in referring to legitimacy as a “*constitutional taboo vampirized by legality*” whereupon constitutions find themselves devoid of substance and anchorage within their societies, the more so since they refer themselves to “external notions of legitimacy” (such as national interest, the assertion that national sovereignty belongs to the people, universal suffrage or indeed the rule of law) and often draw their provisions from the 1958 French constitution. Such constitutions are no more than a “*façade aimed for the West who is easily satis-*

fied..." but a façade behind which a politico-administrative system, run by a head of state who, relying on a single party, the civil service, the police, and the arm, rules unfettered.

As a participant stressed, in Central Africa, constitutions' loss of substance is also the result of a value crisis which is *"not only owed to colonization but also to single party systems' massive ideological propaganda, which disseminated a number of values, cutting off citizens from their true origins. Thus when the Congolese Party of Labour, the ruling single party, spread among the young the message that 'the pioneer is a conscious and effective militant of the youth' who 'in his every acts follows the example of the immortal Marien N'Gouabi⁴ and obeys the party's orders', it was not providing a model, especially since the party's orders were 'protection, discipline, gun' or 'power comes from the end of a gun', etc. This sort of propaganda has shaped people, the emergence of militias after the national conference is hardly a surprise! They spent 30 years hearing this daily on the radio!"*

In the days of single party rule, constitutions served precisely and largely to assert the pre-eminence of the single party, which was to all intents and purposes a "party-state". The denial of fundamental freedoms and Human Rights was openly advocated by a monocratically ran political party. Today, even though they were furnished with a

4. President of the Republic of Congo – which became the People's Republic of Congo from December 31st 1968 to his death, by assassination, in 1977

constitution, everybody accepts that the political powers born of single parties were not legitimate.

In 1990, with what has been called the “advent of democracy” that followed the national conferences, many Central African citizens hoped for a rupture with the regimes derived from colonization. Constitutions and institutions would henceforward seal the social contract and answer the aspirations of freedom-starved populations. The elaboration of a constitution was thus presented as the renewal of the foundation of the state with the participation of the citizens.

The first post-national conference constitutions sought to achieve these aims. They provided for, notably, the limitation of the number of presidential mandates, which opened the way for possible alternations of power. However, in no time at all they were being unilaterally revised in great haste, the conclusions from the national conferences being declared optional and devoid of compulsory force. Thus, Gabon's first post-national conference constitution, dated March 26th, 1991 was modified in 1994, 1995, 1997, 2000, and 2003 – modifications that all served to reinforce the powers of the chief of the executive. The citizenry was not associated to the constitutional revisions and although the first ‘post-national conference’ constitution was drafted on the basis of a broad popular consensus, its revision and all the subsequent ones were done by a derived constituent authority, “on the sly”.

This pre-eminence of the chief of the executive is also palpable in the marginalization of Parliament in the exercise of power. While all Central African countries recognize, in principle, Parliament's power of control over the executive; in practice, the majority drive ensures executive prevalence in such proportions as to place Parliament "*at the service of the president of the republic in particular and of the government in general, thus reducing the opposition to the role of a powerless witness of the political game*". For this Gabonese participant, who, as we saw earlier, extended his analysis of his country to the whole of the sub-region, "*public authorities do not respect the rules of classical constitutionalism that underpin democratic regimes. Therein lies the whole conundrum of law and legislation. Therefore, in the political regimes of Central African States, the democratic principles of freedom, equality, universality, majority are replaced with the principles of authority, orthodoxy and exclusiveness.*" Furthermore, the weak legitimacy associated to constitutions also results from the fact that they are perceived as an "*instrument that those at the top use to secure their chances to stay in power*". Refusing to acknowledge that "*the reasons for legitimacy have a limited shelf life and that in order to last, they must be anchored into social practices*", those in powers claim nothing but the trappings of constitutions which they somehow consider as an "*eternal legitimacy*" which would have befallen them.

Accordingly, constitutional practice – what with the constitution being perceived as “held hostage” by the party in power – is firmly disputed by the populations who withdraw their trust from such fragile institutions. And yet, this tool still holds promise. The participants continued to see the constitution as the preferred instrument for the recognition and articulation of the diverse sources of legitimacy – however the conditions that would enable it to fully play this role remain to be determined.

The conditions for a constitutional renewal

The participants did not stop at noting the failure of constitutionalism as practiced in Central Africa. They examined the obstacles of its implementation, *“the meaning granted by our peoples to the constitutions supposedly ruling them”*, and the way to *“conciliate legality and legitimacy, and how to reconnect the constitutional norm with the societies”*. This debate spanned the Atlantic as a Colombian participant explained how in her country the issue of constitutionalism had been set at the core of the reforms that made it possible to initiate peaceful governance.

Not only is such a comparative approach relevant, but it also serves to underline that the processes at work in Andean America were not all undisturbed harmonious processes. A participant specialized in constitutional issues reminded all *“that it was best not to idealize constitutions too much or imagine that it would all happen in a flash. A*

realistic learning process must be undertaken by asking the question of which elements should be integrated in a constitution."

WHAT CONSTITUENT PROCESSES TO CHECK PRESIDENTIAL EXCESSES?

The case of Cameroon was explored at length in order to unravel the issue of constituent processes. Understanding these processes requires a *"lucid approach"*. It is necessary to *"see how the provisions in the constitution are written, how the political actors are mobilized, how the social actors try to be included, what principles are privileged and how do they rate on the community scale, on the consensus scale."* The need to take the time factor into account in the appreciation of constitutional processes was also stressed: *"there is a need for a pedagogical approach, for a determined and methodical support in order to arrive at a balanced, optimal, and fair societal regulation instrument."* One participant took the long view: *"for 50 years, in the framework of an independent Cameroon, we have been living through an ongoing constitutional dynamic. 50 years, that's not much set against the whole life of a society."*

Indeed, during this half century, Cameroon has gone through *"three, maybe four constitutional reforms"*, *"fact is we are in a country where even the computation of the reforms has not found a consensus!"* The first constitution of March 4th, 1960 was adopted by referendum. This is highly significant as, outside independent Cameroon's

founding text and the 1972 reform, all of Cameroon's constitutional production was achieved through parliament. As for many French-speaking African states, it was said that this 1960 constitution reproduced an important part of the 1958 French one that served as a reference text. For a participant, *"the mimetic approach should be reset in its context. There was a transfer of constitutional rights rather than a conscious imitation of a constitutional model, and when Cameroonian politicians had the opportunity to create a constitutional norm in 1961, you can see that they promptly ditched what had been given to them or imposed on them."*

This 1961 text has a lot to teach us on the constitutional process, as it stands today in 2011 and for the future. In the early 1960s, this text first served as a basis for the "reunion" of two formerly British and French parts of pre-independence Cameroon. The aim was then to set the basis of a federal consensus, which was not an easy task for two areas that, within a shared territory, had evolved along the lines of two different political and administrative cultures. The constitutional norm was then used to signpost what was termed the *"return to the common home"*.

With the 1972 reform, there was no more talk of consultation around the constitutional norm. President Ahidjo, in the name of his *"vision for the unity of the nation"*, instead instigated a *"hidden process, surprising the political actors from the English-speaking zone, who had not accepted the shift from a federal to a unitary state"*. Their reservations

would resurface throughout the following decades, discreetly at first during the single party era, then openly at the beginning of the nineties to the point where eminent personalities like John Ngu Foncha or Salomon Tanden Muna incessantly called for the return of the federal state as the basis of a Cameroonian constitutional consensus. This episode also teaches us at least two further points. Firstly, short of consulting all the actors, a constitution will be unable to fulfill its rallying purpose and it will carry the seeds of later dissent. Secondly, transparency and access to information are essential. A participant pointed at the necessary end of “secret constitutions” which have been a constant feature in Central Africa. Another added that *“if our goal is to achieve a transparent, honest, responsible governance; if we want to trust our leaderships and have a trustworthy private sector; then we must fight the withholding of information. Only thus can we back our leaders in the pursuit of their aims.”*

A participant summed up Cameroon’s constitutional history as *“the adventure of a presidentialism divided between its still powerful authoritarian inheritance and the necessity of its evolution in a democratic context”*. One could say that *“Cameroon’s constitutional dilemma is between enlightened authoritarianism and democratic presidentialism”*. And for want of making a real choice, this hiatus is reflected in the creation of the norm, in the country’s normative and institutional balance, and in institutional praxis. Problems endure and feed into other problems. Thus

in 1961, *“we had a federal constitution and federated constitutions (the constitutions of Eastern, formerly french, Cameroon and of Western, formerly British, Cameroon) with constitutional methodologies and heritages so different you have got to wonder how we managed to fit that lot together, supposing we ever did”*. The fact is that Cameroon did not, the halfway option of the “decentralized unitary state” adopted some years later did not work.

In Cameroon, *“a silent confrontation took place between two constitutionalist approaches: a normative constitutionalism structuring power and guaranteeing political agreements (Western Cameroon) and a more instrumental constitutionalism supporting the realization of the chief’s own political vision.”* In the face of this enduring confrontation, a participant advocated *“finding a balance between the necessary normative dimension required by an evolution towards the rule of law and democracy, and perhaps, an unavoidable, albeit residual, instrumental dimension”*.

GUARANTEEING THE RESPECT OF CONSTITUTIONAL PRINCIPLES AND TAKING INTO ACCOUNT THE CONTEXTS SPECIFIC TO AFRICAN SOCIETIES

Listening closely to the participants, the question of a president’s power, a variation of that of the “chief”, proves crucial. *“Central Africa is the home of lasting power, almost everlasting”* said one, supported by another who calculated that *“the cumulated longevity of Central African heads of state is in excess of a century: 28 years for Cameroon, 42*

for Gabon before Bongo's death, 20 for the Republic of the Congo, 20 for Chad, 30 for Equatorial Guinea, 7 years for the Central African Republic and on it goes...". He concluded his demonstration by asking "does not look very serious, does it?" and by deploring the fact that in Central Africa, power legitimacy seems infinite to the men in power. "Once you have won it, no more effort is needed to deserve it. We need a legitimometre!". Another speaker came to wonder whether "in the Bantu ethos of power, power is only relevant if it lasts for as long as possible". In conclusion, the assembly concurred that "a just measure must be found in order to be able to limit the chief's power, even if the idea of limiting this power may look somewhat bizarre to parts of the population as there sometimes is a contradiction between the chief's power and the power of the constitution".

The Cameroonian example is enlightening in this respect and takes us further in the exploration of this issue: *"President Biya knew how to take advantage of those who demanded a sovereign national conference so as to accept only the few elements of change that were not liable to challenge his power and to impose a personal interpretation of the constitution."* To a Chadian participant, *"this takes you back to the weight of tradition, the elders, and even of discourse word in Africa. It even raises the anthropological question of power in Africa. Put simply, it was enough for a president like Pascal Lissouba to assert that when you are in power, you can not organize elections that*

you might loose. When Eyadema said that a constitution is neither the Bible nor the Koran, these words were and still are highly significant. In some way, this has been institutionalized and Africa operates much along those lines. Ready to listen to our elders, we no longer even take the official texts into account. What the elders say takes precedence on formalism.” This issue of the “chief-president of the republic” is thus unremitting in Africa. For the present, the “chief-president” still is a “*special institution that controls everything, subordinates everything, and answers to nothing or next to nothing*”. How then can it be “*turned into a normal institution, one that follows the constitutional order?*”. A participant suggested establishing “*criteria to identify those who may access to state functions*”; while another referred to the necessity of better defining the mandates, an option he links with that of planning: “*a mandate cannot by definition be open-ended and must include objectives and action-plans. Now, our countries barely keep up the five year plan system that had the merit of visibility.*”

However, it was the issue of elections that dominated the debate. For a Gabonese participant, the populations’ participation to the general decision-making is formally recognized in her country given that, since the nineties, elections have been organized on a regular basis. But it has to be said that the results have not followed: “*the results of the aforesaid consultations are systematically disputed, as the elections are generally thought to have been ‘fiddled with’.*”

This feeling is firmly rooted at the deepest level of popular feeling.” Too often, elections are a gateway for confrontations, as evidenced by events in the Ivory Coast that flared up just as the Yaoundé Meeting was taking place. For a Malian participant, this largely invalidates the electoral process inherited from the Western nation-state model: *“I have observed that each election, by virtue of the fact that it yields a winner and a loser, creates problems as all of us Africans say that we operate by consensus. Why not reclaim the palaver, practice that has many strong points?”*. Still according to him, elections corrode governance in Africa, quite simply because *“they just do not work. ‘Sharing of public management?’, how can we when our constitutions say that the winner takes all? After elections, solutions are sought, ‘inclusive governments’ are created when it would have been simpler to anticipate!”*.

Finally, for several participants the constitutions’ legitimacy should also be derived from their taking of African social realities into account. According to a Malian participant, *“we have constitutions that favor confrontation over conciliation. And, in Africa, we may not know how to handle confrontation, but we do know how to manage conciliation. Is that not what Africa can bring to the rest of the world? If our constitutions are today faced with so many problems, it is because they lack a whole component: tradition. But the tough questions such as ethnic groups and languages for example also have to be addressed.”* If for another participant ethnicity must thus be taken into account in African

constitutionalism, another suggests that it is *“a double-edged sword, it can be taken into account but it is very damaging.”* Faced with the lack of a normative framework designed to express respect and to set rules, ethnicity remains unspoken, confined to dealings between certain traditional and political authorities. That is precisely when it is liable to lead to the most serious abuses. How then should ethnicity be taken into account?

In the end, as summed up by a participant, *“it all rests with the capacity of the state’s norms, and first among them the constitution, to articulate the diverse sources of legitimacy and thus to make room for tradition [and religion].”*

HOW TO GUARANTEE THAT CONSTITUTIONS MAKE PUBLIC INSTITUTIONS ACCOUNTABLE?

The practice of power in Central Africa shows well enough how it manages to overwhelm and neutralize constitutional texts. In the words of a Zimbabwean participant, *“the constitution is not an end in its self. It is implemented, belongs to the people, but it is just a start”*. The constitution must notably be accompanied by institutional reform, control over the power of constitutional revision, and recognition of the independent power of the constitutional judge. The lack of acknowledged institutions in the constitutional text and of adequate protection from the influence of politics risks leaving constitutions at the stage of “empty shells”. That is what is meant by a participant when he asserted that in the absence of *“such institutions, you can*

introduce all the legal sophistications you want, but it will all be for not because of the institutional vacuum - or its vapidity - and you will still be living under the 'crippling constitutionalism' we know so well in Africa, a retentive constitutionalism, nay sometimes a perverse constitutionalism."

It is therefore important to ensure institutional equilibrium, notably by taking good care of the balance between central power and local powers but also, within central power, between government and parliament. In order to understand the first strand of this requirement, we must remember that Central African states were founded by unifying frameworks involving both peoples and territories. The populations had a codified life and their own regulations. Few states in Central Africa have taken these realities into account by giving them a political and administrative voice, especially through decentralization. Central Africa's village populations lack relays with an administration that, aggravating factor, all too often only uses French to communicate with its constituents. To quote again an earlier intervention, "*a villager who does not speak French is not likely to feel involved with an administration with which he cannot communicate with*".

With regard to the second strand of the aforementioned requirement, we have seen how current practice ends up with the chief of the executive as the state's only decisional center. Parliament cannot therefore exercise a *stricto sensu* control over such an executive, especially since a real

control automatically implies sanctions. In reality, parliamentary power is dominated by the executive, the government and its majority also arising from the same source: the head of state. Constitutional control mechanisms are then left out of the equation since majority discipline and loyalty to the leader replace them. As a result, despite the constitutional provisions, the government is less accountable to the nation than, at any moment in time, to the head of state who can reshuffle it at will. Another consequence of this state of affairs is the near impossibility of any alternation. And yet alternation, which is provided for by classical constitutionalism, allows for the necessary political balance for the recognition of the populations. But in Central Africa, the opposition is denied the place that it should have in a democratic regime.

Besides, the reason behind the necessity to set up mechanisms allowing for regular revisions of the constitutions is that because they *“are not tents pitched for sleep or for eternity”*. Taking his country as an example, a Gabonese participant pointed out that *“when you look at the different versions of the constitution passed in Gabon, they prove in keeping with the law but in no way are they legitimate. In reality they obey more to an instrumentalist logic than a democracy one.”* Yet in Gabon, it can be seen that the revision process, as provided for in the constitutional text and as practiced, aims at setting up and preserving authoritarian presidentialism.

The constitution revision process is “*closed and restricted to the political institutions*”, excluding *de facto* the people from their right of initiative since only the head of state and parliament find themselves in a position to use the right to initiate a constitutional reform. It must be added that even then, though parliament used its right in 2000 and 2003, these initiatives had in reality been inspired by the head of state who in fact coordinated the project. Likewise, the Gabonese people were asked only once, in 1995, to ratify the Paris accords concluded in the wake of the chaotic 1993 elections. This followed a decision of the constitutional court that considered that in the absence of a sitting upper chamber, the people had to be consulted by referendum. Nevertheless, one participant told us that “*this was not about allowing the people to use their imprescriptible right to change the constitution, but instead a way of legitimating by acclamation a constitutional coup, arming one’s own executioner*”. In other words, no procedure of this type has any chance of success as long as it is not initiated or accepted by the head of state. The recent history of Gabonese constitutional revisions thus demonstrates the fact that their key objective was to instate and sustain a form of authoritarian presidentialism. In this way, although the 1991 revision did intend to provide the presidential power with a legal framework and to set up a moderate government, the revisions implemented in 1994, 1995, 1997, 2000, 2003, and 2010 swept away democratic considerations. Following an instrumentalist logic, these succes-

sive revisions allowed for the restoration of the head of state's quasi monarchical status, thus reinforcing presidential hegemony. For example, the original five-year presidential mandate was extended to seven years renewable once, and then in 2003 it was made to be renewable *at vitam aeternam*.

With this in mind, a Gabonese participant stressed the necessity of operational and legitimate constitutional revisions and more specifically recommended that the right of initiative on this matter be extended to the citizens. In the model set forth by the June 1991 Burkinabe Constitution, the validity threshold for the people's right of initiative regarding constitutional revision, whether total or partial, is set at 30 000 citizens. However, this participant reckoned that even if the people are at long last involved, unilateralism should no longer prevail: "*other actors should also be involved, such as political parties, civil society organizations, development partners, etc.*" It is equally important for a control to be exercised on the contents of the constitutional revision proposals themselves. Indeed, according to a participant, the new authority, derived from the revision, must not be considered autonomous, unconditional or unrestricted as was the original one by which the original constitution was adopted. It must indeed be limited by the principles set forth in the constitution itself in order to allow for the original constituent's work - deemed just, legitimate and balanced - to be "*protected for all time ensuring thereby a measure of stability*".

A more frequent resort to the referendum process was also put forward by some participants, one of them even suggesting that it *“should become an exclusive means for the adoption of revised constitutional texts”*. He quoted the example of Chad where it is provided that no revision can be enshrined without the people’s intervention by referendum, whereas in Gabon and Cameroon, parliamentary and popular adoption methods co-exist.

Remains to consider the key role of the constitutional judge. *“A constitution, if we want it to be an integral part of the democratic ethos, must be the object of thorough protection”*, a Cameroonian participant declared. As it happens, Cameroon has no means of constitutionality control, the jurisdiction, provided for on the paper in 1996, has yet to see the light of day. And, if truth be told, Gabon is no different, its constitution states that any constitutional revision project must, following its adoption by the council of ministers, be subjected to the constitutional court’s opinion to check whether the text meets ‘the right of initiative’ condition and if it complies, in essence, with the constitution. However, this control has been described as *“wholly insubstantial”*. Indeed, the Gabonese court has never exercised it in a meaningful way given the close links maintained by its members and the executive power who appointed them.

It may be worth turning to the African Charter on Democracy, Elections and Governance (ACDEG), a document adopted under the aegis of the African Union (AU). A

Chadian participant rightly pointed out that the charter already addresses a sizable part of the findings and solutions expressed during the meeting: *“there is good cause to wonder whether this is a problem of text or of will, for there even are provisions to sanction the causes of unconstitutionality. This text goes so far as to provide for mechanisms to set up an African democratic praxis, which should be taken into account when drafting constitutions. All that is needed is for our constitutionalists to have the intellectual honesty, and the courage, to take at their word the heads of State who met-up, drafted and passed that document. It would also be good for governments that have not ratified this text to be made do so.”*

Concluding these developments around the theme of constitutions, the participants firmly placed the prospect of their renewal in the hands of civil society and more broadly the populations. A Cameroonian participant proclaimed that *“it is necessary to accompany the process of constitution appropriation by the people”, “one can not expect a population to be attached to the constitutional norm if this same population has the impression that constitutional debates only take place between political actors; if it has the impression that the constitutional norm does not carry, translate or transcribe their aspirations.”*

Issues regarding tradition, religion, and diversity, what might be called ‘sociological pluralism’, resurfaced in this debate on constitutions, thus showing conclusively that constitutional renewal will not happen without the popula-

tions. Moreover, a participant did point out that if the Cameroonian population had taken such an interest in the 1995-96 constitutional debates, it was indeed because they had touched upon themes that interested them, such as taking indigenoussness into account or the protection of minorities. *“People realized that, for once, here were questions genuinely concerned with social togetherness. Consequently, many persons and social groups attached great importance to the debate.”* He beautifully concluded that *“friendly relations between the nation’s different groups must be protected by the constitution, they must be achieved with integrity. However, with regards to constitutional culture, it is not the state that is about to drill it into societies, political actors are on the contrary rather keener to instrumentalize the population than to supply it with elements of constitutional culture that could work against them.”* To support his conclusion, the speaker related an anecdote he had personally witnessed:

In his village, in 2008, a member of parliament came to explain to the people the rationale for a revision aiming to suppress the clause limiting presidential mandates. He explained that in Ahidjo’s days, nobody said that a president’s time in office should be limited. He was therefore surprised that this should today be so for President Biya. Whilst the villagers went, somewhat forcibly along with him, a man spoke up to say: *“If the constitution constrains the presi-*

dent, let him remove it... if this means he can work for the good of the people!"

The participant ended his intervention by saying: *"that is what you get if you leave these processes in the hands of the politicians. It is not towards a constitutional culture, but rather towards the death of constitutionalism that we go to."* He was supported in this by a Zimbabwean participant who insisted that if you wished to give constitutions all their significance and their effectiveness, *"you must go to the people, it is not for the people to come forward. What's more, ordinary people must imperatively be included."* Not forgetting that a constitution is *"the reflection of a social pact at a given time"*, it is also the vector of *"an ideal to respect, to honor"*. It is therefore important to make it the *"vessel of an order of values a given people has chosen for itself, that is to say, a mirror in which its aspirations are projected"*. Capturing the full measure of Central African societies' mindscapes through their constitutions represents a highly likely path towards peaceful and legitimate governance.

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