

**THE ROAD TO CONSTITUTIONALISM AND DEMOCRACY IN
POST-COLONIAL AFRICA**

THE CASE OF THE DEMOCRATIC REPUBLIC OF CONGO

by

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DEDICATION

In Memory of **Mangu Manyamwakamba Samy,**

My Father,

To **Tshimbiambo Muendenalo,**

My Mother,

and

*To Patrice Emery Lumumba, Nelson Mandela and All Other
African Freedom Fighters of Yesterday, Today and Tomorrow.*

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SUMMARY AND KEY TERMS

Summary

This study on “The Road to Constitutionalism and Democracy in Post-Colonial Africa: The Case of the Democratic Republic of Congo” revolves around a major research problem: What has been the road to constitutionalism and democracy in Africa since independence and How can constitutionalism and Democracy be established and consolidated on the African continent? The importance of the problem and its implications for the life of millions of African people and the state of the literature still dominated by persons foreign to Africa make constitutionalism and democracy one of the most fascinating and challenging intellectual projects, particularly among African scholars. This work is a contribution to the development of knowledge and to the building and consolidation of constitutionalism and democracy in Africa. It revisits and critically examines the concepts and the various discourses and voices we have heard from both inside and mostly outside the continent. It highlights the African struggle, explores the major trends, and stresses the challenges and prospects for constitutionalism and democracy in Africa. The Democratic Republic of Congo (DRC) is a case study. The research deals with the unfinished struggle of the people of the Congo and explains why the Congo has gone from DRC to DRC *via* Zaire, from one crisis of the Congo in the 1960s to another crisis of the Congo since the early 1990s and why the DRC history has been rehearsing in a vicious circle of coups and countercoups, rebellions, unsuccessful national conferences, authoritarian and unconstitutional régimes. Central to the crisis in many African States, including the DRC, is the crisis of constitutionalism and democracy and the failure of the post-colonial State. The study ends with the conclusion that constitutionalism and democracy also belong to Africa and constitute a prerequisite for African survival and renaissance.

Key Terms:

Constitutionalism; Democracy; Separation of Powers; Federalism; Human Rights; Constitution; *Etat de droit*; Africa; Zaire / Democratic Republic of Congo; African Renaissance; African Union; Globalisation; Colonialism; Independence; Monopartyism / Multipartyism; International Community; International Law.

LIST OF ACRONYMS

ABAKO: *Alliance des Bakongo*

ADAPES: *Association des Anciens Elèves des Frères de Scheut*

AEC : African Economic Community

AFDL: *Alliance des Forces Démocratiques de Libération*

ANC: *Armée Nationale Congolaise*

ANC: African National Congress

AU: African Union

BALUBAKAT: *Baluba du Katanga*

CE: Council of Europe

CIA: Central Intelligence Agency (USA)

CEREA: *Cercle de Regroupement Africain*

CNDS: *Club Nation et Développement du Sénégal*

CNL: *Conseil National de Libération*

CNS / SNC: *Conférence Nationale Souveraine / Sovereign National Conference*

CODESA: Convention for a Democratic South Africa

CODESRIA: Council for the Development of Economic and Social Research in
Africa

CONAKAT: *Confédération Nationale des Tribus du Katanga*

CRISP: *Centre de Recherche et d'Information Socio-Politiques*

CVR: *Corps des Volontaires de la République*

DPTN: *Dynamique pour une Transition Neutre*

ECOSOC: Economic and Social Council

Ed.: Edition / Editor

Eds.: Editors

Et al.: *Et alii*

EU : European Union

FCN: *Front Commun des Nationalistes*

FGTB: *Fédération Générale des Travailleurs de Belgique*

FLNC: *Front de Libération Nationale du Congo*

FRELIMO: *Frente de Libertação de Moçambique*

LIST OF ACRONYMS (continued)

HCR: *Haut Conseil de la République*

HCR – PT: *Haut Conseil de la République – Parlement de Transition*

HURISA: Human Rights Institute of South Africa

IBB: Ibrahim Babamasi Babangida

ICCPR: International Covenant on Civil and Political Rights

ICESC: International Covenant on Economic and Social Rights

IFI(s): International Financial Institution(s)

IFP: Inkhata Freedom Party

ILO: International Labour Organisation

IMF: International Monetary Fund

INEP: *Institut National d'Etudes Politiques*

LGDJ: *Librairie Générale de Droit et de Jurisprudence*

LLB: Bachelor of Laws

LLD: Doctor of Laws

LLM: Master of Laws

MDC: Movement for Democratic Change

MLC: *Mouvement de Libération du Congo*

MNC: *Mouvement National Congolais*

MNC/L: *Mouvement National Congolais / Lumumba*

MNC/K: *Mouvement National Congolais / Kalonji*

MONUC: *Mission de l'Organisation des Nations Unies au Congo*

MPLA: *Movimento Popular de Libertação de Angola*

MPR: *Mouvement Populaire de la Révolution*

MRS: *Mouvement Républicain du Sénégal*

NAM: Non-Aligned Movement

NEPAD: New Partnership for Africa's Development.

NGO(s): Non – Governmental Organisation (s).

NICs: Newly Industrialised Countries

No.: *Numéro*

NP: National Party

LIST OF ACRONYMS (continued)

OAU: Organisation of African Unity

ONUC: Mission de l' *Organisation des Nations Unies au Congo* (1960)

Op.cit.: *Opere citato*

p.: page

PAI: *Parti Africain de l'Indépendance*

Para(s): Paragraph(s)

PDCI: *Parti Démocratique de Côte d'Ivoire*

PDG: *Parti Démocratique de Guinée*

PDS: *Parti Démocratique Sénégalais*

PDSC: *Parti Démocratique et Social Chrétien*

PNP: *Parti National du Progrès*

PSA: *Parti Solidaire Africain*

PSB: *Parti Socialiste Belge*

PSS: *Parti Socialiste Sénégalais*

PUF: *Presse Universitaire de France*

PUNA: *Parti pour l'Union Nationale*

PUZ: *Presses Universitaires du Zaïre*

RCD: Rassemblement Congolais pour la Démocratie

RCD/ML: Rassemblement Congolais pour la Démocratie -Mouvement de Libération

RCD/N: Rassemblement Congolais pour la Démocratie - National

RDC / DRC: *République Démocratique du Congo* / Democratic Republic of Congo

RDR: Rassemblement Démocratique pour la République

RENAMO: *Resistencia Nacional Mocambicana*

RPR: *Rassemblement Pour la République*

RSA: Republic of South Africa

SA: South Africa

SADC: Southern African Development Community

SAJHR: South African Journal of Human Rights

SALJ: SA Law Journal

LIST OF ACRONYMS (continued)

SAP(s): Structural Adjustment Programme(s)

SAPL: SA Public Law / *SA Publikereg*

STELL LR: Stellen Bosch Law Review

THRHR: *Tydskrif vir Hedendaagse Romeins – Hollandse Reg* / Journal of
Contemporary Roman – Dutch Law

UDHR: Universal Declaration of Human Rights

UDPS: *Union pour la Démocratie et le Progrès Social*

UFERI: *Union des Fédéralistes et des Républicains Indépendants*

UK: United Kingdom

ULK : *Université Libre de Kinshasa*

UN: United Nations

UNAZA: *Université Nationale du Zaïre*

UNESCO: *United Nations for Education, Science, and Culture Organisation*

UNHCR: United Nations High Commissioner for Refugees

UNICEF: United Nations Children's Fund

UNIKIN: *Université de Kinshasa*

UNIMO: *Union Nationale des Mongo*

UNISA: University of South Africa

UNITA: União Nacional para a Indêpendence Total de Angola

UNITAR: United Nations programme for Training and Research

Unp.: Unpublished

UPS: *Union Progressiste Sénégalaise*

USOR: *Union Sacrée de l'Opposition Radicale*

USORAL: *Union Sacrée de l'Opposition Radicale et Alliés*

US / USA: United States of America

USSR: Union of the Soviet Socialist Republics

V: *Versus*

Vol.: Volume

ZANU-PF: Zimbabwe African National Union-Patriotic Front

TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS	i
SUMMARY AND KEY TERMS	iii
LIST OF ACRONYMS	iv
CHAPTER 1 GENERAL INTRODUCTION	1
1.1. Research Problem and Subject Matter of the Study	1
1.2. Objectives and Interest	9
1.3. Scope and Delimitation	14
1.4. Justification of the Study	21
1.4.1. Why Study a “Road”: Importance of Direction and Movement in Social Sciences	21
1.4.2. Why Study Constitutional Law, Constitutions, Constitutionalism, and Democracy in Post-colonial Africa and the Democratic Republic of Congo	22
1.4.3. Breaking the Culture of Silence on Constitutionalism and Democracy on Our Continent	27
1.5. Literature Review	34
1.5.1. Brief Intellectual History and Major Trends in the Literature	35
1.5.2. Neglected Questions or Questions Insufficiently Addressed in the Existing Literature	61
1.6. Research Questions	69
1.7. Hypotheses and Expected Findings and Conclusions	72
1.8. Research Methods	78
1.8.1. Review of the Major Methodological Approaches generally Used in Similar Research and Assessment of their Strengths and Weaknesses	79
1.8.1.1. Traditional Approaches	79
1.8.1.1.1. The Legal, Juridical or Normative Approach	79
1.8.1.1.2. The Empirical, Sociological or Behavioural Approach	80

TABLE OF CONTENTS (continued)

	Page
1.8.1.2. Assessment of the Strengths and Weaknesses of the Traditional Approaches	84
1.8.1.2.1. The Legal, Juridical or Normative Approach	84
1.8.1.2.2. The Empirical, Sociological or Behavioural Approach	87
1.8.2. Methodological Approaches Used in the Study and Motivation: Multidisciplinary and Interdisciplinary Approaches	87
1.8.2.1. Legal and Empirical Approaches	87
1.8.2.2. Historical Approach	95
1.8.2.3. Comparative Approach	95
1.9. Research Plan	97
CHAPTER 2 REVISITING CONSTITUTIONALISM AND DEMOCRACY: A THEORETICAL ANALYSIS	98
2.1. Introduction	98
2.2. Constitutionalism	99
2.2.1. Defining Constitutionalism: Competing and Contradictory Perspectives	100
2.2.1.1. Traditional Approaches: Procedural and Negative Constitutionalism	104
2.2.1.2. Modern Approaches: Substantive and Positive Constitutionalism	110
2.2.1.3. Constitutionalism as Understood in the Study	112
2.2.2. Elements of Constitutionalism	118
2.2.2.1. Separation of Powers	119
2.2.2.1.1. Principle, Justification, and Forms	119
2.2.2.1.2. Horizontal Separation of Powers	122
2.2.2.1.2.1. Components of the Separation of Powers Principle	122
2.2.2.1.2.2. Separation of Powers and Political Regimes	126
2.2.2.1.2.2.1. Parliamentary Regimes	127
2.2.2.1.2.2.2. Presidential Regimes	129
2.2.2.1.2.2.3. Mixed Regimes	130

TABLE OF CONTENTS (continued)

	Page
2.2.2.1.2.3. Assessment and Evolution of Horizontal Separation of Powers	133
2.2.2.1.3. Federalism or Vertical, Spatial or Territorial Separation of Powers	134
2.2.2.1.3.1. The Federal Principle and Its Justification	135
2.2.2.1.3.2. Models of Federalism and Forms of States	137
2.2.2.1.3.2.1. Models of Federalism	137
2.2.2.1.3.2.2. Federalism and Forms of States	140
2.2.2.1.3.2.2.1. Federal States	140
2.2.2.1.3.2.2.2. Confederal States	142
2.2.2.1.3.3. Assessment and Evolution of the Federal Principle	143
2.2.2.2. Human Rights	144
2.2.2.2.1. Concept and Categorisation of Human Rights	145
2.2.2.2.2. Protection of Human Rights	149
2.2.2.2.2.1. National Human Rights Law	149
2.2.2.2.2.2. International Human Rights Law	151
2.2.2.2.2.2.1. Universal Human Rights Law and Bill of Rights	151
2.2.2.2.2.2.2. African Human Rights Law and Bill of Rights	154
2.2.2.2.2.3. Relationship between National and International Human Rights Law and Bills of Rights	159
2.2.2.3. Constitution	163
2.2.2.3.1. Concept and Classification of Constitutions	163
2.2.2.3.2. Relationship between Constitutions and Constitutionalism	167
2.3. Democracy	172
2.3.1. Defining Democracy: Conflicting Conceptions and the Weight of Ideology	174
2.3.1.1. Minimalist Conceptions and Liberalism	175
2.3.1.1.1. <i>Exposé</i>	175
2.3.1.1.2. Critical Appraisal	178

TABLE OF CONTENTS (continued)

	Page
2.3.1.2. Maximalist Conceptions and Socialism, Populism or Communism	180
2.3.1.2.1. <i>Exposé</i>	180
2.3.1.2.2. Critical Appraisal	181
2.3.1.3. Democracy as Understood in the Study	184
2.3.2. Elements of Democracy	188
2.3.2.1. Economic Development	190
2.3.2.2. Elections and Multipartyism	196
2.4. Dialectic of Constitutionalism and Democracy	202
2.4.1. Marriage between Constitutionalism and Democracy	202
2.4.2. The Counter-Majoritarian Dilemma	203
<i>Exposé</i>	203
2.4.2.1. Critical Appraisal	206
2.4.3. Tension between Constitutionalism and Democracy in Constitutional Democracy or Democratic Constitutionalism: Which Should Preempt?	210
2.4.3.1. Problem	210
2.4.3.2. Possible Solution	210
2.5. Constitutionalism and Democracy in The Changing World of Globalisation	213
2.5.1. Constitutionalism, Democracy and Globalisation of Law and Politics	215
2.5.1.1. Constitutionalism, Democracy, and Internationalisation of the <i>Etat de Droit</i> or Rule of Law under the United Nations	215
2.5.1.2. Constitutionalism, Democracy, and Regionalisation of the <i>Etat de Droit</i> or Rule of Law	216
2.5.1.2.1. The Council of Europe, European Union, and Constitutionalism and Democracy in European States	217
2.5.1.2.2. The OAU/AU and Constitutionalism and Democracy in African States	219
2.5.1.2.2.1. The Organisation of African Unity	219
2.5.1.2.2.2. The African Union	221
2.5.2. Constitutionalism, Democracy and Economic Globalisation	224

TABLE OF CONTENTS (continued)

	Page
2.5.2.1. Globalisation as Anti-Democratic	225
2.5.2.2. Globalisation as Democratic	227
2.5.3. Assessing the Debate Globalisation <i>versus</i> Constitutionalism and Democracy	229
2.6. Conclusion	231
 CHAPTER 3 CONSTITUTIONALISM AND DEMOCRACY	
IN POST-COLONIAL AFRICA	
	233
3.1. Introduction	233
3.2. Discourses and Debates on Constitutionalism and Democracy in Africa: Western and African Voices on Some Old and Recurrent Questions	234
3.2.1. The Question of “Paternity” and “Model” of Constitutionalism and Democracy: Liberals and Eurocentrists <i>versus</i> Marxists, Socialists, Africanists, and Afrocentrists	235
3.2.1.1. Liberals and Eurocentrists	236
3.2.1.2. Marxists, Socialists, Africanists, and Afrocentrists	242
3.2.1.3. Assessing the Debate	252
3.2.2. The Question of “Autochthony” and The Problematic of “African” Constitutionalism and Democracy: Relativists <i>versus</i> Universalists	255
3.2.2.1. Relativists	255
3.2.2.2. Universalists	257
3.2.2.3. Assessing the Debate	258
3.2.3. The Question of “Feasibility” of Constitutionalism and Democracy in Africa: Pessimists <i>versus</i> Optimists	265
3.2.3.1. Pessimists	266
3.2.3.2. Optimists	269
3.2.3.3. Assessing the Debate: Optimist or Pessimist?	270

TABLE OF CONTENTS (continued)

	Page
3.2.4. The Question of “Idealism” and “Realism”: Idealists <i>versus</i> Realists, Empiricists, Instrumentalists or Utilitarians	271
3.2.4.1. Idealists	271
3.2.4.2. Realists, Empiricists, Instrumentalists or Utilitarians	273
3.2.4.3. Assessing the Debate	277
3.3. Constitutionalism, Democracy and Colonial Rule in Africa	282
3.3.1. The Two Faces of Colonialism: Civilisation and Barbarity	284
3.3.1.1. Civilisation and Human Rights	284
3.3.1.2. Barbarity and Authoritarianism	285
3.3.2. Constitutionalism and Democracy in the Struggle Against Colonialism	288
3.4. Major Trends of Constitutionalism and Democracy in Independent Africa: Hard Road and Uneven Paths	290
3.4.1. Rise of Formal Constitutionalism and Democracy	291
3.4.2. Decline and Fall of Formal Constitutionalism and Democracy	292
3.4.3. Renaissance and Transition to Constitutionalism and Democracy	292
3.4.3.1. Liberalisation or Democratisation?	294
3.4.3.2. Causes of Change: “Wind of the East,” “Wind of the West,” and Primacy of Domestic Factors or the “Wind of Africa”	297
3.4.4. Consolidation of Constitutionalism and Democracy	306
3.5. Conclusion	307
 CHAPTER 4	
CONSTITUTIONALISM AND DEMOCRACY IN THE DEMOCRATIC REPUBLIC OF CONGO	309
4.1. Introduction	309
4.2. Constitutional and Democratic Challenges to the Belgian Colonial Rule	312
4.2.1. Internal Challenge to the Belgian Colonial Rule and Independence Movements	313
4.2.1.1. Nationalist Awakening in the Congo	314
4.2.1.2. Independence Movements	316

TABLE OF CONTENTS (continued)

	Page
4.2.1.2.1. The First Resistance Movements	316
4.2.1.2.2. The Syncretic Religious Movements	316
4.2.1.2.2.1. Kimbanguism	317
4.2.1.2.2.2. The Kitawala and Mwana Lesa Movements	318
4.2.1.2.3. Riots and Violence in Urban Centres	318
4.2.1.2.4. Pre-political Groupings, Tribal or Ethnic, Cultural, Intellectual Associations and Trade Unions	318
4.2.1.2.5. Political Parties	320
4.2.2. External Challenge to the Belgian Colonial Rule	322
4.2.3. Colonial Response to the Struggle for Independence and the Bilsen Plan: From Repression and Liberalisation of Colonialism to Independence	324
4.2.3.1. Repression of the Movement for Independence	325
4.2.3.2. Liberalisation of Colonialism	325
4.2.3.3. The 1959 Leopoldville Massacre and the Belgian Royal Speech and Governmental Declaration Promising Independence	326
4.2.3.3.1. The Massacre	326
4.2.3.3.2. The Belgian Royal Speech and Governmental Declaration	327
4.2.3.4. Brussels Round Tables, Constitutional Debates and Belgian Expectations	328
4.2.3.4.1. Round Table Conferences and Constitutional Debates	328
4.2.3.4.2. Belgian Expectations	330
4.2.3.5. Enactment of the Fundamental Law, Elections and Establishment of the First Congolese Institutions	331
4.2.3.5.1. The Fundamental Law	331
4.2.3.5.2. Elections and Establishment of the First Congolese Institutions	332
4.3. Constitutionalism and Democracy under the Fundamental Law and the First Congolese Republic (1960 – 1965)	333
4.3.1. Background	333
4.3.2. Constitutional Framework	333

TABLE OF CONTENTS (continued)

	Page
4.3.2.1. The Political Regime	333
4.3.2.1.1. Parliament	333
4.3.2.1.1.1. The Chamber of Representatives	334
4.3.2.1.1.2. The Senate	334
4.3.2.1.2. The Executive	335
4.3.2.1.2.1. The Head of State	335
4.3.2.1.2.2. The Government	336
4.3.2.1.3. The Judiciary and the Constitutional Court	337
4.3.2.1.4. The Parliamentary Regime	338
4.3.2.2. The Form of State: Was the Congolese State at Independence a Unitary or a Federal State?	340
4.3.2.2.1. Federal Features	340
4.3.2.2.2. Unitary Features	342
4.3.2.3. Pluralism and Human Rights under the Fundamental Law	343
4.3.3. Functioning of the Regime and the State: The First Congolese Crisis	344
4.3.3.1. Mutiny in the <i>Force Publique</i>	344
4.3.3.2. Secessions	345
4.3.3.2.1. Katanga secession	346
4.3.3.2.2. South Kasai Secession	346
4.3.3.3. Decline of Parliamentarianism	347
4.3.3.3.1. Dismissal of Prime Minister P.E. Lumumba by President J. Kasa – Vubu	347
4.3.3.3.2. Constitutional Appraisal of the Dismissal of the Prime Minister	350
4.3.3.4. <i>Coup d'Etat</i> by Colonel Mobutu and Rebellions	352
4.3.3.4.1. First Mobutu's <i>Coup d'Etat</i>	352
4.3.3.4.2. Government of the <i>Collège des Commissaires Généraux</i>	353
4.3.3.4.3. First Congolese Rebellions and Struggle for the "Second" Independence	355

TABLE OF CONTENTS (continued)

	Page
4.3.3.5. Congolese and International Efforts aimed at Ending the First “Congolese” Crisis	356
4.3.3.5.1. First United Nations Operation in the Congo (ONUC)	356
4.3.3.5.2. Congolese Round Table Conferences and Avalanche of Governments	357
4.4. Constitutionalism and Democracy under the Luluabourg Constitution (1964)	358
4.4.1. Background	358
4.4.2. Constitutional Framework	360
4.4.2.1. The Political Regime	360
4.4.2.1.1. The Executive	360
4.4.2.1.1.1. The President of the Republic	361
4.4.2.1.1.2. The Central Government	361
4.4.2.1.2. Parliament	362
4.4.2.1.3. The Judiciary and the Constitutional Court	362
4.4.2.1.3.1. The Judiciary	362
4.4.2.1.3.2. The Constitutional Court	363
4.4.2.1.4. Nature of the Political Regime	365
4.4.2.1.4.1. Parliamentary Features	365
4.4.2.1.4.2. Presidential Features	365
4.4.2.2. The Form of State and Federalism	368
4.4.2.3. Plural Democracy and Human Rights under the Luluabourg Constitution	371
4.4.3. Functioning of the Regime	375
4.4.3.1. Election of a New Parliament and Dismissal of Prime Minister Tshombe	375
4.4.3.2. The 24 November 1965 <i>Coup d'état</i> , Proclamation of the High Command of the Congolese National Army (ANC), Military Rule and Demise of Constitutionalism and Democracy	376

TABLE OF CONTENTS (continued)

	Page
4.4.3.2.1. Mobutu's Second <i>Coup d'Etat</i>	376
4.4.3.2.2. Proclamation of the High Command of the Congolese National Army	377
4.4.3.2.3. Military Rule	378
4.4.3.2.4. Demise of Constitutionalism and Democracy: Concentration of Powers in the Hands of General President Mobutu	378
4.4.3.2.5. Towards a New Constitution and Return to Constitutionalism and Democracy	380
4.5. Constitutionalism and Democracy under the Constitution of 24 June 1967 or Under the so-called Second Republic	382
4.5.1. Background	382
4.5.2. The 1967 Constitution	383
4.5.2.1. The Political Regime	383
4.5.2.1.1. The Executive	383
4.5.2.1.1.1. The President of the Republic	383
4.5.2.1.1.2. The Government	385
4.5.2.1.2. Parliament	386
4.5.2.1.3. The Judiciary and the Constitutional Court	387
4.5.2.1.3.1. The Judiciary	387
4.5.2.1.3.2. The Constitutional Court	388
4.5.2.1.4. Nature of the Political Regime	389
4.5.2.2. The Form of State: Unitarianism and Centralisation	390
4.5.2.3. Plural Democracy and Human Rights	391
4.5.3. Constitutional Acts Relating to the 1967 Constitution	395
4.5.3.1. Amendments to the 1967 Constitution? Challenging the Official Thesis	395
4.5.3.2. Law-Ordinance No. 70-025 of 17 April 1970	396
4.5.3.3. Law No. 70-001 of 23 December 1970	396
4.5.3.4. Law No. 71-006 of 29 October 1971	398
4.5.3.5. Law No. 71-007 of 19 November 1971	399
4.5.3.6. Law No. 71-008 of 31 December 1971	399

TABLE OF CONTENTS (continued)

	Page
4.5.3.7. Law No. 72-003 of 5 January 1972	399
4.5.3.8. Law No. 72-008 of 3 July 1972	399
4.5.3.9. Law No. 73-014 of 5 January 1973	400
4.5.3.10. Law No. 74-020 of 15 August 1974	401
4.5.3.11. Law No. 78-010 of 15 February 1978	407
4.5.3.12. Law No. 80-007 of 19 February 1980	412
4.5.3.13. Law No. 80-012 of 15 November 1980	414
4.5.3.14. Law No. 82-004 of 31 December 1982	416
4.5.3.15. Law No. 88-004 of 27 January 1988	417
4.5.3.16. Law No. 88-009 of 27 June 1988	418
4.6. Constitutionalism and Democracy in Zaire in Unfinished Transition (Since 1990)	419
4.6.1. Background	419
4.6.2. Constitutionalism and Democracy under Mobutu's "Granted" or "Decided" Transition (1990 – 1991) and "Mobutu's Third Republic" (1991-1997)	420
4.6.2.1. Guided Democracy: Hijacking Discourse for Change, Mobutu's "Royal" Speech	420
4.6.2.2. Law No. 90-002 of 5 July 1990	423
4.6.2.3. Failure of "Decided Democratisation" and Law No. 90-008 of 25 November 1990: From "Tripartyism" to "Integral Multipartyism"	425
4.6.2.4. Appreciation of the Constitutionality of the Constitutional Laws of 5 July and 25 November 1990	428
4.6.2.5. Popular opposition to Mobutu's "Guided" Democratisation, Struggle for the Sovereign National Conference and Results	430
4.6.2.5.1. Opposition to the Constitutional Commission and Struggle for the Sovereign National Conference and Results	430
4.6.2.5.2. Results of the Sovereign National Conference	434
4.6.3. Constitutionalism and Democracy under Mobutu's "Negotiated" Transition: The Sovereign National Conference Regime and the Permanent <i>Coup d'Etat</i>	435

TABLE OF CONTENTS (continued)

	Page
4.6.3.1. The Sovereign National Conference Constitutional Act <i>versus</i> the Constitutional Law of 5 July as Amended on 25 November 1990	436
4.6.3.1.1. Constitutional and Institutional Duplication	436
4.6.3.1.2. Zairian Armed Forces and Constitutional and Institutional Duplication	438
4.6.3.1.3. The Supreme Court of Justice and Constitutional and Institutional Duplication	439
4.6.3.2. The Sovereign National Conference Constitutional Act <i>versus</i> the Harmonised Constitutional Act	441
4.6.3.2.1. Constitutional and Institutional Duplication	442
4.6.3.2.2. Zairian Armed Forces and Constitutional and Institutional Duplication	443
4.6.3.2.3. The Supreme Court of Justice and Constitutional and Institutional Duplication	445
4.6.3.3. The Transitional Constitutional Act and Constitutionalism	445
4.6.3.3.1. The Political Regime	445
4.6.3.3.1.1. The Executive Authority	445
4.6.3.3.1.1.1. The President of the Republic	445
4.6.3.3.1.1.2. The Government	447
4.6.3.3.1.2. Parliament	447
4.6.3.3.1.3. The Judiciary	448
4.6.3.3.1.4. Other Institutions and Important Provisions	448
4.6.3.3.1.5. Parliamentarianism	449
4.6.3.3.1.6. The Transitional Constitutional Act: New Act or Amendment?	449
4.6.3.3.1.7. Constitutionalism and Democracy under the Transitional Constitutional Act	451
4.6.3.3.2. Functioning of the Regime	451

TABLE OF CONTENTS (concluded)

	Page
4.6.3.3.3. The International Community and Hijacking of Change or Subversion of Democracy in Zaire	454
4.6.4. Kabilas' Regimes, Authoritarianism, Rebellions and the Inter-Congolese Dialogue	455
4.6.4.1. Authoritarianism, Rebellions and the International Community	456
4.6.4.1.1. Authoritarianism	456
4.6.4.1.2. Rebellions	457
4.6.4.1.3. The International Community and Hijacking of Change by Mr. Kabila	457
4.6.4.2. The Lusaka Agreement and the Inter-Congolese Dialogue	458
4.6.4.2.1. Background	458
4.6.4.2.2. Principles Supporting Constitutionalism and Democracy in the Lusaka Agreement	459
4.6.4.2.3. The Inter-Congolese Dialogue and Future Prospects for Constitutionalism and Democracy in the DRC	461
4.6.4.2.3.1. Organisation and Participation	462
4.6.4.2.3.2. Agenda of the Dialogue and Regulations of the Proceedings	463
4.6.4.2.3.3. Results of the Inter-Congolese Dialogue and the Way Forward	464
4.7. Conclusion	469
CHAPTER 5 GENERAL FINDINGS AND CONCLUSION	470
5.1. Introduction	470
5.2. Findings and Conclusions in terms of the Aims of the Study	472
5.3. Findings and Conclusions in terms of Research Questions and Hypotheses	475
5.4. Questions and Recommendations for Further Research or Investigation	500
BIBLIOGRAPHY	507
LEGAL INSTRUMENTS AND CASE LAW	547

CHAPTER 1 GENERAL INTRODUCTION

1.1. Research Problem and Subject Matter of the Study

The subject matter of this study is “The Road to Constitutionalism and Democracy in Post-colonial Africa: the Case of the Democratic Republic of Congo”. It revolves around a major research problem: what has been the road to constitutionalism and democracy in Africa since independence and how can constitutionalism and democracy be established and consolidated in post-colonial Africa?

Arguably, the importance of the problem and its implications for the life of millions of African people make constitutionalism and democracy in post-colonial Africa one of the most interesting, fascinating and challenging intellectual projects, particularly amongst African scholars. It is our view that in the execution of this formidable project, African social scientists in general and constitutional lawyers in particular cannot deny their responsibilities without excommunicating themselves and discrediting their disciplines. We shall be venturing into a very much contested terrain.¹ However, the importance of the problem and the project itself justify the risk.

The fate of constitutionalism and democracy in Africa is inextricably linked to the Organisation of African Unity² that was replaced by the African Union.³

¹On constitutionalism as “*contested terrain*”, see Mamdani, M., “Social Movements and Constitutionalism in the African Context”, in Shivji, I.G., (ed.), *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES, 1st ed., 1991, 239; Shivji, I.G., “State and Constitutionalism: A New Democratic Perspective”, in Shivji, I.G., (ed.), *idem*, 27-69.

² Hereinafter OAU. The African organisation was created on 25 May 1963 in terms of an international agreement. The OAU Charter was adopted by several independent African States and came into operation in 1963.

³ Hereinafter AU. The Constitutive Act of the AU was adopted by the Conference of Heads of State and Government of OAU Member States during their annual summit held on 11 July 2000 in Lomé, Togo. It came into operation on 25 May 2001 following the deposit of instruments of ratification by the two-thirds of OAU Member States (Article 28). Article 33.1. provided for a provisional period of one year or such period as could be determined by the Assembly of Heads of State and Government for the purpose of enabling the OAU / AEC (African Economic Community) to undertake the necessary measures regarding

A great deal of criticism accompanied the OAU during its 38-year existence as the African organisation failed to achieve unity and development of the continent. However, much of the criticism leveled against it may be considered unwarranted.

Expectations were just too high for an organisation of countries still awakening to independence. The OAU may be commended for its successful fight against colonialism, which was in fact one of the major purposes of its creation.

Other purposes of the OAU included the promotion of unity, solidarity and co-operation among African States and peoples, the defence of their sovereignty, territorial integrity and independence, the promotion of international co-operation and the achievement of a better life for all African peoples.⁴

To a large extent, the errors and failure of the OAU were associated with its infancy. It is hard to be satisfied with what the Organisation achieved in almost four decades. However, its poor performance in terms of unity and development ultimately raised the need for African States to move faster and taking inspiration from other parts of the world, especially Europe, to commit themselves to building up a new organisation to face the critical challenge of development.

Except for countries such as Ethiopia and Liberia that escaped colonial rule,⁵ or became independent earlier,⁶ most African countries gained their independence in the 1960s, the few remaining in the 1970s and the last ones in the early 1980s.

the devolution of its assets and liabilities to the Union and all matters relating thereto (Articles 19 -24). The 12-month transition period expired in May and the AU was officially launched on 10 July 2002 in Durban, South Africa.

⁴ Article II, 1 of the OAU Charter (2 LLM 766), 1963.

⁵ Bahru, wrote:

“Ethiopia’s main distinction in Africa rests on its survival as an independent nation while the rest of the continent (with the exception of Liberia) came under colonial rule”. See Bahru, Z., “Historical Legacy and The Democratisation Process in Ethiopia”, *Afrika Zamani*, No.2, 1996: 154-155.

⁶ Egypt, Morocco, South Africa, Ghana and Guinea.

According to Mamdani, apartheid was actually the generic form of the colonial state in Africa.⁷

Starting with the liberation of Nelson Mandela on 11 February 1990 after a twenty-seven-year imprisonment, the demise of the apartheid rule in South Africa was sealed by the 1994 Constitution,⁸ which in turn was replaced by the 1996 Constitution.⁹

By the time Africa buries the OAU,¹⁰ there is not any single African country left under colonisation or apartheid.

The end of a colony in Africa was characterised by the adoption of a formal Constitution shortly before the proclamation of independence.

⁷Mamdani, M., *Citizen and Subject*, Princeton: Princeton University Press, 1996, 8. This view was, however, challenged by scholars such as Luc Sindjoun who rejected this "normalisation" or "de-dramatisation":

"If we accept Mamdani's thesis then apartheid within the iron law of colonialism is an intellectual fallacy due to the illusion of generality" (Sindjoun, L., "Politics in Central Africa: A Reflective Introduction to the Experience of States and Region", *African Journal of Political Science*, Vol.4, No.2, December 1999, 9).

In this author's view, apartheid and colonialism in Africa were not synonymous although they were closely related in South Africa, South West Africa (Namibia) and Southern Rhodesia (Zimbabwe). In the latter country, the official end of apartheid coincided with independence. Yet in the first, the "masters" themselves claimed to be and were South African citizens. Therefore, the Apartheid State was not a colonial state. According to John Dugard (*International Law. A South African Perspective*, Second Edition, Juta & Co, 2000, 76):

"It is difficult to pinpoint the exact moment at which South Africa became independent... The correct view, it seems, is that South Africa acquired full international status at the moment that it acquired the capacity to enter into relations with other states and this capacity was recognized by Britain. 1926 therefore appears to be the year in which South Africa became a fully sovereign independent state under international law."

Following this, South Africa was already an independent state when the apartheid rule collapsed in 1993. Therefore, Apartheid survived colonisation.

⁸ The Constitution of the Republic of South Africa, Act 200 of 1993, said the "Interim Constitution".

⁹ The Constitution of the Republic of South Africa, Act 108 of 1996, generally referred to as the "Final" Constitution". Section 1 of the Constitution provides for a democratic state based on values including human rights, non-racialism and non-sexism.

¹⁰ The Constitutive Act of the AU provided for a transitional period of at least twelve months from the OAU to the AU. According to Article 33.1:

"This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto."

With the notable exception of Portuguese colonies and a couple of others that engaged in a violent freedom fight or struggle for independence, the first Constitutions of newly independent States were generally carbon copies of the Constitutions of the former colonial powers.

According to the conventional wisdom in constitutional law and political science, that was the first step or the point of departure on the road to constitutionalism and democracy in post-colonial Africa. As a fair copy of the model of the former colonial master, the Constitution was the birth or baptism certificate of independent African States *circa* 1960, and much more, a symbol of “political civilisation” for African “heirs” of the colonial power who led their peoples to independence.

Ihonvbere explained why the constitutional system of the former colonial power was regarded as a model by African elites in many countries. He also dismissed the general idea that the state structure was dismantled at independence:

“Rather it (the state) was simply ‘whitewashed’ or ‘Africanised’ and handed over to a carefully nurtured political elite that was extremely hungry for power. Leading members of the new African elite that had been carefully identified, educated and nurtured in the ways of European interests were domesticated or incorporated into the colonial political machines as apprentices after World War II.”¹¹

To borrow from the French scholar Hauriou, one might say that for independence’s elite, entering the international society without a pluralist constitution could have been the same as presenting oneself to an evening party in a bathing-costume.¹²

¹¹ Ihonvbere, J.O., *Towards a New Constitutionalism in Africa*, London: CDD Occasional Papers Series, No.4, 2000, 17.

¹² See Hauriou, A., quoted by Lavroff, D.G., *Les systèmes constitutionnels en Afrique noire: Les Etats francophones*, Paris: A. Pédone, 1976, 16; Mangu, Mbata B., *Les régimes pluralistes africains. Cas de la République du Sénégal*, unpubl. LLB Dissertation, Kinshasa: Université de Kinshasa, 1986.

To African leaders, it seemed that the dignity of their new States and their international legitimacy required they model their institutions on those of their former colonial masters.¹³ Adopting a democratic Constitution inspired and very often drafted by the colonial masters was proof that the new State deserved its independence and thereby demonstrated its “political maturity” and “modernity”.¹⁴

Concerning the mimicry in the former French colonies, Jean Hilaire noted:

“The legislative activity of the first years of de-colonisation reveals a clear tendency to get closer to the (French) model and to go beyond the bounds never reached before”.¹⁵

In October 1961, the French Minister of Justice even arrogantly and paternalistically told African leaders:

“We taught you our concepts, terminology, skills of drafting, and methods of legal construction; it is unlikely that you will depart from all of these so early.”¹⁶

Accordingly, the first act of sovereignty of the new States was an act of acknowledgement of the excellency of French constitutional law and it is striking that the original constitutions resembled like daughters their mother-Constitution, that of the French Republic.¹⁷ “Historic Constitutions” borrowed articles, even entire titles, word for word from the 1958 French Constitution, without any or with minor amendment.¹⁸

¹³ Conac, G., *Les institutions constitutionnelles des Etats d'Afrique francophone et de la République malgache*, Paris: Economica, 1979, 10.

¹⁴ Mangu, Mbata B., *Les régimes pluralistes ...* 19.

¹⁵ Hilaire, J., quoted by Gonidec, P.F., *Institutions publiques africaines et malgaches*, Paris: Les Cours de Droit, D.E.S., 1964-1965, 77, emphasised:

“L'activité législative des premières années de la décolonisation fait apparaître une nette tendance à se rapprocher du modèle (français) et à dépasser les limites que l'on avait jamais osé franchir antérieurement.”

¹⁶ Gonidec, P.F., *supra.*, 79-80, wrote:

“Nous vous avons communiqué et nos concepts, et notre terminologie, et nos habitudes de rédaction, et nos méthodes de construction juridique, et tout cela, il est vraisemblable que vous n'en perdrez pas l'habitude si tôt.”

¹⁷ See Gonidec, P.F., *op.cit.* 73; Mangu, Mbata B., *Les régimes pluralistes ...* 16.

¹⁸ Mabileau, A. & Meyriat, J., *Décolonisation et régimes politiques en Afrique noire*, Paris: Fondation Nationale de Science Politique, Armand Colin, 1967, 17.

The existence of the "Community,"¹⁹ the local presence of French advisors, who participated in drafting the constitutional texts and the necessity for new governing powers to hold onto the support of the old metropolis, led the African States to adopt constitutions borrowed from the French text of 1958.²⁰ The situation was almost identical in other colonies, especially the British and Belgian ones.

On the eve of independence, the United Kingdom managed to provide its colonies with its own constitutional model to ensure the continuity of the legal colonial order.²¹ An interesting deviation is that in many Anglophone colonies, the independence Constitution contained some form of bill of rights unlike the Westminster "mother".

Despite unfortunate experiences with Ghana and later Nigeria, British lawyers entertained hope that before granting independence, at least the "spirit" of the Westminster Model could be infused into the new members of the Commonwealth. Accession to sovereignty therefore legally materialised through a Constitution "offered" by the government of Her Most Gracious Majesty.

All the same, Belgians could not resist the temptation to "export" their model to their former colonies and so perpetuating their own domination.²² Accordingly, the Kingdom "offered" a Basic Law to the Congolese leaders convened to "receive" independence during the Round Table Conferences²³ organised in Brussels in 1960.

¹⁹ Grouping set up by France to maintain under her leadership all her African colonies even after independence.

²⁰ Romdhane, M.B., "Constitutionalism and Social Movements in Tunisia", in Shivji, I.G., (ed.), *State and Constitutionalism...* 219-220.

²¹ See Gonidec, P.F., op.cit. 75; Alexandre, P., "L'Afrique orientale britannique", in Mabileau, A. & Meyriat, J., op.cit. 136; Mangu, Mbata B., *Les régimes pluralistes africains* 16-17.

²² Mangu, Mbata B. *Les régimes pluralistes ...* 17.

²³ Two round table conferences took place in Brussels, Belgium, in 1960. The first was the "Economic Round Table", which discussed economic issues associated with the forthcoming independence. The second and most important was the "Political Round Table", which dealt with political and constitutional concerns, including the question of exercise and transfer of power from colonial authorities to the new Congolese government and the collaboration to be maintained between Belgium and its former colony. Although most participants were Congolese political leaders, the round tables were chaired by

The *Loi Fondamentale*,²⁴ the first Constitution of independent Congo, which actually governed the Democratic Republic of Congo²⁵ during its first five years of independence, originated from a bill drafted by the Belgian government.

It was then tabled in and passed by the Belgian Parliament, assented to and signed by the King of Belgium and published in the Belgian *Moniteur* as any other Belgian law.²⁶

All the “founding” Constitutions of African States provided for democratic rule and entrenched the principle of “government of the people by the people and for the people”, as first formulated by American President Lincoln in his famous speech delivered at Gettysburg on 19 November 1863. Africa was in search of democracy.²⁷

Leaders of the newly independent States solemnly committed themselves to building constitutional and democratic States respectful of the rights of all without any distinction in their countries.

There is no single state that opposed constitutionalism and democracy. Emphasis was even put higher in countries such as the Congo, which incorporated democracy in its official name as “Democratic Republic of Congo”.

representatives of the Belgian government that had earlier decided on the agenda and the rules of the proceedings.

²⁴ The Congolese Basic Law was a multi-document Constitution since it was embodied in three separate but related instruments, each called *Loi Fondamentale* or Fundamental Law. The first instrument was the *Loi Fondamentale relative aux structures du Congo* (Fundamental Law on Structures of the Congo), which was enacted on May 19, 1960. It dealt with the organisation and functioning of political institutions at and after independence, the issues of power transfer from the colonial authorities to the new Congolese government and the co-operation between Belgium and its former colony after independence. On the other hand, the *Loi Fondamentale relative aux Libertés Publiques* (Fundamental Law on Public Freedoms), which enshrined the rights of all the people in the Congo, and the *Loi Fondamentale relative aux enquêtes parlementaires* (Fundamental Law on Parliamentary Inquiries) were enacted on 17 June 1960.

²⁵ Hereinafter the DRC.

²⁶ Mangu. Mbata B., *Les régimes pluralistes...* 17.

On 27 October 1971, following a decision by the Political Bureau of the single party, the *Mouvement Populaire de la Révolution*,²⁸ and rubberstamping President Mobutu's wish, the name of the country was changed from DRC to Zaire.²⁹

On 17 May 1997, the rebels of the *Alliance des Forces Démocratiques pour la Libération*³⁰ led by Laurent-Désiré Kabila³¹ overthrew Mobutu's regime that ruled the country for over thirty-two years and ironically reestablished it. On 2 August 1998 new rebellions³² unfolded in the Congo against Kabila Sr's regime.³³ Each of the different rebel groupings governs part of the DRC and there is no contention over the name of the country as "Democratic Republic" of Congo.

In post-colonial Africa, despite the commonly agreed negative "balance sheet",³⁴ bad fortune, problems and obstacles, constitutionalism and democracy strongly remain on the political agenda and people long for them. This is a paradox worthy of scholarly investigation.

²⁷ Busia, K.A., *Africa in Search of democracy*, London: Routledge and Kegan Paul, 1967, 99.

²⁸ Hereinafter MPR.

²⁹ The change of name from DRC to Zaire necessitated an amendment of the 1967 Constitution by Law No. 71-006 of 29 October 1971 with effects from 27 October 1971 (Article 1.3).

³⁰ Hereinafter AFDL.

³¹ Hereinafter Kabila Sr. to be distinguished from Joseph Kabila, the son who took over after the assassination of his father in Kinshasa on January 16, 2001. Joseph Kabila will be designed as Kabila Jr.

³² The two main rebel groupings are *Rassemblement Congolais pour la Démocratie* (Congolese Rally for Democracy), RCD, and the *Mouvement pour la Libération du Congo* (Movement of the Liberation of Congo), MLC. Splinter rebel groups include *Rassemblement Congolais pour la Démocratie – Mouvement de Libération* (RCD-ML) and *Rassemblement Congolais pour la Démocratie – National* (RCD-N).

³³ The death Kabila Sr. in January 2001 and the change of government in Kinshasa did not result in the end of the rebellion. The *RCD and MLC* continued their rebellion against the government led by Kabila Jr.

³⁴ On the "balance sheet" of constitutionalism and democracy in Africa, see Young, C., "The Third Wave of Democratization in Africa: Ambiguities and Contradictions", in Joseph, R., (ed.), *State, Conflict, and Democracy in Africa*, Boulder & London: Lynne Rienner Publishers, 1999, 25-25. Quoting the Executive Secretary of the Council for the Development of Economic and Social Research in Africa (CODESRIA) speaking during the 20th anniversary of the Council, Chafe also wrote:

"That African rule was authoritarian was always an article of faith in the CODESRIA networks." (Chafe, K.S., "The Problematic of African Democracy. Experiences from the Political Transition in Nigeria", *Afrika Zamani*, No.2, July 1996, 128-129).

1.2. Objectives and Interest

The general goal of this study is to highlight and contribute towards an understanding of the struggle of African peoples in general and the Congolese in particular, and to the building and consolidation of constitutionalism and democracy in post-colonial Africa.

In examining the struggle, the steps taken, problems encountered, challenges faced and those still ahead, as well as the prospects and opportunities for constitutionalism and democracy in post-colonial Africa and the DRC will be considered.

Related to this is the impact of the international (and regional) community and international law on both the establishment and consolidation of constitutionalism and democracy on the continent.

This study on constitutionalism and democracy in post-colonial Africa is also about the construction or reconstruction of the African State. In this context, the issues of constitutional regimes, human rights and institutions to uphold them, particularly the judiciary, will be an important part of the inquiry.

Ronen contends that it is not democracy that failed in Africa, but the African State and the making of democratic institutions and processes. Accordingly, the challenge today is not to fit democracy to the African State but to fit the African State to democracy.³⁵

Diamond, Linz and Lipset once remarked that despite the rich profusion of literature

“There remained huge gaps in our understanding of the factors that fostered or obstructed the emergence, instauration, and consolidation of democratic government around the world... All the existing studies were very limited in important ways: to a particular period of time;... to particular moments or segments of the historical record (such as crises and breakdowns or transitions); or to a limited range of theoretical variables.”³⁶

³⁵ Ronen, D., “The State and Democracy in Africa”, in Ronen, D., (ed.), *Democracy and Pluralism in Africa*, Boulder: Lynne Rienner Publishers, 1986, 192. Nevertheless, as it will be ventured later on democracy and state should not be opposed as implied in Ronen’s contention.

³⁶ Diamond, L., Linz, J.J. & Lipset, S.M., *Democracy in Developing Countries: Asia*, Vol.3, Boulder: Lynne Rienner Publishers, 1989, XIII.

Concerning the DRC, which is our case study, the research purports to cut horizontally and vertically through historical phases of the country in order to explain its overall path to constitutionalism and democracy since independence. It examines the country's historical experience with constitutionalism and democracy.

This includes the whole range of phenomena: establishment, breakdown, period of democratic persistence, crises, authoritarianism, renewal, and all the ambivalence and oscillations in between. The result should be a very rich analysis of the opportunities and obstacles to constitutionalism and democracy.

Some forty years on, it is worth understanding and explaining why, for instance, we have gone from one DRC to another DRC, from a crisis of the Congo in the 1960s to another crisis of the Congo,³⁷ with actors nearly identical to the ghosts of the past,³⁸ and from one United Nations (UN) operation to another UN operation in the Congo.³⁹

³⁷ In the early 1960s, shortly after independence, the DRC became famous in international affairs and in the West. The country was closely associated with disorder and chaos it came to epitomise and to which the former colonial power and its Western allies were not foreign.

³⁸ Mkandawire, T., "Introduction", in Kankwenda, Mbaya, (ed.), *Le Zaïre Vers Quelles Destinées* (Zaire: What a Destiny), Dakar: CODESRIA, 1992, IX-X.

³⁹ The first United Nations military operation named as ONUC was requested in 1960 by the first Congolese President Joseph Kasavubu and Prime Minister Patrice-Émery Lumumba following intervention of Belgian parachutists. The Belgian intervention officially to rescue Belgian citizens in the Congo was considered an act of aggression by the United Nations that then decided to send troops to secure the new independent state. In July 1999, an agreement was reached under the auspices of the Zambian President Frederick Chiluba, who was mandated by the Southern African Development Community (SADC) as a mediator in the Congolese conflict. The Lusaka Agreement was aimed at bringing to an end the crisis that unfolded in the DRC and resulted in a number of other African countries sending troops to the DRC to support either Kabila's government (Angola, Namibia, Zimbabwe and at some stage Chad and Sudan), the RCD (Rwanda) or the MLC (Uganda). The Congolese belligerents, their allies and the representatives of SADC, OAU and United Nations (UN) signed it. The Lusaka Agreement provided for the deployment of a United Nations peacekeeping force to monitor its implementation, respect for the cease-fire and withdrawal of foreign troops from the DRC. Under the code name MONUC, UN troops arrived in the DRC in mid-2001. They were expected to leave after the end of the conflict, especially after the withdrawal of all foreign troops and the organisation of an inter-Congolese dialogue also provided by the Agreement to set up new institutions for the Congo and to bring the country under a single and negotiated administration.

The study intends to explain why history has been repeating itself in the DRC since independence, what may be done to break the dichotomy of formal constitutionalism or democracy and actual authoritarianism to get out of the vicious circle of authoritarianism, rebellions, *coups d'état*, and unfinished transitions.

Its objective is also to prepare the future although it is not to offer a blueprint of constitutionalism and democracy.

The study will suggest a way of addressing the current crisis of constitutionalism and democracy to ensure that history is not continuously repeated in the Congo, unfolding simultaneously as both tragedy and farce.⁴⁰

On the other hand, like citizenship sovereignty is both right and responsibility.⁴¹ While African and especially Congolese peoples, like “constitutional pilgrims,”⁴² are thinking about making a fresh start, designing new institutions and rebuilding their States, it would serve no purpose to carry out a purely theoretical research.

In the particular context of the African and Congolese State, the study intends to provide with some insights and to be policy relevant. Far from being value-neutral, it contains value judgments about constitutionalism and democracy in Africa and the Congo.

Admittedly, the author is not a politician. Nor is he an apolitical intellectual. At this juncture of African history, African intellectuals are expected to get involved and show solidarity with their peoples embarked on a merciless fight against authoritarianism, human rights abuses and underdevelopment. We should be committed and become for our peoples what Gramsci referred to as “organic intellectuals”.

⁴⁰ Mkandawire, T., “Introduction”, in Kankwenda, Mbaya, (ed.), op.cit. IX-X.

⁴¹ Deng, F. *et al.* (eds.), *Sovereignty as Responsibility*, Washington: Brookings Institution, 1996.

⁴² Dorandeu, P., “Les pèlerins constitutionnels. Eléments pour une sociologie des influences juridiques”, Rapport présenté au 4e Congrès de l'Association française de science politique, 23-26 septembre 1992.

There is no excuse for being apolitical intellectuals, especially for lawyers or any other social scientist researching constitutionalism and democracy. The “apolitical” or “neutral” intellectual living imprisoned in his or her ivory tower has practically no place in our society.

Besides, a great Guatemalan revolutionary, Castillo,⁴³ warned us against apolitical intellectualism:

“One day
 the apolitical intellectuals
 of my country
 will be interrogated
 by the simplest of our people
 What did you do when the poor
 suffered, when tenderness
 and life
 burned out in them?”

Despite being the first to deal with constitutionalism and democracy in the DRC since independence, this work does not pretend to be a treatise on constitutionalism and democracy in post-colonial Africa.

However, it is our hope and ambition to contribute to the production and reproduction or the development of knowledge and especially to the advancement of social sciences as a whole by emphasising the legal perspective still neglected in comparative studies on constitutionalism and democracy in Africa.

Accordingly, the research is to review and revisit critically the discourses and voices from both inside and outside the continent on the crucial issues of constitutionalism and democracy, which is the object of an ongoing struggle of African peoples since independence.

⁴³ Castillo, quoted by Shivji, I.G., *Fight My Beloved Continent: New Democracy in Africa*, Harare: SAPES Books, 2nd ed., 1992, 31-32.

In the process, the research should be thought-provoking and stimulate reflection on the African and Congolese society. Conducted at the university, it is an intellectual product thereof.

Despite attacks and neglect it suffered from African authoritarian leaders who perceived it as an instrument of demobilisation and subversion of society, the university has never been and will never be, in institutional regimes, a counter-society, but a place for critical reflection on and for society and its development.

As Leclercq rightly pointed out, democracy cannot develop without the development of critical thinking.⁴⁴

This study should therefore also incite African peoples to critical reflection to help them rebuild their countries and integrate as citizens and conscious beings into the contemporary changing world.⁴⁵

They should be prepared for the transformation of the current world and for what Alvin Toffer called the "Shock of the Future",⁴⁶ that is already being felt in the present.

⁴⁴ See Leclercq, Cl., *Intitutions politiques et droit constitutionnel*, Paris: Librairie Technique, 3e ed., 1981, 23; Mangu, Mbata B., *Les régimes pluralistes africains...* 1.

⁴⁵ However, Leleux, Cl., *La démocratie moderne. Les grandes théories*, Paris: Les Editions du Cerf, 1997, is more sceptical and critical about human sciences :

"We must realise that human sciences, which worked to describe the real, seem today unable to foresee and think the current overturning with their analytical and explanatory models (p.3). Neither God, nor science or political ideologies will be useful to face the cultural, economic and social change we live."(p.4).

(My translation of "Il nous faut réaliser que les sciences humaines qui avaient oeuvré à décrire le réel semblent fort dépourvues aujourd'hui avec leurs modèles d'analyse et d'explication, impuissants à prévoir et à penser les bouleversements en cours... Ni Dieu, ni la science, ni les idéologies politiques ne seront d'un quelconque secours pour affronter les mutations culturelles, économiques et sociales que nous vivons".).

Although we agree on the great challenge for human sciences to think and anticipate change in our contemporary society, we do not share Leleux's overall scepticism, pessimism or atheism. The intellectual and religious history of the world shows that not only human sciences contributed to prepare or brought about change but also helped foresee it. The study claims to be part of this great tradition. On the other hand, God as the "Master" of history and of change may always assist.

⁴⁶ Alvin Toffer, quoted by Leclercq, Cl., op.cit.23.

Leclercq held that the only lasting civilisations were those in which spirituality did not lose to dogmatism or mechanism.⁴⁷ The present study claims to be part of spirituality.

1.3. Scope and Delimitation

As emphasized earlier, this is a research on constitutionalism and democracy in post-colonial Africa in general and in the DRC in particular.

As Cowen aptly put it,

“Anyone teaching constitutional law in Africa would do well to remember that the idea of constitutionalism is no novelty among Africans, and that indigenous African institutions have much to teach in regard to the taming of power.”⁴⁸

Africa did not start marching or struggling for constitutionalism and democracy just during the colonial era, on the eve of or after independence. Constitutionalism and democracy were known and fought for in pre-colonial Africa and did not come with the colonial masters. Therefore, carrying out a research on constitutionalism and democracy since the African pre-colonial era would be a very interesting and amazing project, which unfortunately falls outside the scope of this study. That would be one of those gigantic projects that never end.

According to scholars such as Cheikh Anta Diop,⁴⁹ Africa as “cradle of humankind and civilisation” is the oldest continent. It is also occupied by peoples who are different from one another in terms of their culture, race, and experience in the struggle for independence, constitutionalism, democracy and development.

⁴⁷ Leclercq, Cl., op.cit.23.

⁴⁸ Cowen, D.V., “African Legal Studies – A Survey of the Field and the Role of the US”, *Law and Contemporary Problems*, Vol.XXVII, No.4, autumn 1962, 571.

⁴⁹ See Diop, C.A., *The African Origin of Civilization: Myth or Reality?* New York – Westport: Lawrence Hill & Company, 1974.

We must be as clear as possible about Africa we are dealing with. A few comments are in order here as we also anticipate debate and intellectual dispute over “Post-colonial” and “Africa” used in the topic of the study.

Africa’s recent social history falls into three periods: pre-colonial, colonial and post-colonial.⁵⁰ This categorisation of African history is, however, challenged by some African scholars since it perceives Africa in its dependency on Europe while the history of Europe, America and Asia, which were also colonised at particular times, does not adopt such a classification.

Although this view has much to commend itself, African historians unfortunately do not offer any better categorisation to refer to the contemporary Africa we are talking about. On the other hand, it seems even better to maintain it in order to understand the role played by the former colonial powers in the march of Africa towards constitutionalism and democracy.

The choice of post-colonial Africa has the potential of reminding us of the colonisation the continent had suffered and whose legacy and persistence in other forms impacted and still impact on the African struggle for constitutionalism and democracy.

The great nineteenth-century German Chancellor Otto von Bismarck is reported to have said, “He who speaks Europe speaks nonsense”,⁵¹ as he referred to the fact that European traditions were so diverse and European nations so different. The same has been said of Africa. In Europe, the European Union already exists as sort of confederal State. Common European institutions have been set up.

⁵⁰Busia, N.K.A. Jr., “The Status of Human Rights in Pre-colonial Africa: Implications for Contemporary Practices”, *Afrika Zamani*, No.2, 1996, 43.

⁵¹Abrams, E., “Pluralism and Democracy”, in Ronen, D., (ed.), *op.cit.* 61.

A European legal order is consolidating. A single currency, the Euro, is in circulation. In international affairs, Europe tends to speak with one voice. Europe does exist and its peoples share many common values of civilisation. A European nation or citizenship is no longer a myth. Recent developments in Europe have proved Bismarck terribly wrong. Regarding our continent, Sindjoun blamed the use of unifying labels such as "Africa" for having "the potential of hindrance and impoverishment":

"This tendency of unifying Africa...is more the point of view of ardent advocates such as Mamdani than a reflection of the reality itself, which is less homogenous...The idea of 'One Africa' does not have dominance over the reality... 'One Africa' and 'Multiple Africa' are not immutable categories...Neither is more valid than the other...Each of them is a construct, a researcher's view of reality."⁵²

Based on Mamdani's use of "Equatorial Africa",⁵³ which is not Mamdani's construct, Sindjoun's critical remark⁵⁴ extends to the use of both "one Africa" and "Multiple Africa", but he does not propose anything else. The disenchantment with the idea of "One Africa" should not authorise a shift from one extreme to another, "Multiple Africa". In so far as "Africa" is concerned, it is hard to contend that it is a "researcher's construct". Nor is "post-colonial Africa", as used in the topic of the study.

Geographically, naturally, politically, socially, diplomatically, economically and legally, there may be little contention over the identification of the continent already famous in terms of its negative performance in different sectors.

African peoples or States are not just an intellectual invention. There are many shared characteristics and similarities amongst African States and with the African Union the continent is very likely set to achieve more unity.

⁵² Sindjoun, L., "Politics in Central Africa..." 3.

⁵³ Mamdani, M., *Preliminary Notes on Political Science in Equatorial Africa*, Paper presented at "International Symposium on Globalisation and Social Sciences in Africa", Johannesburg, CODESRIA / HSRC, 14-18 September 1998, 2.

⁵⁴ Sindjoun, L., "Politics in Central Africa..." 3.

On the other hand, the tendency to “racialise” the discourse on Africa by dividing it into “Black Africa”⁵⁵ and “White Africa” without naming the latter as such is unfortunate, unscientific and racist-minded.⁵⁶

Although it may be interesting for some Africanists to emphasise “Many Africas”,⁵⁷ African scholars would make very little contribution to the development of their continent should they insist on or make a fetishism of plurality or differences which exist within any society whatever its size. That would be tantamount to a *postmortem* sanctification of colonial and apartheid rule.

As Shivji did, the use of the term Africa in the title is symbolic, in the sense that whatever we say will certainly not apply to the whole of Africa. Africa is a vast and complex continent and countries’ problems are not necessarily the same.

It is obviously difficult and risky to generalise, but we hope that we can at least discuss some broad trends that crystallised from the practice and experience of some African countries, particularly in sub-Saharan Africa.⁵⁸

⁵⁵ See Wiseman, J.A., *Democracy in Black Africa. Survival and Revival*, New York, New York: Paragon House Publishers, 1990. It is worth noting that Wiseman came to realise the racial-racist tone of the title of this book. Referring to the same subject matter, he stopped using “Black Africa”. In the title of the book he edited in 1995, “Black Africa” was replaced by “Sub-Saharan Africa” (Wiseman, J.A., (ed.), *Democracy and Political Change in Sub-Saharan Africa*, London & New York: Routledge, 1995). One year later, “Africa” without epithet was preferred to both “Black” and “Sub-Saharan” Africa (Wiseman, J.A., *The New Struggle for Democracy in Africa*, Avebury, 1996).

⁵⁶ Only “Black Africa” in the title is here in question. Scholars such as Wiseman are so positive and sympathetic to the continent that it would be unfair and dishonest to label them racists. On the other hand, beyond the title, their analyses of the African situation and politics are penetrating, leaving relatively small room for value judgments and can hardly be considered unscientific.

⁵⁷ See Martin, W.G. & West, M.O., (eds.), *Out of One, Many Africas*, Urbana and Chicago: University of Illinois Press, 1999.

⁵⁸ Shivji, I.G., *Fight My Beloved Continent...* 36.

On the other hand, the title of the research should not be misunderstood or misread to suggest a unilinear evolution, a uniform or an easy and single way forward. According to Amor, the process is not linear and irreversible.⁵⁹

Schatzberg maintains that these processes are always and everywhere the result of a political struggle, they are never unilinear and their outcome is never preordained.⁶⁰

Wiseman held that the political systems of African states are different from one another. Differences arise from a range of causal factors, including the levels of development and underdevelopment, the social composition of the population, the styles of political leadership that have operated and the distinctive historical experiences over the *longue durée* combined with the memories of those experiences which exist in often conflicting forms within the population. Despite that, Wiseman referred to "One Africa" in his contributions.⁶¹

African States did not obtain their independence on the same day. Nor were they colonised by the same colonial masters, inhabited by the same peoples or ruled by the same political leaders. Every country has its own history and trajectory.

In Mamdani's words, "The historical routes to the rule of law and a concept of constitutionalism are several and contradictory".⁶²

According to Joseph, the experiences of the 1990s suggest a slow, uneven, halting movement toward democratic reforms.⁶³

⁵⁹ Amor, Abdelfattah, "L'émergence démocratique dans les pays du Tiers-Monde: le cas des Etats africains", in Conac, G., (ed.), *L'Afrique en transition vers le pluralisme politique*, Paris: Economica, 1993, 55.

⁶⁰ Schatzberg, M.G., "Hijacking Change: Zaire's 'Transition' in Comparative Perspective", in Ottaway, M., (ed.), *Democracy in Africa. The Hard Road Ahead*, London: Lynne Rienner Publishers, 1997, 129.

⁶¹ Wiseman, J.A., (ed.), *Democracy and Political Change in Sub-Saharan Africa...* 6-10; Idem, *The New Struggle for Democracy in Africa...* 15, 167.

⁶² Mamdani, M., "Social Movements and Constitutionalism..." 239.

⁶³ Joseph, R., "State, Conflict, and Democracy in Africa", in Joseph, R., (ed.), *op.cit.* 5.

Even in individual States or in relation to African States in general, the evidence demonstrates that it has been very much a mixture of two steps forwards one step back.⁶⁴ In Diamond's view, "Democracy is bound to be gradual, messy, fitful, and slow, with many imperfections along the way."⁶⁵

The choice of "road" in the title does not mean it is an easy road. It is a hard road.⁶⁶ It is full of obstacles and is necessarily a struggle.⁶⁷

According to Bangura, "The struggle for democracy in Africa has a complex and tortuous history. Democratisation triumphed at certain historical conjunctures, but it was blocked and suppressed in other phases."⁶⁸

The focus on struggle is useful in that it serves to indicate that there is no predetermined outcome and the study of a struggle is not confined to successful struggles, however one may define the latter.⁶⁹

Furthermore, in agreement with Young, what we are suggesting by "road" is that despite differences, slowness, and unevenness and halting, there has been a continuing movement towards a more polyarchical form of governance.⁷⁰

⁶⁴ Wiseman, J.A., *The New Struggle...* 7.

⁶⁵ Diamond, L., quoted by Young, C., "The Third Wave of Democratization..." 25.

⁶⁶ Ottaway, M., (ed.), *Democracy in Africa ...* 1997.

⁶⁷ On the concept of "Struggle" for constitutionalism and / or democracy, see Barber, B. & Watson, P., *The Struggle for Democracy*, Toronto: Lester & Orpen Dennys, 1988; Wiseman, J.A., *The New Struggle for Democracy in Africa...*, supra; Shivji, I.G., *Fight My Beloved Continent*, supra; Busia, K.A., *Africa in Search of Democracy*, supra. 1967; Cheru, F., "New Social Movements: Democratic Struggles and Human Rights in Africa", in Mittelman, J.H., (ed.), *Globalization: Critical Reflections*, Boulder, Co: Lynne Rienner Publishers, 1996.

⁶⁸ Bangura, Y., "Authoritarian Rule and Democracy in Africa: A Theoretical Discourse", in Nyang'oro, J.E., (ed.), *Discourses on Democracy: Africa in Comparative Perspective*, Dar-Es-Salaam: Dar-Es-Salaam University Press, 1996, 111.

⁶⁹ Wiseman J.A., *The New Struggle...* 7.

⁷⁰ Young, C., in Joseph, R., (ed.), op.cit. 18, 35.

Although the routes might vary, most political roads carried the polity to a democratic destination.⁷¹

Nowhere have peoples stop struggling for constitutionalism and democracy. In this context, democracy may be likened to a shooting star, an unfinished journey.⁷²

Scholars such as Jean-Jacques Rousseau expressed doubt about the possibility of men to reach that destination since he argued that only a people of gods could govern itself democratically and such a perfect government was not fit for men.⁷³

A thesis on the road to constitutionalism and democracy of each of the fifty-four African States would be a monumental task for which the present author does not have the necessary time, space, means or expertise.

Perhaps in an ideal world one might have included chapters on each of the African States, but to have done so would have required a multi-volume thesis rather than a single one and, to be honest sounds like one of those over-ambitious projects from which nothing ever materialises.⁷⁴

Much of the trajectory of the Congolese State resembles the trajectory of most of the African States, and lessons from the case study may also be of relevance to other African States. The DRC may be considered an illuminating case, representative of the post-colonial African experience with constitutionalism and democracy. Basil Davidson sees it as a paradigmatic case.⁷⁵

⁷¹ See also Young, C., *Politics of Cultural Pluralism*, Madison: University of Wisconsin Press, 1976, 520; Idem, C., "The Third Wave..." 18.

⁷² See Dunn, J., *Democracy: The Unfinished Journey*, Oxford: Oxford University Press, 1992.

⁷³ Jean-Jacques Rousseau, quoted by Leleux, Cl., op.cit. 136:

"S'il y avait un peuple de dieux, il se gouvernerait démocratiquement. Un gouvernement si parfait ne convient pas à des hommes."

⁷⁴ Wiseman, J.A., *Democracy and Political Change...* 7.

⁷⁵ Quoted by Schatzberg, M.G., "Hijacking Change..." 114.

As Mkandawire also put it:

“Every since the Congo crisis and Mobutu’s accession to power, Zaire has represented the full range of African problems, from colonial domination and exploitation through corruption, authoritarian rule and ethnic conflicts, to military regimes and mismanagement. The country offers a caricatural case history of the astounding waste of African potential”.⁷⁶

1.4. Justification of the Study

The balance sheet of constitutionalism and democracy in post-colonial Africa in general and the DRC in particular being what it is, a study like this may require some justification.

1.4.1. Why Study a “Road”: Importance of Direction and Movement in Social Sciences

A study of the road taken by African States towards constitutionalism and democracy is worthy of interest.⁷⁷

It signals an important thing: Africa is not static or immobile. It is in the throes of change. It is dynamic and there is hope in any dynamism. Direction and movement are important issues of study, not only in natural or physical sciences, but also in social sciences, including law.

According to Olukoshi, “a crucial challenge associated with scholarly efforts is to understand and explain the content, direction and scope of the change”.⁷⁸

⁷⁶ Mkandawire, T., “Introduction”IX-X.

⁷⁷ On the concept of “road” or “journey”, see Ottaway, M., (ed.), and Dunn, J., supra.

⁷⁸ Olukoshi, A., “State, Conflict, and Democracy in Africa: The Complex Process of Renewal”, in Joseph, R., (ed.), op.cit. 461.

Joseph also contended that scholars should be more attentive to the sense of direction, forward or backward, implicit in studies of democratization.⁷⁹

Such a broader approach can enrich the study of democratization, as it can help us understand the different steps and also obstacles or pitfalls and forces which dialectically determine the slowness or the halting of the African and Congolese march to constitutionalism and democracy.

It can address the question how to stop the backward march and speed up the movement to the consolidation of constitutionalism and democracy.

Our conceptual strategy is to view the struggle for constitutionalism and democracy in post-colonial Africa as part of a continuum or a process starting with the revolt against authoritarian precolonial and colonial rule.

Human societies are in constant movement and it is critical in social sciences to know where they come from, where they stand, where they are going, and what the prospects for them reaching the destination are.

1.4.2. Why Study Constitutional Law, Constitutions, Constitutionalism and Democracy in Post-colonial Africa and the Democratic Republic of Congo?

The question does not arise only as regards post-colonial Africa and the DRC. In an article published some decades ago, the French scholar Lecuyer asked, "Can one Still Teach Constitutional Law?"⁸⁰

⁷⁹ Joseph, R., "State, Conflict, and Democracy in Africa" 12.

⁸⁰ My translation of Lecuyer's "Peut-on encore enseigner le droit constitutionnel?", *Annales de la Faculté de Droit de Clermont-Ferrand*, quoted by Leclercq, Cl., op.cit. 23.

Diamond and Lipset asked the same question about democracy: “Why study democracy?”⁸¹

Dealing with constitutional law, Georges Burdeau⁸² wrote about an “impossible teaching”.

Constitutional lawyers are not always welcomed by those in power, as their teachings tend to lay bare the power itself and denude its holders by enlightening and thereby empowering the sovereign people.

Constitutional law is mainly about the study of constitutionalism and democracy that generally require the existence of a constitution as the supreme law of the land.

The Constitution is very often clear indication that a country is a constitutional and democratic state or has embarked on the road to constitutionalism and democracy.

Unfortunately, that has not been always the case in post-colonial Africa where little has been achieved in terms of constitutionalism and democracy despite the existence of a constitution in almost every African State.⁸³

In countries like DRC, democracy exists only in name. In its forty years of independence the Congo has known around thirty-two documents dubbed Constitution, *Loi Fondamentale*, Basic Law, Constitutional Act or Decree, setting the dismal world record of a “Constitution” every fifteen months!

⁸¹ Diamond, L., Linz, J.J. & Lipset, S.M., (eds.) *Democracy in Developing Countries: Asia...* XXIII-XXV.

⁸² Burdeau, G., in *Mélanges Trotabas*, quoted by Leclercq, op.cit. 23.

⁸³ Okoth-Ogendo, H.W.O., “Constitutions without Constitutionalism: Reflections on an African Political Phenomenon”, in Shivji, I.G., (ed.), op.cit. 3-25; Idem, in Greenberg, D. *et al.*, (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, New York: Oxford University Press, 1993, 65-82; Idem, in Zoethout, C.M., *et al.*, (eds.), *Constitutionalism in Africa. A quest for autochthonous principles*, Gouda Quint-Deventer, 1996.

With the perspectives of constitutionalism and democracy being so gloomy, Okoth-Ogendo⁸⁴ asked: “Do Constitutions Matter?” and “What Price Constitutionalism?”

Ihonvbere also lamented:

“Why should one waste time studying this problem when there is such a gap between the ideal of the democratic system, such as practiced in the United States or Western Union, and Africa’s political reality...? This divorce between reality and ideal moves us wonder why we are engaging in the debate on constitutionalism.”⁸⁵

Things and men may change overnight. So do constitutions. The today widely acclaimed “nationalist” and “democratic” leader may become the most horrible dictator and a political monster in the next few days. People have just finished praising a regime when it is violently overthrown the following day without the same people offering any resistance. In political terms, African people seldom mourn their dead “democratic” leaders. In Constitutional law, it often happens that the regime that was the object of an intellectual inquiry is overthrown and replaced by another shortly after the completion of the study or when it was already drawing to an end.

According to Ghai and McAuslan,

“There are so many reasons for not writing a book on the public law of an African State, not the least that much of the subject-matter of the book tends to be somewhat ephemeral, as several authors (and publishers) have found to their cost that a book on such a topic might be thought to require some justification... There were ... in the 1960s and 1970s, a number of authors in Nigeria, Ghana, Uganda, and Zaire, to cite but a few, who found at the end of a scholarly inquiry into the constitutional law of these states, that the subject-matter itself was no longer in existence”⁸⁶.

Following the somber picture of constitutionalism and democracy in post-colonial Africa, African constitutional scholars even developed a very regrettable complex of inferiority *vis-à-vis* their colleagues in other social sciences disciplines.

⁸⁴ Okoth-Ogendo, H.W.O., in Shivji, I.G., (ed.), *op.cit.* 20.

⁸⁵ Ihonvbere, J.O., *Towards a New Constitutionalism...* 11.

⁸⁶ Ghai, Y.P. & J.P.W.B. McAuslan, quoted by Okoth-Ogendo, H.W.O., in Greenberg, D. *et al.*, (eds.), *op.cit.* 65.

One of the leading African legal scholars, the Tanzanian Shivji, rather complained about the “retreat” or “metamorphosis” of the “radical” African intellectual, in his sense the Leftist or Marxist-Leninist one.⁸⁷

However, much could be said about the retreat, resignation, and silence of most of his legal and constitutional colleagues in the debate on constitutionalism and democracy in Africa in general and in the DRC in particular. They tended to keep a low profile, as manifested by their contribution to the debate on the democratisation process within the Council for the Development of Economic and Social Research in Africa.⁸⁸

Legal studies of constitutionalism and democracy in Africa fell in disrepute in many African universities at the expense of political science, history, sociology, anthropology, and philosophy.

In the 1970s and 1980s, scholars from other disciplines abandoned altogether any attempt to examine African Constitutions on the grounds that they bore but an obscure relation to governance and politics on the continent.”⁸⁹

Among social scientists in general, academic disregard of Constitutions remains the rule rather than the exception. Okoth-Ogendo considered it of great interest, from an African side, to research the question why among social scientists academic disregard for constitutional law is the rule.⁹⁰

As a result thereof,

“Not merely the books themselves, but constitutional law and lawyers tended to be almost irrelevant in much academic discussion of political and economic development in Africa”.⁹¹

⁸⁷ Shivji, I. G., “Contradictory Class Perspectives in the Debate on Democracy”, in Shivji, I.G., (ed.), op.cit. 255-259.

⁸⁸ Hereinafter CODESRIA.

⁸⁹ Okoth-Ogendo, H.W.O., “Constitutions without...”, in Shivji, I.G., (ed.), op.cit. 3.

⁹⁰ Idem, op.cit. 4.

⁹¹ Ghai, Y.P. & McAuslan, J.P.W.B., quoted by Okoth-Ogendo, H.W.O., op.cit. 3.

The situation led to both a dilemma and a paradox in African constitutional jurisprudence, as described by Okoth-Ogendo:

“The dilemma is whether to abandon the study of Constitutions altogether on the ground that no body of constitutional law or principles of constitutionalism appears to be developing, and might, in all probability fail to do so ...or to continue teaching and pontificating upon those liberal democratic values in the hope that state elites in Africa will eventually internalise and live by them. The paradox is what appears, nonetheless, from that same scenario as a commitment to the idea of the Constitution and an equally emphatic rejection of the classical notion of constitutionalism.”⁹²

According to Okoth-Ogendo, the dilemma was “inconsequential, even false” and scholars of constitutional jurisprudence should be freed from it.⁹³

He also ascribed lack of interest in the study of African Constitutions to primarily ideological and analytical reasons.⁹⁴

In the 1960s lawyers tended to treat Constitutions as static phenomena, “frozen at a particular moment in time, in a photograph from which the background has been carefully excluded.”⁹⁵ That was a very serious methodological problem, which will be dealt with later on in this chapter.

The fact that the Constitution does not exist, is regularly violated or that authoritarianism prevails over democratic rule should not bar us from investigating constitutionalism and democracy in post-colonial Africa and the Congo.

Despite their poor record on the ground, constitutionalism and democracy remain solidly entrenched in the minds of African peoples. The mere fact that they never died and survived autocratic leaders and *coups d'état* might be enough for constitutionalism and democracy in post-colonial Africa to take pride of place on the intellectual agenda. Arguably, it is even in countries such as the DRC that their study is the most interesting.

⁹² Okoth-Ogendo, H.W.O, “Constitutions Without Constitutionalism...” in Shivji, I.G., (ed.), op.cit. 4-5.

⁹³ Idem 5.

⁹⁴ Idem 4.

⁹⁵ Idem 3.

While denouncing the imperialism of political science, sociology, anthropology, history and political economy, and their concepts and methodological approaches in comparative studies on State and democratisation in Africa, we are not vindicating any monopoly for law, especially constitutional law.

It cannot be denied that law, as a discipline is part and parcel of social sciences. However, it is an autonomous discipline, with an object and methodological approaches of its own. Definitely, law is not subject to any other social science discipline and should not be dissolved in any other or in the social sciences as a whole.

Lawyers are probably the best or among the social scientists best equipped to deal with the issues of constitutionalism and democracy. It is even crucial for the development of social sciences in Africa that law, especially constitutional law, be rehabilitated in its own right in the discourse on state and democracy in Africa.

The task of rehabilitating constitutional law and lawyers in comparative African studies lies first with African legal scholars themselves.

1.4.3. Breaking the Culture of Silence on Constitutionalism and Democracy on Our Continent

The literature on constitutionalism and democracy is largely dominated by American, British, French and Belgian scholars, especially in the case of the Congo, and among them by political scientists, historians, anthropologists, sociologists, economists and philosophers.

In their Preface to "Constitutionalism", Pennock and Chapman proclaimed that among the living authors whose names were outstanding in the literature on constitutionalism, none outshone that of Carl Joachim Friedrich, the German-born American political scientist.⁹⁶

⁹⁶ Pennock, J.R. & Chapman, J.W., "Preface", in Idem, (eds.), *Constitutionalism*, New York: New York University Press, 1979, VII.

Friedrich also comes before the legal scholar McIlwain⁹⁷ in the *American Constitutional Law Dictionary*.⁹⁸

To celebrate Friedrich's career and seminal contribution to constitutionalism, both in theory and in practice, the American Society for Political and Legal Philosophy voted to make "Constitutionalism" the theme of the 1975 meetings of the Society.

These meetings were held in conjunction with those of the American Political Science Association.

The important contribution of American scholars, mostly political scientists and philosophers, definitely impacted on the conceptualisation of Constitutionalism.

Cowen nevertheless blamed American legal scholars for their insignificant engagement and contribution to African research in comparison with their colleagues of other social sciences disciplines:

"In the US, lawyers have been slow starters in the field of African studies. While American anthropologists and sociologists – and in more recent years – political scientists and economists – have been prolific in African research, their legal colleagues have, with few exceptions, remained silent."⁹⁹

The particular issue of Constitutionalism in Africa was brought to the fore during three major conferences held in Europe in the 1990s.¹⁰⁰

⁹⁷ His writings include *Constitutionalism in the Changing World*, Cambridge: Cambridge University Press, 1939, and *Constitutionalism: Ancient and Modern*, Ithaca, New York: Cornell University Press, Revisited Ed., 1947.

⁹⁸ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., *The Constitutional Law Dictionary*, Vol.1 Individual Rights, ABC-CLIO, Oxford, England, 1985.

⁹⁹ Cowen, D.V., "African Legal Studies..." 545.

¹⁰⁰ The first was a conference on "Africa in Transition to Political Pluralism" that took place in Paris (1990) and brought together French and African scholars. The meeting was partly sponsored by the French Ministry of Cooperation. The second was a symposium on "Constitutionalism in Africa", which was organised in Rotterdam by the Dutch-based International Association of Constitutional Law. The third was the 16th world Congress of the Association. It was held in Berlin, Germany, and its major theme was "Democratisation".

As a whole, African scholars were particularly absent or came very late in the debate on constitutionalism and democracy on their own continent. Here again, legal scholars lost to their colleagues of other social sciences disciplines.

Earlier reflections on constitutionalism and democracy in Africa were commissioned by American and European institutes or dictated by those who still fund our works, decide on our research agendas and hardly resist the temptation to direct them.

The African Conference on the Rule of Law, which was held in Lagos, Nigeria, in 1961, was organised by the International Commission of Jurists.¹⁰¹

As Mamdani admitted,¹⁰² the Harare conference on "The State and Constitutionalism"¹⁰³ which preceded the African Association of Political Science workshop on "Constitutionalism and Political Change in East Africa"¹⁰⁴ resulted from a North American initiative.¹⁰⁵

In French-speaking Africa, France also sponsored the Dakar Conference on "Democracy and Transition".¹⁰⁶ On the other hand, the Berlin Conference on "Democratisation" inspired the 21st Congress of the African Association of Political Science on "State and Democracy".

¹⁰¹ The Conference was held from 3 to 7 January 1961. One hundred ninety-four participants, judges, lawyers, and teachers of law attended it from twenty-three African countries. On the Conference, see Busia, K.A., *Africa in Search of Democracy* 91, 103-109; Hinden, R., *Africa and Democracy*, Encounter, Pamphlet No.8, 1963, 4-6; International Commission of Jurists, *Proceedings of the African Conference on the Rule of Law*, Geneva, 1961.

¹⁰² Mamdani, M., "Social Movements and Constitutionalism..." 237.

¹⁰³ The Conference was organised in Harare, Zimbabwe, from 22 to 25 May 1985.

¹⁰⁴ January 1987, Nairobi, Kenya.

¹⁰⁵ The American Society Trust and the American Council of Learned Societies as part of their project on Comparative Constitutionalism sponsored it. African scholars, who attended, including our "radical" intellectuals, therefore responded to a demand of the American Society and accepted to be part of their project.

¹⁰⁶ About two hundred African political leaders attended the Conference, which was held in May 1992 in Dakar, Senegal. It came as no surprise after the Conference on "Africa in Transition to Political Pluralism", which was organised in Paris in 1990.

The developments above should not be understood to dismiss any partnership between Western and African scholars, which is so crucial for the development of knowledge.

Nor should they be read as rejecting any funding from the Western and rich countries and institutions yet acknowledged and welcomed by African researchers every day struggling to survive and very often neglected by their governments and incapable of funding their own research.

On the other hand, they are not to deny any independent initiative by African scholars and institutions in the field of constitutionalism and democracy.

Some scholars even wrote extensively on these questions, but due to problems of research funding, intellectual production and reproduction on the continent, their works remained unfinished or unpublished and unknown to the general public.

Some others were just unlucky as they thought or wrote about it too early, which is during the 1960s, 1970s and even 1980s, when constitutionalism and democracy were not yet an issue because Western powers were still sympathetic to the authoritarian African rulers.

As a result, we still have to rely upon Western literature developed by scholars who tend to consider that they know and care about us better than we do ourselves and in which Africans sometimes fail to recognise their continent, their peoples and even themselves. One is even amazed at the ease with which definitive conclusions are arrived at in African studies.

Olukoshi came to blame “conceptual and methodological approaches (which) have for too long dominated the study of Africa and produced, at best, only partial interpretations of developments on the continent and, at worst, gross caricatures that many Africans resident on the continent find difficult to recognise.”¹⁰⁷

¹⁰⁷ Olukoshi, A. “State, Conflict, and Democracy in Africa...” 464-465.

Zezeza pushed the criticism too far as he contended that in the discourse on African politics, "Epithets, anecdotes, and caricature have replaced sober analysis. Racist and racialising tropes have been coined as the most denigrating labels."¹⁰⁸

From a legal perspective, it is crucial to contribute to the development and furtherance of an African discourse¹⁰⁹ on constitutionalism and democracy in post-colonial Africa in general and the DRC in particular.

Mkandawire rightfully remarked:

"Volumes have been written on Zaire. Of existing works, few are by Zairean scholars; fewer still are focussed on the interests of the Zairean people"¹¹⁰.

Compared with other African countries like Nigeria and South Africa, there is very little literature on the Congo despite the large number of Congolese scholars. That is a real paradox.

Congolese intellectuals seem to have contributed more to building authoritarianism than constitutionalism and democracy.

Some of them ended up sanctifying authoritarianism, sacrificing the exigencies of scientific research on the altar of material survival and security and instead of denouncing the authoritarian monster. They then became prone to defend it and transformed themselves into its praise-singers and caricatures.¹¹¹

¹⁰⁸ Zezeza, P.T., *Manufacturing African Studies and Crises*, Dakar: CODESRIA, 1997, 125.

¹⁰⁹ See Nyang'oro, J.E., (ed.), *supra*; Anyang' Nyong'o, P., "Discours sur la démocratie en Afrique", *op.cit.* 27-40. Yet Mafeje maintains: "There is no such thing which may be identified as an 'African Discourse' on democracy" (My translation) (Mafeje, A., "Théorie de la démocratie et discours africain: 'Cassons la croûte, mes compagnons de voyage'", in Chole, E. & Ibrahim, J., (eds.), *Processus de Démocratisation en Afrique : Problèmes et Perspectives*, CODESRIA & Karthala 1995, 14, 24.

¹¹⁰ Mkandawire, T., "Introduction" IX-X.

¹¹¹ Mangu, Mbata B., *Démocratie, régime pluraliste et tribalisme au Zaïre*, unpublished Paper (Monograph) for 1994 CODESRIA Summer Institute on Democratic Governance in Africa, Dakar: CODESRIA, 1996, 54-56.

That is not only typical of Congolese scholarship. Wherever there is authoritarianism, a scholarship emerges to sustain it.

For instance, the Nazi rule had its Gobineau and Groebels. Slave trade and racism in Africa, America, Asia and Europe had or still have their champions.

In South Africa, for instance, the vibrant discourse on democracy and human rights we have heard is recent and only dates back to the late 1980s and early 1990s. Apartheid had its legal scholars, its theologians and its doctors.

In Nigeria, a barbaric dictatorship such as the regime of General Ibrahim Babangida fabricated its "IBB¹¹² professors",¹¹³ very well recruited and known in the academia.¹¹⁴

¹¹² Initials of the past Nigerian authoritarian military leader, General Ibrahim Babamasi Babangida.

¹¹³ Ibrahim, J., "Political Scientists and the Subversion of Democracy in Africa", in Nzongola-Ntalaja, G. & Lee, M., (eds.), *The State and Democracy in Africa*, Harare: AAPS Books, 1997, 117-118.

¹¹⁴ Ibrahim Jibrin is particularly critical about the "*IBB Professors*", some of the leading Nigerian political scientists who devoted themselves to two principal activities, namely sycophantic praise singing in favour of General Babangida, and devising tactics and strategies for perpetuating his repressive rule. For an account of their sycophantic works, see Olagungu, T., Jinadu, A. & Oyovbaire, S., (eds.), *Portrait of a New Nigeria: Selected Speeches of IBB*, Volume 1, London: Precision Press, 1989, IX, where they wrote about the general dictator:

"A professional, courageous and devoted soldier of the good old days; a military intellectual and strategist; a man with great personable disposition, charm and humour; a very brilliant and witty person; a man of robust heart with tremendous African humanism; a person of manifest devotion to family and friends...; the 'Maradona' of Nigerian politics and master tactician; a statesman with abidingly immense convictions and faith in the unity and greatness of Nigeria and in her destiny in world affairs."

According to Jinadu ("Introduction", quoted by Ibrahim, p.118), IBB's speeches

"Reflect a deep concern with the human condition in Nigeria and how to improve upon it. They represent the thought of a patriot and nationalist, of a statesman who, acting out of a historical role and contending against great odds, is working strenuously with his colleagues and compatriots to bequeath a legacy of which future generations of Nigerians will be proud."

In *Transition to Democracy in Nigeria 1985-1993*, Ibadan: Safari Books, 1993, 24, (Also quoted by Ibrahim, J. op.cit. 118), the above praise singing academics held:

"The book is a testimonial to, and an appreciation of the vision and historical significance (in the Hegelian sense) of President Ibrahim Babamasi Babangida and his colleagues in the Armed Forces Ruling Council for their Commitment to and dogged pursuit of the democratization of political and socioeconomic structures and processes in Nigeria".

Bakary¹¹⁵ denounced the same situation in Ivory Coast under the long-standing leader Houphouët Boigny. In Zaire-Congo, Ivory Coast and many other African countries, democracy is not, to follow Benda's formula, a "permanent Dreyfus case".¹¹⁶ According to Bakary, there is no question of a "plea for intellectuals" in the Sartrean sense¹¹⁷ or a "praise of intellectuals" *à la* Levy.¹¹⁸

One might rather speak of a "betrayal of clerks",¹¹⁹ a "defeat or retreat of thought",¹²⁰ or a "resignation of intellectuals".¹²¹

There are, however, a few exceptions to the rule and we should be proud of those intellectuals and scholars who fought for constitutionalism and democracy and refused to compromise with their authoritarian leaders for the best interest of their peoples and the development of legal and political science.

With the bulk of the discourse on Africa still coming from outside Africa and being even anti-African, we have heard very few independent, autonomous and optimistic African and Congolese voices.

Sometimes the ones we have heard were low and even inaudible. Yet, as Mkandawire suggested,

"In the impending process political and intellectual reflection on Zaire's history, current situation and prospects, the key protagonists will henceforth necessarily be Zairean".¹²²

¹¹⁵ Bakary, A.T., *La démocratie par le haut en Côte d'Ivoire*, Paris: L'Harmattan, 1992, 98-102.

¹¹⁶ See Bakary, A.T., *supra*; Benda, J., *La trahison des clercs*, Paris: J.J. Pauvert, 1965.

¹¹⁷ Sartre, J.P., *Plaidoyer pour les intellectuels*, Paris: Gallimard, Collection des Idées, 1972.

¹¹⁸ Levy, M.B.-H., *Eloge des Intellectuels*, Paris: Grasset, 1987.

¹¹⁹ See Benda, J., *La trahison des clercs...* *supra*; Caillé, A., *La démission des clercs: la crise des sciences sociales et l'oubli du politique*, Paris: La Découverte, 1993.

¹²⁰ Finkielkraut, A., *La défaite de la pensée*, Paris: Gallimard, 1987.

¹²¹ Mangu. Mbata, B., *Crise de la démocratisation au Zaïre: Eloge des Intellectuels ou Trahison des Clercs?*, unpubl. Paper read at ULK, June 1995.

¹²² Mkandawire, T., "Introduction" X.

Whatever its shortcomings and shortcomings there will be, the present is an African and Congolese voice on constitutionalism and democracy, a voice from inside Africa. This voice is not necessarily different from or louder than those that have been heard from the “masters” in African studies.

Nor is it a mere repetition of what we have read and heard about constitutionalism and democracy in post-colonial Africa.

However, it claims its own tone and in many respects, it may depart from many other voices we have heard from Western, African and Congolese scholars.

Being one voice amongst many others, it is likely to be partial and incomplete. It may provide some answers, but definitely no final answers or conclusions on constitutionalism and democracy.

1.5. Literature Review

Attempts were made to review the literature on African transitions.¹²³ One might possibly think of a literature review on constitutionalism as such, that is narrowly understood as different although closely related to democracy, a literature review on democracy itself and a literature review on constitutionalism and democracy taken altogether.

On the other hand, one could divide it into a review of the literature produced by Africanists and that by African researchers themselves.

All in all, a literature review on constitutionalism and democracy in Africa and the Congo would require not a single chapter in a thesis or a book, but several theses and volumes.

¹²³ For a survey of the earlier literature reviews and comprehensive bibliographies, see Buijtenhuijs, R. & Rijniere, E., *Democratization in Sub-Saharan Africa 1989-1992: An Overview of the Literature* Leiden: African Studies Center, 1992; Buijtenhuijs, R. & Thiriot, C., *Democratization in Sub-Saharan Africa 1992-1995: An Overview of the Literature*, Leiden: African Studies Center, 1995.

Accordingly what is suggested here is a brief intellectual history highlighting the major trends, some questions considered neglected or insufficiently tackled in the existing literature and ultimately how the proposed study may contribute to the advancement of knowledge. The available literature on the subject matter is reviewed throughout the study.

1.5.1. Brief Intellectual History and Major Trends in the Literature

First of all, it is worth emphasising four main features of the conventional discourse on constitutionalism and democracy in post-colonial Africa.

The first relates to the confusion of our two key concepts, constitutionalism and democracy, the “retreat” of legal and constitutional scholars and the impact of this on the production of knowledge. Constitutionalism and democracy are closely intertwined. However, as it appears from the topic of the study and contributions by other scholars,¹²⁴ they are not synonymous.

The second feature of the literature is its basically contradictory character. Scholars agree to disagree on constitutionalism and democracy.

Very little room is left for a common understanding or identity of views on these concepts and other related issues.¹²⁵

¹²⁴ See Olukoshi, A., “State, Conflict and Democracy...” 456; Okoth-Ogendo, H.W.O., *supra*; Rosenfeld, M., “Modern Constitutionalism as Interplay Between Identity and Diversity”, in Rosenfeld, M., (ed.), *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives*, Durham & London: Duke University Press, 1994, 3; Shivji, I.G., *Fight My Beloved Continent...* 6; Henkin, L., “A New Birth of Constitutionalism: Genetic Influences and Genetic Defects”, in Rosenfeld, M., (ed.), *op.cit.* 41; Franklin D.P. & Baun, M., (eds.), *Political Culture and Constitutionalism. A Comparative Approach*, Armonk, New York, London, England: M.E.Sharpe, 1994, 231-232; Nwabueze, B.O., *Constitutionalism in the Emergent States*, London: C.Hurt & Co, 1973, 2.

¹²⁵ See Mamdani, M., “Social Movements and Constitutionalism...” 239, 248, 249; Nyang’oro, J.E., “Introduction”, in Nyang’oro, J.E., (ed.) *op.cit.* IX; Shivji, I.G., *Fight My Beloved Continent ...* 26-69; *Idem*, “Contradictory Class Perspectives...” 255.

The third feature of the literature is its overall Afro-pessimism and Euro-centrism. Africa is generally “invented”¹²⁶ by Africanist scholars.

On the other hand, when constitutionalism and democracy are not ruled out altogether, they are presented as a questioning or a “problematic”.¹²⁷

The literature is Euro-centrist in the sense that African States and politics are generally judged against the background of Western “models”.

The analysis is either a celebration of the extent to which the model has been reproduced in the local milieu; or it is condemnation of the differences between the Western ideal and the African reality.¹²⁸

Africa is not primarily studied in terms of its own dynamics, but as an appendix or a periphery to the centre (the West) and considered valuable only by its submission to the West and its conformity to Western standards.

Afro-pessimism has resulted in a “political science of pejorative epithets,”¹²⁹ denigration and negation, which gives rise to a serious problem of validation.

The fourth feature that is closely related to the third is the “imperialism”¹³⁰ of Western social scientists who have established themselves as the “masters” in African studies. The most respected experts in African studies are not African, but Western scholars. “Authorities” have succeeded in imposing concepts, standards and paradigms in the light of which any research by African intellectuals is assessed.

¹²⁶ See Mudimbe, V.Y., *The Invention of Africa*, Bloomington: Indiana University Press, 1998.

¹²⁷ On the “Problematic” of Constitutionalism and Democracy, see Ghai, Y.P., “The Theory of the State in the Third World and the Problematic of Constitutionalism”, in Greenberg, D. *et al.*, (eds.), *Constitutionalism and Democracy...* op.cit. 186-196; Bayart, J.F., “La problématique de la démocratisation en Afrique noire”, *Politique Africaine*, No.43, 1991, 5-20; Chafe, K.S., “The Problematic of African Democracy...” 127-143.

¹²⁸ Sindjoun, L., “Politics in Central Africa...” 10.

¹²⁹ See Sindjoun, L., *supra*; Zeleza, P.T., op.cit.125.

¹³⁰ See Ake, Cl., *Social Science as Imperialism*, Ibadan, Nigeria: Ibadan University Press, 1979.

The present study is not immune thereto. The high quality and consideration of a research work generally depends on the extent to which it echoes masters' voices.

As far as constitutionalism and democracy in post-colonial Africa are concerned, the intellectual history may be divided into several phases.

In the early 1960s, the issues of constitutional rules and regimes were very well part of the academic research agenda when structural and functionalist ideas made them relevant to the study of politics. With the reign of the normative theory and its juridical approach, research tended to focus on institutions, rules and especially the rule of law. To borrow from Hyden, the politics regarding the rules of the political game was on the academic research agenda.¹³¹

Arguably, first African voices on constitutionalism and democracy came from the African Conference on the Rule of Law.

During the conference, Sir Adekunbo A. Ademola, Chief of Justice of Nigeria,¹³² dismissed the idea of Western paternity of the Rule of Law:

"It has been said that the Rule of Law is merely an Anglo-American institution; that the concept of 'Government under Law' and such phrases as the 'Supremacy of Law' are all purely Western inventions... But the Rule of Law is not a Western idea, nor is it linked up with any economic or social system. As soon as you accept that man is governed by Law and not by the whims of men, it is the Rule of Law".

The Conference also outlined the connection between rule of law, democratic representation and fundamental human rights. Summing up the work of one of the committees at the end of the Conference, Mr. Abdoulaye Wade said:¹³³

"The problem with which we were basically concerned was the question of democratic power and personal power. Our belief was that... it is essential to avoid personal power, endeavouring rather to canalise power through institutions and put as many limits on the Executive as possible".¹³⁴

¹³¹ Hyden, G., "Governance and the Reconstitution of Political Order", in Joseph, R., (ed.), *op.cit.* p. 185.

¹³² Quoted by Hinden, R., *op.cit.* 5.

¹³³ President of the Republic of Senegal at the time of writing.

¹³⁴ Abdoulaye Wade, quoted by Hinden, R., *supra*.

One of the things on which all the jurists at the Lagos Conference¹³⁵ agreed, was that there was an urgent need for an independent judiciary,¹³⁶ if the Rule of Law was to be a reality.¹³⁷

Unfortunately, the Lagos Conference did not really impact on governance in Africa and for a number of the participants and the commitment to the Rule of Law did not seem to go beyond the conference venue.

As soon as the Lagos mass was over and while some sincere participants were still busy preaching the "Lagos Good News", the Rule of Law discourse was denied in practical political life and confiscated by some civilian leaders or military officers.

The Rule of Law was rapidly reversed and replaced by the Rule of Force and Weapons. The first constitutional frameworks did not withstand the determination of some leaders to confiscate the power for themselves and to personalise it as they thought they were entitled thereto in exchange for "sacrifices" they endured for independence.

They considered themselves the founders of the new States with a particular title to rule in order to safeguard the fruit of their revolution.

¹³⁵ For a criticism of the "Law of Lagos", see Shivji, I.G., "State and Constitutionalism: A New Democratic Perspective", in Shivji, I.G., (ed.), *State and Constitutionalism...* 27. Shivji considered the Lagos perspective of democracy as a liberal and statist one, opposed to a new democratic perspective, which was in his view the popular one. Once more, he blamed his legal discipline and complained that:

"Whether by training, social status or inclination, African constitutional lawyers have uncritically operated within, and propagated, the conceptual framework handed down by Dicey, refined by De Smith and sanctified by the 'Law of Lagos'".

See later our comments on Shivji's "New Democratic Perspective".

¹³⁶ On the importance of an independent judiciary for the rule of law, Mr. H. Chtepo of Southern Rhodesia, reporting on the work of his committee, said:

"Probably the most significant thing about the Committee's deliberations was that almost all the lawyers there accepted without question the absolute need for an independent judiciary." (Quoted by Hinden, R., *op.cit.* 5.

¹³⁷ Busia, K.A., *Africa in Search...* 104.

Opposition was considered an attempt to destroy the revolution, a struggle in which they had sacrificed so much, and borne so much humiliation and deprivation.¹³⁸ Then came the turn for military intervention in politics.

Colonel Mobutu, neutralising both President Joseph Kasa-Vubu and Prime Minister Patrice Lumumba in September 1960 in the DRC, perpetrated a *coup d'état* without him exercising power directly.

On 17 December 1962, a "civilian" *coup d'état* by Mr. Mamadou Dia, President of the Council, failed to overthrow President Senghor in Senegal. Other attempts aborted in many African independent States before the military decided to be taken very seriously.

The historic leader in the business, who in all likelihood will still be in power on completion of this study,¹³⁹ is General Eyadema whose *coup d'état* in Lomé, Togo, was the first to result in the killing of an African Head of State, President Sylvester Olympio, on 13 January 1963.

¹³⁸ Nwabueze, B.O., *Constitutionalism...* 301-302. The argument of the rulers was:
 "We shall not sit by and allow others to snatch the fruit of our labour from us. Whatever amenities the people enjoy today, in the way of jobs, education, medical services, etc., they owe to us as the authors of the revolution" (Supra).

¹³⁹ President Eyadema declared after the OAU / AU summit in July 2001 in Lusaka, Zambia, that he would not stand for office during the forthcoming presidential elections set for 2003 in Togo. President Chiluba made the same statement earlier in Zambia and only mass demonstrations and opposition of some of his lieutenants forced him not to reverse his pledge. In August 2001, President Edouardo Dos Santos of Angola did the same. Decades earlier, Lieutenant General Joseph Désiré Mobutu seized power in Kinshasa following his *coup d'état* on 24 November 1965. He promised the world that he was there *just for a little five years*, the necessary time for him to bring an end to the chaos, restore order in the country and return people to work. Thirty years on, the *Guide* (Leader) - as he used to be called by sycophants - was still there and only disease (prostate cancer) and AFDL rebellion got the better of him. Some leaders such as General Ahmani Touré (Mali), Senghor (Senegal), Nyerere (Tanzania), General Aboubacar (Nigeria), Mandela (South Africa) honoured the continent by keeping their promises and voluntarily relinquishing power. However, that is still an exception to the general rule according to which power is for life. It is not said that President Eyadema who made history as the man who committed the first bloody *coup d'état* in post-colonial Africa, or President Dos Santos would not stick to their words. What is suggested is only that we should exercise caution and even positive scepticism when these words come from authoritarian or power-addicted leaders.

The example set by Mobutu, Eyadema and other historic leaders was emulated throughout the continent.¹⁴⁰

The rise and rule of constitutionalism and democracy did not go beyond independence celebrations. Time then came for the one-party and military rule.

“Strong regimes” with “strong men” to bring about peace, order and unity to their States and peoples were applauded by “democrats” from all persuasions, either from the liberal and capitalist West or from the socialist and communist East, as well as in the literature. Among the first advocates of the one-party State was Immanuel Wallerstein.¹⁴¹

Mahiou,¹⁴² as Africa’s contribution to political science also hailed the advent of one-party rule. Many other works by Africanists and African scholars were carried out or openly commissioned to celebrate one-party rule and even the *coup d’état*.¹⁴³

¹⁴⁰ The number of successful and failed or aborted *coups d’état* in post-colonial Africa amounts to hundreds and hardly a handful of States may be considered an exception. See Decalo, S., *Coups and Army Rule*, New Haven & London: Yale University Press, 1976; Amissah, A. “Constitutionalism and Law in Africa”, in Ronen, D., (ed.), *supra*. According to Amissah, (op.cit.47):

“Of about fifty black African states, only sixteen, that is less than a third, have never had a successful coup since independence.”

¹⁴¹ Wallerstein (*Africa: The Politics of Independence*, quoted by Nwabueze, B.O. *supra*, 305) praised the African one-party States as being

“integrating organisms...carefully built conditions, in need of constant nurture, whose primary aim is to keep the country together.”

¹⁴² Mahiou, A., *L’Avènement du parti unique en Afrique noire: l’expérience des Etats d’expression française*, Paris: L.G.D.J., T.3, 1969.

¹⁴³ For recent explanations of African *coups d’état*, Jenkins, J.C., and Kposowa, A.J., “Explaining military coups d’Etat: Black Africa, 1957-1984”, *American Sociological Review* 55, 6, 1990, 861-875; Johnson, T.H., McGowan, P. & Slater, R.O., “Explaining African military coups d’état 1960-1982”, *American Political Science Review* 78, 3, 1984, 622-640; Johnson, T.H., “Explaining African coups d’état”, *American Political Science Review* 80, 1, 1986, 225-232. For a comprehensive literature review, see Harbeson, J.W., (ed.), *The Military in African Governance*, New York: Praeger 1987; Luckham, R., “The Military, Militarisation and Democratisation in Africa: A Survey of Literature and Issues”, in Hutchful, E. & Bathily, A., (eds.), *op.cit.* 1-45.

Much of the Africanist and African literature in the mid-and late 1960s and the early 1970s was therefore to praise military and one-party regimes as a manifestation of an “African democracy” or “African constitutionalism”, as if Africa only deserved second zone constitutionalism and democracy.¹⁴⁴

To the general cult of authoritarianism and amid the literature of sycophancy to justify, accompany and consolidate it in the 1960s, Busia’s *Africa Search of Democracy* is one of the few exceptions.

On a continent where authoritarianism and monopartyism already entered their golden age, Busia insisted on the Rule of Law¹⁴⁵ and was one of the earlier protagonists of African integration, as he stressed the importance of union and world brotherhood¹⁴⁶ in sustaining constitutionalism and democracy in Africa.

Decades before the “African Spring”,¹⁴⁷ the Ghanaian scholar heralded the continental struggle for constitutionalism and democracy:

“‘Freedom!’ was the battle cry against colonialism in Africa; the next stage is to free the continent from oppressive government”¹⁴⁸.

From a public law perspective, other exceptions include the work by Ghai, McAuslan,¹⁴⁹ and Nwabueze.¹⁵⁰

Ghai and McAuslan pondered on constitutionalism beyond Kenya to embrace the whole continent.

¹⁴⁴ See our comments on these issues in Chapter 3 of the study.

¹⁴⁵ Busia, K.A., op.cit. 91-110.

¹⁴⁶ Idem, 144-161.

¹⁴⁷ Translation of the French expression *Le Printemps de l’Afrique* used by Bourgi, A. & Casteran, C. (Paris: Hachette, 1991) to refer to the wind of democratisation blowing on much of the continent in the late 1980s.

¹⁴⁸ Busia, K.A., op.cit. 172.

¹⁴⁹ Ghai, Y.P. & McAuslan, J.P.W.B., *Public Law and Political Change in Kenya*, Nairobi: Oxford, 1970.

¹⁵⁰ Nwabueze, B.O., *Constitutionalism in Emergent States...* supra.

They regretted that in the 1960s, lawyers “tended to eschew politics...and concentrated instead on a broad survey of the text of the Constitution, other relevant laws and the few cases...in the courts”¹⁵¹.

Very much concerned with the erosion of the foundations and principles of constitutionalism in the developing world in general, Ghai and McAuslan held:

“Politicians in developing countries are yet to develop the right attitude towards the constitution; they are yet to learn to regard and respect it as an ‘umpire above the political struggle,’ and not as ‘a weapon’ in that struggle which can be used and altered in order to gain temporary and passing advantages over one’s political opponents.”¹⁵²

Building on the foundations lay down by Ghai and McAuslan, one of the most remarkable and courageous intellectual contributions to constitutionalism and democracy in Africa in the 1970s came from the Nigerian constitutional lawyer Nwabueze.

In comparative African studies, *Constitutionalism in Emergent States*, which preceded two other excellent studies,¹⁵³ was and still remains an immense contribution to the study of constitutionalism and democracy in post-colonial Africa.

The picture of constitutionalism painted by Nwabueze was one of failure, somewhat unduly pessimist if not altogether too somber, but the Nigerian scholar was right to hold that although there were many pitfalls at independence one yet expected Africa to be a constitutional paradise.¹⁵⁴

¹⁵¹ Ghai, Y.P. & McAuslan, J.P.W.B., quoted by Okoth-Ogendo, op.cit. 3.

¹⁵² See Ghai, Y. P. & McAuslan, J.P. W.B., op.cit. 511; Nwabueze, B.O., *Constitutionalism...* 301.

¹⁵³ Nwabueze, B.O., *Presidentialism in Commonwealth Africa*, St Martin’s Press, 1974; idem, *Judicialism in Commonwealth Africa*, London: C.Hurst & Co, 1977.

¹⁵⁴ Nwabueze, B.O., *Constitutionalism...* 300, 301.

By the end of the 1970s, the World Bank, mandated by its governors, produced a major policy document, the Berg Report, named after its principal author, the American economist Elliot Berg.

The Berg Report was to serve as a guide for economic reform programmes in Africa during the 1980s. Structural Adjustment Programmes (SAPs), particularly in the public sector, became necessary in almost all sub-Saharan African countries.

Earlier literature on SAPs was commissioned or funded by the World Bank and the IMF to praise, justify and accompany their programmes, presenting them as a panacea for the continent, the "miracle pill" to save African economies and bring about prosperity and development.

The World Bank and IMF massively recruited in the academia and secured the services of many African scholars as "SAPs Professors", who moved in, became their errand boys and embarked on a non-stop campaign to teach us that there was no other alternative.

African peoples were requested to swallow the "magic pill", however bitter it might be, and to "tighten their belts".

It was like a collective enchantment and the very few voices that warned against the pill went unheard and were very often silenced.

There was a huge amount of literature on the World Bank and IMF-sponsored SAPs and their impact on constitutionalism and democratisation in Africa.¹⁵⁵

¹⁵⁵ See Haggard, S. & Kaufman, R., (eds.), *The Politics of Economic Adjustment: International Constraints, Distribution, and the State*, Princeton, New York: Princeton University Press, 1992; Idem 1992, "Economic Adjustment and the Prospects for Democracy" in Haggard, S. & Kaufman, R., (eds.), supra; Hutchful, E., "Adjustment in Africa and Fifty Years of the Bretton Woods Institution: Change or Consolidation?" *Canadian Journal of Development Studies*, Vol.16, 1995; Ihonvbere, J., "Economic Crisis, Structural Adjustment, and Social Crisis in Nigeria", *World Development*, Vol.21, No.1, 1993, 141-153; Gibbon, P. & Olukoshi, A., (eds.), *Structural Adjustment and Socio-economic Change in Sub-Saharan Africa*, Uppsala: Scandinavian Institute of African Studies, 1996; Gibbon, P., Bangura, Y. & Ofstad, (eds.), *Authoritarianism, Democracy, and Adjustment: The Politics of Economic Reform in Africa*, Uppsala: Scandinavian Institute of African Studies, 1992; Gibbon, P., "Structural Adjustment and Structural Change in Sub-Saharan Africa: Some Provisional Conclusions" in Gibbon, P. & Olukoshi, A., (eds.) supra; Mkwandawire, T., "Adjustment, Political Conditionality, and Democratization in Africa" in Comia, A. &

The bulk of the early conventional discourse on SAPs favoured "dictatorships of development".¹⁵⁶ The "developmental State"¹⁵⁷ had to be authoritarian. Many political scientists endorsed the idea of a developmental or modernising oligarchy.¹⁵⁸

At this historical juncture, the State, as an undemocratic and "strong" State, was still held in high esteem, as its armed forces and authoritarian governance could help administer the pill and implement the programme without any discussion with the peoples.

Genuine democratisation was considered the necessary and natural product of submission to the rationality of the world market.

According to Amin, a simple dual equation was deduced from that logic: "capitalism or liberalism is democracy and democracy is capitalism or liberalism".¹⁵⁹

As the 1970-decade was drawing to an end, the inability of African governments to realise their developmental objectives had become manifestly evident.

Helleiner, G., (eds.) *From Adjustment to Development in Africa: Conflict, Controversy, Consensus*, London: Macmillan, 1994, 155-173; idem, "Ajustement, conditionnalités politiques et démocratisation en Afrique", in Chole, E. & Ibrahim, J., (eds.), op.cit. 81-99.

¹⁵⁶ See Gregor, A.J., *Italian Fascism and Developmental Dictatorship*, Princeton: Princeton University Press, 1974, 3; Nicol, D., "African Pluralism and Democracy", in Ronen, D., (ed.), op.cit. 165; Sklar suggested "developmental democracy or dictatorships" (Sklar, R.L., "Developmental Democracy", in Nyang'oro, J.E., (ed.), op.cit. 1-30)

¹⁵⁷ See Sorensen, G., "Democracy and the Developmental State", in Nyang'oro, J.E., (ed.), op.cit. 33-36; White, G., "Developmental States and Socialist Industrialization in the Third World", *Journal of Developmental Studies* 21,1 October 1984, 84.

¹⁵⁸ See Huntington, SP, "Will More Countries Become Democratic?" *Political Science Quarterly*, 99, 2, Summer 1984, 2; Gregor, A.J., op.cit.3; Idem, *Democracy, Dictatorship, and Development: Economic Development in Selected Regimes of the Third World*, New York: St Martin's Press, 1967; Nyang'oro, J.E., "Introduction" X; Sandbrook, R., "Liberal Democracy in Africa: A Socialist - Revisionist Perspective", in Nyang'oro, J.E., (ed.), op.cit. 140; Sklar, R.L., "Developmental Democracy..." 2; Sorensen, G., "Democracy and the Developmental State..." 31-60.

¹⁵⁹ See Amin, S., "The Issue of Democracy..." 62. This was, however, a too radical presentation of the liberal thesis. See also Mkandawire, T., "Crisis Management..." 120.

The main objectives pursued by Western countries and international organisations, namely economic development and opening up of the market, were not achieved.

The results of World Bank and IMF-inspired politics of austerity were hardly convincing that loans granted were going to be repaid with the expected interest. On the other hand, African peoples who were victims of these policies had started crying and their voices could no longer be silenced.

In Zaire, for instance, Mobutu set a goal known as "The '80' Objective", which was captured in a slogan of the single party, the MPR. According to the demagogic slogan, Zaire was to be the first, the second or, at least, the third developed country in the world in 1980.

The fourth place was categorically opposed. However, as the Zairean people were preparing to enter the 1980s, there was no visible sign of the "promised paradise".

The paradise on earth was only created for Mobutu and his "*dinosaurs*", as the single-party bosses came to be known by the masses of the people.¹⁶⁰

In Zaire like many other African States, as Shivji aptly put it, after "eating" the fruit of independence, the "*Wa Benzi*"¹⁶¹ leaders from the single party were already busy "eating or squandering independence itself".¹⁶²

Hence the "insurrection" or the "reawakening" of mass politics with democracy as central demand.¹⁶³

¹⁶⁰ The masses referred to giant carnivorous and voracious animals of the prehistoric era implementing the "Politics of the Belly" in the country that was compared to a nature reserve. Party bosses surrounding Mr. Mobutu, who was familiarly dubbed "The Big Leopard" or "The Eagle" to which he compared himself, had to "eat" their people to survive. "Dinosaur", "Leopard", "Cat", or "Eagle" therefore became the Zairian version of Hobbes's Leviathan.

¹⁶¹ Meaning, in Swahili, "those who ride Mercedes Benz", see Shivji, I.G., *Fight My Beloved...* 42-43.

¹⁶² Shivji, I.G., *idem*.

¹⁶³ *Idem*, 36-46.

To fit the new state of affairs, both the political, economic and intellectual discourse underwent tremendous change.

African scholars were generally against liberalism or capitalism,¹⁶⁴ as implied in the logic of modernisation and dependence, and voiced criticism against SAPs.

SAPs were held to be anti-democratic, anti-African peoples, anti-development, imperialist, and accused of fostering crises and conflicts on the continent.

However, scholars diverge in their overall assessment of SAPs, some being more critical than others.

Mkandawire held that there is a general agreement that SAPs were detrimental to development and also to democracy, as these programmes were to undermine people in the name of the capital and undemocratic.¹⁶⁵

¹⁶⁴Liberalism came to be regarded as inimical to democracy. Can one speak of a "Capitalist democracy"? Owusu (M., "Democracy and Africa..." 276) quoted with approval Milibrand according to whom capitalist democracy

"is a contradiction in terms, for it encapsulates two opposed systems. One the one hand there is capitalism, a system of economic organization that demands the existence of a relatively small class of people who own and control the main means of industrial, commercial, and financial activity, as well as a major part of the means of communication; these people thereby exercise a totally disproportionate amount of influence on politics and society both in their own countries and in lands far beyond their own borders. On the other hand there is democracy, which is based on the denial of such preponderance, and which requires a rough equality of condition that capitalism ...repudiates by its very nature."

The dominant literature contends that the power of capital excludes or opposes the government of the people overwhelmingly outside the capital. According to Amin ("The Issue of Democracy..."62), "For our democracy to take root, it must, from the start, take a position that goes beyond capitalism." (Amin, S., "The Issue of Democracy..." 70) According to Sandbrook (R., "Liberal Democracy in Africa..."152), "Capitalism is far from an unmitigated blessing for democracy." Opposed to this view are liberal scholars such as Charles Lindblom (Quoted by Sangmpam, S.N., "The Over-Politicized State..."81) who held that "However poorly the market is harnessed to democratic purposes, only within market-oriented systems does political democracy arise".

¹⁶⁵ Mkandawire, T., "Crisis Management..." 121.

In Mkandawire's view, SAPs represented not only the liberalisation of domestic markets but also a submission to the logic of global markets and "this impinges on national sovereignty understood as the ability of the national governments to pursue socially-valued objectives such as growth and equity."¹⁶⁶

In its contribution, Bangura questioned received theories that attempted to establish a positive relationship between structural adjustment and democracy."¹⁶⁷

According to Lisa Laasko and Olukoshi,¹⁶⁸ SAPs had several dire consequences, including undermining state capacity and legitimacy, and reinforcing structures of authoritarianism. Authoritarianism rather than democracy was the flip side of structural adjustment.¹⁶⁹

Structural adjustment was regarded as a stratagem to get African countries to meet debt-repayment schedules while subjecting the masses of the people to further misery through currency devaluation, retrenchment in public employment, elimination of subsidies on items of mass consumption, and the imposition of fees for many social services.¹⁷⁰

On the other hand, there were some scholars who credited SAPS with some positive results.

Joseph admitted that SAPs had negative effects on African countries and peoples but consider them a necessary evil since, according to him, "It is because and thanks to SAP, its dire effects, lack of support that led to revolt against authoritarian rule."¹⁷¹

¹⁶⁶ Mkandawire, as quoted by Van de Walle, N., "Globalization and African Democracy" 97.

¹⁶⁷ Bangura, Y., "Authoritarian Rule and Democracy..." 97.

¹⁶⁸ Quoted by Joseph, R., "The Reconfiguration of Power..." 65-66.

¹⁶⁹ Olukoshi, A., quoted by Joseph, R., "The Reconfiguration of Power..." 65.

¹⁷⁰ Joseph, R., "The Reconfiguration ..." 64.

¹⁷¹ Idem.

In the same vein, Bates argues that “externally imposed reforms of these (African) economies devastated patronage networks and made possible a retreat from single-party rule.”¹⁷²

With the failure of “dictatorships of development” and the pro-SAPs discourse running out of tune came the famous discourse on “governance”,¹⁷³ which did not necessarily mean “democratic governance”,¹⁷⁴ as what matters for financial institutions and their underlying capitalist or liberal ideology was and unfortunately still is less democracy than business.

When it was conceived, “governance” did not even refer to “good governance”. It is only in a paper presented at a Bank-sponsored conference on development economics in 1992 that Boeninger suggested that governance was the same as “good government”.¹⁷⁵

This new line of policy brought about a divorce between the World Bank, the IMF, and their “owners” (Western and rich countries) on the one hand, and many African States and their authoritarian leaders on the other.

From statist in the 1960s and 1970s, the discourse became frankly anti-statist and tended to be pro-democracy. Subsequently, calls were made for less of State.

¹⁷² Bates, R.H., quoted by Joseph, R., “State, Conflict and Democracy...” 6-7.

¹⁷³ See World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Development*, Washington, DC: World Bank, 1987.

¹⁷⁴ For a criticism of World Bank and IMF’s concept of governance, see Hyden, (Hyden, G., “Governance and the Reconstruction of Political Order”, in Joseph, R., (ed.), op.cit.184) when he wrote:

“The language of governance is typically applied by these institutions to serve their own narrow purposes. For example, in its 1989 report on the prospects for development sub-Saharan Africa, the World Bank defined governance with reference to the exercise of political power to manage a nation’s affairs.”

In 1992, the World Bank used governance to refer to the practical exercise of power and authority to conduct public affairs. According to Hyden, it was clear that in such terms, “governance could refer to just anything political. It had no other value than allowing the Bank to make reference to things political”.

¹⁷⁵ See Boeninger, E., “Governance and Development: Issues of Governance”, *Proceedings of the World Bank Annual Conference on Development Economics*, Washington, DC: World Bank, 1992, 24-38; Hyden, G., op.cit. 184.

Efforts were made to dismantle the African State, which in theory and practice, was, and to a large extent continues to be seen, as the main obstacle to growth, development, and liberty on the continent.¹⁷⁶ How did the social sciences scholarship adapt to the changing situation?

Olukoshi noted that “the ruling intellectual vague was the adoption of the zealous and decisively one-sided anti-statism of the neoliberals”.¹⁷⁷

This discourse dramatically contrasted with that of the modernisation and adjustment era when the state was considered to be instrumental for modernisation or development.

Like the earlier pro-SAPs discourse, the anti-statist discourse of good governance was mainly commanded or commissioned by developed countries and the International Financial Institutions (IFIs), namely the World Bank and IMF.

It sounded like African and Africanist scholars condemning the African State and politics just because the West said they were no longer a couple.

Many of them only woke up in the 1980s and 1990s to find out the collapse, failure, weakness, and underdevelopment of the state or even statelessness in Africa, as if statehood was much better and the state was well developed under the one party or military rule.

The anti-statist discourse of the 1980s and 1990s was also a contradictory one and to some extent lacking in consistency.

¹⁷⁶ Olukoshi, A., “State, Conflict, and Democracy in Africa...” 460.

¹⁷⁷ *Idem.*

While some celebrated the “crisis”,¹⁷⁸ “weakness”,¹⁷⁹ “disintegration”,¹⁸⁰ “failure”,¹⁸¹ “decline”,¹⁸² “fall”,¹⁸³ “collapse”,¹⁸⁴ “statelessness”,¹⁸⁵ “quasi-statehood”¹⁸⁶ in Africa or the “colonial”,¹⁸⁷ “underdeveloped”,¹⁸⁸ “unfinished”,¹⁸⁹ “shadow”,¹⁹⁰ or “atrophied”¹⁹¹ African State, some others or the same were surprised that the weak and collapsed African States still survived,¹⁹² or persisted.¹⁹³

¹⁷⁸ Olukoshi, A & Laasko, L., “The Crisis of the National-State Project in Africa” in Olukoshi A & L. Laakso, (eds.), *supra*.

¹⁷⁹ See Jackson, R.H. & C.G. Rosberg, “Why Africa’s Weak States Persist: The Empirical and the Juridical in Statehood”, *World Politics*, Vol.35, 1982, 1-24; Idem, “Why Africa’s Weak States Persist” in Atul Kohli (ed.) *The State and Development*, Princeton, NJ: Princeton University Press, 1980, 259-282; Migdal, J., *Strong Societies and Weak States: State – Society Relations and State Capabilities in the Third World*, Princeton, NJ: Princeton University Press, 1988.

¹⁸⁰ See Villalon, L. & Huxtable, P., (eds.), *Critical Juncture: The African State Between Disintegration and Reconfiguration*. Boulder, Co: Lynne Rienner Publishers, 1997; Zartman, I.W., (ed.), *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, Boulder, CO: Lynne Rienner Publishers, 1995; idem, *Collapsed States*, Boulder: Lynne Rienner Publishers, 1999; Mazrui, A., “Towards a Benign Recolonisation of the Disintegrating States of Africa”, *Codesria Bulletin*, vol.2, 1995.

¹⁸¹ See Herbst, J., “Responding to State Failure in Africa”, *International Security*, vol.21 (Winter) 1996, 120-144; Joseph, R., “Failed States in Africa”, *Paper* presented to the Joint Seminar on Political Development, Harvard and MIT, November, 1993; Wunsch, J.S. & Olowu, D., *The Failure of the Centralized State: Institutions and Self-Government in Africa*, Boulder, CO: Westview Press; Clapham 1990, 271; Young, C., “The Third Wave of democratization...” in Joseph, R., (ed.), *op.cit.* 24-25; Ronen, D., “The State and Democracy in Africa”, in Ronen, D., (ed.), *op.cit.* 192.

¹⁸² Young, C. & Turner, T., *The Rise and Decline of the Zairean State*, Madison: University of Wisconsin Press, 1985.

¹⁸³ See Joseph, R., “The Reconfiguration of Power in Late Twentieth Century Africa” 87; Joseph, R., *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic*, New York & Cambridge, England: Cambridge University Press, 1987.

¹⁸⁴ See Zartman, I.W., *supra*; Ottaway, M., “Ethnic Politics in Africa: Change and Continuity”, in Joseph, R. (ed.), *op.cit.* 314-315.

¹⁸⁵ See Joseph, R., “The Reconfiguration ...” 58, 60; Jackson, R.H. & C.G. Rosberg, *op. cit.*; Widner, J.A., “States and Statelessness in Late Twentieth-Century Africa”, *Daedalus*, Vol.124, No.3; 1995, 129-154; Young, C., “Zaire, Is There a State”, *unp. Paper* for the Annual Conference of the Canadian Association of African Studies, Quebec, 1983.

¹⁸⁶ See Clapham, C., *op.cit.* 271; Jackson, R. H., *Quasi-States: Sovereignty, International Relations, and the Third World*. Cambridge, England: Cambridge University Press, 1990.

¹⁸⁷ See Young, C., *The African Colonial State in Comparative Perspective*, New Haven, CT: Yale University Press, 1994.

¹⁸⁸ See Médard J.F., “The Underdeveloped State in Tropical Africa: Political Clientelism or Neo-Patrimonialism?” in Clapham, C., (ed.), *Private Patronage and Public Power: Political Clientelism in the Modern State*, Boulder: Pinter 1982; idem, “L’Etat sous-développé au Cameroun”, *Politique Africaine*, 1977, 35-84.

¹⁸⁹ Whitaker, S., “The Unfinished State of Nigeria”, *Worldview*, Vol.27, No.3, 1984.

¹⁹⁰ Reno’s concept, see Joseph, R. *op.cit.* 71; Chabal, P. & Daloz, P.J., *Africa Works. Disorder as Political Instrument*, London: James Currey, 1999, 11.

¹⁹¹ Joseph, R., “The Reconfiguration of Power...” 68.

In the meantime, some scholars saw the State as both "Problem and Solution",¹⁹⁴ while others were already thinking about "Bringing the State Back in".¹⁹⁵

The DRC, our study case, was presented as an illuminating and paradigmatic case of the "failed", "disintegrating" and "collapsed" State.¹⁹⁶

In 1983, Crawford Young, undoubtedly one of the most famous Africanist experts on the Congo,¹⁹⁷ gave his paper the questioning title: "Zaire, is there a State?"¹⁹⁸

¹⁹² See Clapham, C., *Africa and the International System: The Politics of the State Survival*, New York: Cambridge University Press, 1996; Quantin, P., "L'Afrique dans la guerre: les Etats-fantômes ne meurent jamais", *African Journal of Political Science*, Vol.4, No.1, December 1999, 106-125.

¹⁹³ Jackson, R.H. & Rosberg, C.G., supra 1980 & 1982.

¹⁹⁴ Evans P, "The State as Problem and Solution: Predation, Embedded Autonomy, and Structural Change" in Haggard, S. & Kaufman, R., (eds.), supra.

¹⁹⁵ Evans P, Rueschemeyer, D. & Skocpol, T., *Bringing the State Back in*, New York: Cambridge University Press, 1985.

¹⁹⁶ See Zartman, I.W., (ed.), supra; Sindjoun, L., "Politics in Central Africa..." op.cit. 11.

DRC, formerly Zaire, was shortlisted with Angola, Chad, Ethiopia, Mozambique, Somalia, and Sudan as "failed and collapsed States" (see Joseph, R., "The Reconfiguration of Power...", op.cit. 58, 68-80: "State disappearance").

"Discussing the Democratic Republic of Congo" (*Paper presented at CODESRIA's 9th General Assembly on 'Globalisation and Social Sciences in Africa', Dakar, Senegal, 14-18 December 1998, 3*), Mamdani also admitted that "The Congo is often held up as an example of this."

In 1993, Joseph wrote:

"There are cases in which something calling itself the 'state' still stands but is unable to conduct any of the normal functions of statehood. Zaire is not the only country in which the 'state' disappears a short drive outside its capital or the area of residence of its presidency. Where civil servants are irregularly paid, and funds for normal functions are absent, government offices may exist in various localities but nothing of consequence takes place within them. The governing structures of the state have thus joined the hospitals and infirmaries that lack medicines and equipment and schools that lack books and chairs... In addition to the 'failed or collapsed states,' there are many cases in Africa of the advanced erosion or atrophy of the state." (Joseph, R., "The Reconfiguration of Power..." 68)

¹⁹⁷ His writings on the Congo include *Introduction à la politique congolaise* (Translated from English by P. Duchesne), Bruxelles: Centre de Recherche et d'Information Socio-Politiques (C.R.I.S.P), 1968; *Introduction à la politique congolaise*, 2 ed., Kinshasa: PUZ, 1979; *The Congo: Background to Independence*, Johannesburg: University of the Witwatersrand, 1966; *Post-independence Politics of the Congo*, Johannesburg: University of the Witwatersrand, 1965; *Politics in the Congo: Decolonization and Independence*, Princeton, N.J.: Princeton University Press, 1965.

¹⁹⁸ Young, C., "Zaire, is there a State?" *Conference Paper*, supra.

In 1985, he concluded with Turner on the “decline of the Zairean State”.¹⁹⁹ Ten years later, Zartman kept Zaire in the top five “Collapsed States”.²⁰⁰

The State collapse and disengagement theories brought about an intellectual shift from State to civil society in the literature.²⁰¹

Scholars applauded the “retreat of the state” and the emergence of what was assumed to be elements of a vigorous and self-reliant civil society.²⁰²

Yet, the State is still there. Despite wars and rebellions raging on the continent of allegedly “collapsed States”, the state did not wither away in Angola, Congo-Brazzaville, Central African Republic, Liberia, Somalia, Sierra Leone, or the DRC, to name but a few. It is even unlikely that some African States will disappear in the short run in the way they are expected to do, as a result of rebellions or annexation by other States.

On the contrary, while scholars and Western politicians were celebrating the “collapsed States”, a new State came into being, born from another without the latter disappearing.²⁰³

On State “disappearance” in Africa, Western and African analysts certainly failed in the same way as their Marxist-Leninist colleagues who heralded the withering away of the State.²⁰⁴

¹⁹⁹ Young, C. & Turner, T., *The Rise and Decline of the Zairean State...*, supra.

²⁰⁰ Zartman, I.W., supra.

²⁰¹ See Lewis, P., “Political Transition and the Dilemma of Civil Society in Africa”, *Journal of International Affairs*, Vol.41, No.1, 1992: 31-54; Monga, C., “Civil Society and Democratization in Francophone Africa”, *Journal of Modern African Studies*, Vol.33, No.3, 1995: 359-379.

²⁰² Joseph, R., “Reconfiguration ...” 68.

²⁰³ That is the case of Eritrea, which was born from Ethiopia and achieved fully-fledged statehood with membership of the OAU, the UN and many other international organisations.

²⁰⁴ According to Marx, the State as an instrument of oppression in the hands of the *bourgeois* minority was first to be confiscated by the *Proletariat*. The *Proletariat* would exercise a dictatorship to end with the bourgeoisie, suppress private ownership of production means and create the conditions for a communist society where there would no more be place for the State and anyone could enjoy all rights and goods depending on needs.

When by intellectual mercy the State is not declared altogether failed, collapsed, shadow or non-existent, it is found to be in conflict with either the civil society or the citizenry.

The empirical and political scientist theories of State collapse or statelessness that managed to hijack the discourse on state and democracy in Africa proved wrong.

So did the theory of State-Society struggle,²⁰⁵ alleging that citizens were disengaging from the state and the African State was running without citizens.²⁰⁶

It is worth stressing that Western scholars of repute like Maurice Duverger earlier levelled a great deal of criticism against the schizophrenic character of Western democracy.

According to the leading French constitutional lawyer, "democracy without people" was the second face of Janus-democracy in the West.²⁰⁷

On the other hand, the DRC case, for instance, does not teach that the Congolese people have been disengaging from the state. On the contrary, we learnt that the more the existence of the country as a whole was threatened, the more the people engaged in rebuilding and restoring it or safeguarding its territorial integrity.

²⁰⁵Callagy, T., *The State-Society Struggle: Zaire in Comparative Perspective*, NY: Columbia University Press, 1984; Migdal, J., *supra*; Rothchild, D. & Chazan, N., (eds.) *Prekarious Balance: State and Society in Africa*, Boulder, CO: Westview Press, 1988.

²⁰⁶Azarya, V. & Chazan, N., "Disengagement from the State in Africa: Reflections on the Experience of Ghana and Guinea" *Comparative Studies in Society and History*, Vol.29, No.1, 1987, 105-131. Ayoade J, "States Without Citizens: An Emerging African Phenomenon" in Rothchild, D. & Chazan, N., (eds.), *supra*.

²⁰⁷See Duverger, M., *La démocratie sans le peuple*, Paris: Armand Colin, 1976; *idem*, *Janus, les deux faces de l'Occident*, Paris: Fayard, 1972). Recent elections in Europe and the USA, for instance, have been characterised by a decreasing turn-out with people manifesting a great fatigue and indifference *vis-à-vis* the things political and the body politics. Fewer and fewer people are interested in politics. Yet scholars who referred to "Disengagement from the State" or "States Without Citizens" in Africa never used the same impressive terminology about American and European States, politics and citizens.

Our major problem with empiricist theoreticians of state collapse or failure or disengagement pundits is that their theories were based on faulty premises while at worst ignoring or at best disregarding both constitutional and international law. The problem is twofold.

First, they failed to capture the very concept of the allegedly collapsing or non-existent state or from which citizens were disengaging. One might agree with Jackson and Rosberg that there is something empirical and juridical in statehood.²⁰⁸ However, the State is predominantly a legal concept and not an empirical or sociological one.

The traditional criteria for statehood are described in the Montevideo Convention of 1933, which provides:

“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.”²⁰⁹

Accordingly, population, territory, government and sovereignty or independence which confers the capacity to enter into relations with other states are components or constitutive of statehood. When they speak of state collapse, failure, state without citizens or from which citizens are disengaging, scholars cannot clearly say whether it is population, territory, government or sovereignty that has failed or collapsed, from which there is a disengagement, and who is disengaging.

²⁰⁸ Jackson, R.H. & C.G. Rosberg, “Why Africa Weak States Persist: The Empirical and...”1-24.

²⁰⁹ The Montevideo Convention of 1933, quoted by Dugard (Dugard, J., op.cit. 72). According to the leading South African international lawyer (at 72, Footnote 8),

“Although only fifteen Latin American states and the United States are parties to this Convention, it is generally accepted as reflecting the requirements of statehood under customary international law. It also received support from Opinion 1 of the Arbitration Commission established in 1991, under the chairmanship of Mr. Badinter of France, to advise the European Community on legal problems arising from the dissolution of Yugoslavia. The Commission stated ‘that the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty’.”

“Collapsed States” in Zartman’s words does not necessarily mean the same as Jackson and Rosberg’s “Quasi-States” or “Weak States”.

Among political scientists, there is a great deal of confusion about the criteria for statehood.²¹⁰

What is referred to is sometimes the “territory”, very often the “government”²¹¹ of the State and seldom its “capacity to inter into relations with other States” or “sovereignty”²¹² or its population.²¹³

Taken individually, none of these components would by itself make a state. Inversely, there cannot be a state without population.

A state without citizens is an oxymoron, a contradiction in terms. Even narrowly conceived and reduced to the component “government”, it would be hard to defend the thesis of “State without citizens” or “state-society struggle”.

²¹⁰ Ronen (See Ronen, D., “The State and Democracy...”194) also denounced the confusion: “Although African States are often said to be unstable, it is their governments that actually are.” However, Ronen’s own conception of the State is contentious:

“The word ‘State’ should not be used for both the governing and the governed... it should be used either for the government or for the territory and population, or else the word ‘State’ should not be used at all.” (Ronen, *supra*, 195-196)

²¹¹ The confusion is obvious in the description of ‘failed or collapsed states’ made by Joseph in 1993 and referred to earlier (Joseph, R., *op.cit.* 68).

²¹² Yet, one could also think of “State collapse” based on “sovereignty” since very few states in the world would qualify as sovereign and developing countries are even less sovereign than others. About the developed countries, one may also ask what remains of European Union member States taken individually in terms of sovereignty.

²¹³ Arguably, with the devastating effects of HIV / AIDS, it is very likely that theoreticians will very soon base the theory of state collapse on the “collapsing” populations of African States.

The reason is that those citizens who are allegedly the beneficiaries of the "politics of the belly",²¹⁴ "prebendal politics",²¹⁵ "corrupted"²¹⁶ or "predatory" rule²¹⁷ or of the "criminalisation" of the State,²¹⁸ or those for whom rulership appears to be an exercise in "how to ruin a country",²¹⁹ would die for their "State" or at best defend it at all costs.

²¹⁴ Bayart J.F. *The State in Africa: The Politics of the Belly*, New York: Longman, 1993.

According to Bayart, "politics" in Africa is all about feeding the "belly". Based on expressions that are generally used in Cameroon and many other African States in relation to "politics", Bayart's theory is euro-centrist and Afro-pessimist. The French scholar maintains that the main goal pursued by Africans when they engage in politics is to live (oneself and his small family) and let live (parents or large family, ethnic group, clients, friends...). Politics revolves around material survival and honours and mostly around the belly. Men in power easily distinguish themselves by the size of their bellies. The fatter in power, the thinner once out or cut from the "dairy cow". The situation is worse in our developing and poor countries. However, even in "democratic" and rich countries, politics is also plagued with embezzlement, corruption and scandals as demonstrated by scandals within the European Union in the late 1990s. These scandals involved former members of the European Commission, including a former French Prime Minister. Mr. Roland Dumas, a former French Foreign Affairs Minister under President François Mitterrand and at the time of his arrest President of the Constitutional Council, that is the third in protocol after the President of the Republic and the President of the Senate, was also sentenced to prison alongside several other former French ministers. A French court was fighting to obtain a testimony from Mr. Chirac, the French President, also involved in a financial scandal when he was the mayor of Paris. Against this background, Bayart cannot convince us that politics in the USA, Europe or in France, his home country, excludes the "belly" or is only for honours without any expected or related material and financial gains. There is some truth in Bayart's theory, but such a conception of politics may be insulting of African peoples (excluding leaders involved who deserve it) and traditions. It is not based on African history or a conception of power widely shared by African traditional communities. In traditional Africa, power was not about accumulation of wealth for personal interest. The chief was there firstly to serve his people and not himself. He was both the master and the servant. He could own and possess everything, but as the guardian, distributor and manager for the best interest of his population. Hence African soil was not fertile in producing capitalist and bourgeois managers. Accumulation for personal interest is a recent phenomenon that is closely linked to the advent of colonialism and capitalism on the continent. To some extent, it is also a colonial legacy. The late Zairean (Congolese) President Mobutu used to say that "corruption" was unknown in many African languages and any way it involved at least two parties, the one who corrupts and the other who is corrupted. Accordingly, if African leaders were to be blamed for corruption, those who corrupt them, implying Western leaders and capitalists searching for big investments in African countries were the first culprits. Unfortunately, in much of the Western literature blaming Africa, it sounds like Westerners do not have a "belly" in Bayart's conception of the term.

²¹⁵ See Joseph, R, supra, 87; Bayart, J.F., supra; Mbembe, A., "Une économie de prédation: les rapports entre la rareté matérielle et la démocratie en Afrique sub-saharienne", *Foi et Développement*, 1996; Médard, J.F., "L'Etat patrimonialisé", *Politique Africaine*, Spécial 10e Anniversaire, Karthala, No.39, 1990, 25-36.

²¹⁶ William, R., *Corruption and State Politics in Sierra Leone*, Cambridge, England: Cambridge University Press, 1995; Mbembe, A "Pouvoir, Violence et Accumulation" *Politique Africaine*, Vol.39, No.24, 1990, 7-24.

²¹⁷ See Darbon, D., "L'Etat prédateur", *Politique Africaine*, No. 39, 1990, 37-45; Fatton, R., *Predatory Rule: State and Civil Society in Africa*, Boulder, Co: Lynne Rienner Publishers, 1992; Shafer, D. M., "The Perverse Paradox of Peace and the Predatory State", *Paper* prepared for the American Political Science Association Annual Meeting, Washington, DC, September 2-5, 1993; Evans, P., "The State as Problem and Solution..." supra.

The second problem with the theories of State collapse or failure is their disregard of international law. The modern state is a subject of international law and to a large extent lives by it.²²⁰

Scholars who questioned the existence of the African State only in terms of ravaging wars, conflicts, rebellions and number of refugees fleeing the country failed to understand that they remained states under international law.

African political scientists such as Mamdani²²¹ and Sindjoun²²² also found fault with State collapse or failure theories developed by Africanist political scientists in Northern America and Western Europe. Therefore, we shall not dwell on this any longer.

²¹⁸ Bayart, J.F., Eilis, S. & Hibou, B., (eds.), *La criminalisation de l'Etat en Afrique*, Bruxelles: Editions Complexe, 1997.

²¹⁹ Gerster, R., "How to Ruin a Country: The case of Togo", Institute for Developmental Alternative, *IFDA Dossier 71*, May 1989; also quoted by Ake, Cl., *Democracy and Development in Africa*, Washington, D.C.: The Brookings Institution, 1996, 40.

²²⁰ Israel is a case in point. As a State, it is a perfect product of international law since it owes its existence to the UN through a resolution of the Security Council. Expectedly, the State of Palestine will not come into being without the blessing of the international community. On the other hand, there are entities that never achieved statehood due to sanctions under international law. The "independent States" of Transkei, Bophutatswana, Venda and Ciskei (generally known as TBVC) created by the South African State under apartheid met all the "empirical" requirements for statehood, but lack of international recognition was fatal. It was held that they had been created in violation of rules of *jus cogens*. These puppet states failed to qualify as states under international law and with the demise of the apartheid system, South Africa ultimately reintegrated them among its provinces.

²²¹ See Mamdani, M., "Preliminary Notes on Political Science in Equatorial Africa," 8. *Discussing the Democratic Republic of Congo* (Paper read during CODESRIA's 9th General Assembly on 'Globalisation and Social Sciences in Africa', on page 3), Mamdani wrote:

"The main problem with this thesis is that it tries to understand the state in Africa through an analogy, rather than through its own history. Instead of taking as its starting point the state created under colonialism and actually existing in Africa, this thesis presumes that the state in Africa has been an attempt to recreate the European State in African conditions. The conclusion that the attempt to imitate the original has failed has ushered in a deep sense of pessimism about African possibilities. For Afro-pessimism, the difference between the Post-Westphalian State in Europe and the post-colonial state in Africa is evidence of the failure of the modernist project in Africa. It is this difference that Africanist political science understands as a failure and sums up as a theory of state collapse... The difference needs to be understood as the outcome of a different historical process, rather than as empirical evidence of failure. The state in Africa is a product of a radically different history, a history of colonial conquest."

²²² Sindjoun, L., "Politics in Central Africa..." op.cit. 11-12. According to Sindjoun, "Collapsed states are 'conflictualised' states. The intense conflict over the state is generally perceived and analysed as a sign of state 'pathology'. I think that paradoxically, conflicts in

Scholars never agreed on the causes of the alleged state failure or collapse in Africa. Much of the literature unreservedly blamed African governments.

Very few scholars referred to the responsibility of international financial institutions and Western powers that put and maintained them in power for many years. Conceived of as one of the main agents of state failure or collapse and a further obstacle to constitutionalism and democracy, ethnicity attracted a lot of attention in Africanist and also African studies. Studies on ethnicity are generally descriptive and negative about it. Very often, ethnicity is abusively dealt with as if it were an African scourge.

Among the few scholars who suggested a way to address it in an African constitutional and democratic State is Claude Ake.²²³

“Responding to the State failure in Africa,”²²⁴ some Western-minded pundits called for radical and neo-colonial solutions such as “self-colonisation” or “benign recolonisation” of the disintegrating States of Africa.²²⁵

Central Africa reveal the consolidation of the state... (p.11) State persistence in (Central) Africa can also be analysed by taking seriously the state as a cultural form. The symbolic life of the state, expressed through rituals of state power, political socialisation and nationalism, can be an explanatory variable. The material failure of the state in terms of effective power over its territory and people can be compensated for by a relative symbolic success, which is that the political elite has successfully constructed a mental domain of reference. In that regard, one of the weaknesses of Jackson's analysis of the 'negative sovereignty' of African States is the minimisation of institutions and norms that constitute the state in Africa. The institutionalisation of the system of states should be taken seriously. There is no sufficient argument why the effective or material life of the state is to be prioritized over the symbolic and cultural life or vice-versa.” (p.12)

²²³ Ake, Cl. (*Democracy and Development in Africa...* 132-134) proposed the creation of a “Chamber of Nationalities” within Parliament. Ake's analysis was based on the situation in his home country, Nigeria, and what he suggested could not be of interest to monoethnic countries such as Lesotho, Somalia, and Swaziland. On the other hand, Ottaway (quoted by Joseph, R., “State, Conflict, and Democracy in Africa...” 8) pointed out that “in much of Africa ethnicity is not a problem until it is made a problem”, generally through politicisation. It is therefore also possible to imagine a solution dealing with the experts in ethnic manipulation or engineering or ethnic lords.

²²⁴ See Herbst, J., op.cit. 120-144.

²²⁵ Mazrui A, “Towards a Benign Recolonisation of the Disintegrating States of Africa”, supra.

The “self-colonisation” or “recolonisation” theory unleashed a spirited debate amongst social scientists.²²⁶

For those who insisted the state should be rebuilt, they were not clear about this process of rebuilding and how it could be carried out.

There has been an increasing wave of interest in the study of democracy and pluralism in Africa²²⁷ and the debate on democracy and constitutionalism has assumed new vigour and dimension since the late 1980s and the 1990s.²²⁸ Nyang’oro pointed out that democratisation... had become the “buzzword in African Studies”.²²⁹

Among the forerunners was Anyang's *Popular Struggles for Democracy in Africa*.²³⁰ The book contained a number of articles that examined the impact of the global economic crisis on the prevailing political, economic, and cultural situation in Africa during the 1980s. It also dealt with the emergence of democratic clamors and the revolt of the masses.

²²⁶ On “recolonisation of disintegrating States of Africa”, see the exchanges between Ali Mazrui and Archie Mafeje as well as contributions to the debate by other scholars, including this author: Mazrui, A., “Self-Colonisation and the Search for Pax Africana: A Rejoinder”, *CODESRIA Bulletin*, No.2, 1995; Mafeje, A., “Recolonisation or Self-Colonisation and Malignant Minds in the Service of Imperialism”, *CODESRIA Bulletin*, No.2, 1995; Bangura, Y., “The Pitfalls of Recolonization: A Comment on the Mazrui-Mafeje Exchange”, *CODESRIA Bulletin*, No.4, 1995; Mangu, Mbata B., “Conflict Settlement in Post-Colonial Africa: Recolonization or Decolonization? A Reflection on the Mafeje / Mazrui Debate”, *CODESRIA Bulletin*, No.1, 1996, 21-30; idem, “Débats sur le règlement des conflits en Afrique post-coloniale: décolonisation ou recolonisation? Une réponse à Dr Amady Dieng”, *Sud Quotidien*, Dakar, Sénégal, No. 1003, 1996, 3; Wanyonyi, P.K., “The Notion of Self-Colonization: Is it an Appropriate Solution in the 21st Century?” *CODESRIA Bulletin*, No.1, 1996, 19-21.

²²⁷ See Conac G, *L’Afrique en transition vers le pluralisme politique*, supra; Ronen, D., (ed.), supra.

²²⁸ Chafe, K.S. op.cit.130.

²²⁹ Nyang’oro, J.E., “Discourses on Democracy in Africa: An Introduction”, in Nyang’oro, J.E., (eds.), op.cit. IX.

²³⁰ Anyang’ Nyong’o P. *Popular Struggles for Democracy in Africa*, London: Zed Books, 1987.

Much of the literature on democratisation in Africa was, however, produced within the Council for Development of Economic and Social Research in Africa (CODESRIA).

According to Nyang'oro,

“It was not until the famous debates of the late 1980s in *Africa Development*, the journal published by CODESRIA in Dakar, that discussions about democracy in Africa became generalized in the African academy.”²³¹

CODESRIA has been particularly productive in terms of reflections and publications on constitutionalism, democracy, state and development in Africa.²³²

During its 20th anniversary, Mr. Mkandawire, CODESRIA's Executive Secretary, remarked:

“No issue has been a source of as much debate in CODESRIA as the question of democratisation... The issues have ranged from methodological problems to questions of political commitment to democratisation and of course about the content of democracy.”²³³

In the late 1980s and early 1990s, comparativists tended to focus on two issues, the one being elections and the other the economic basis of democracy.²³⁴

Anyang lamented the predominance of the economic approach in the debate of the Left on democracy.²³⁵

Olukoshi also regretted “the growing trend integral to the ‘new’ political economy, by applying the categories of economics to the quest for understanding the behaviour of political actors, as well as processes and outcomes in Africa.”²³⁶

²³¹ Nyang'oro, J.E., “Discourses... An Introduction” op.cit. IX.

²³² Since 1992, CODESRIA runs every year in Dakar, Senegal, an Institute on “Democratic Governance” which brings together 10 to 15 scholars of the continent and democratisation has been the major theme of its general assemblies, workshops, seminars, multinational and national research working groups. Organised under the theme “Social Sciences and Globalisation in Africa”, the 9th CODESRIA General Assembly, which was the last of the 20th century, also gave African scholars the opportunity to examine the concept of globalisation and its impact on constitutionalism, democracy and State in Africa.

²³³ Chafe, K. S., op.cit. 128-129.

²³⁴ Hyden, G., “Governance and The Reconstitution of Political Order...” 183.

²³⁵ Anyang' Nyong'o, P., “Discours sur la démocratie en Afrique” 35-36.

²³⁶ Olukoshi, A., “State, Conflict, and Democracy...” 462.

According to Olukoshi,²³⁷ this trend is one of the limitations that have tended to weaken the quality of analysis and obscure the crucial questions that should normally engage the attention of the academic and policy communities, such as the question of the state referred to earlier.

The Left might also complain about an overemphasis on elections, multipartyism and political and civil rights in the discourse of the Right or liberal scholars.

As already emphasised, it was still a relatively easy task in the early 1990s to undertake a review of the ever-growing literature on constitutionalism and democracy in Africa.

Over years the task has become an intellectual mammoth that cannot be accommodated in a single thesis or in a chapter thereof.

1.5.2. Neglected Questions or Questions Insufficiently Addressed in the Existing Literature

According to Thompson,

“No single volume can do more than illuminate the contours of a subject as fundamental as constitutionalism...At most it can call attention to certain neglected aspects of constitutionalism.”²³⁸

Since constitutionalism provides “the cornerstone on which any discussion of democracy can be based”,²³⁹ what is said of constitutionalism also applies to democracy.

There are a number of questions that are neglected or insufficiently addressed by students or experts in constitutionalism and democracy in Africa.

The first neglected question is the very struggle of African and Congolese peoples.

²³⁷ Olukoshi, A., “State, Conflict...” 462.

²³⁸ Thompson, K.W., “Introduction”, in idem, (ed.), *Constitutionalism: Founding and Future... X.*

²³⁹ Idem, “Preface” VII.

In Greenberg's words,

"For most of the post-World War II, eminent social scientists have concentrated their research efforts on the so-called Western-styled democracies. With the exception of the negative aspects of Third World politics (riots, coups, or revolutions), the analysis of Third World struggles for democracy has been a relatively neglected area."²⁴⁰

Olukoshi also noted:

"There is a neglected ... struggle for renewal that is unfolding on the continent, but that is not sufficiently remarked upon and supported because of the faulty prisms through which attempts are made to interpret the state of the continent"²⁴¹.

As for Anyang' Nyong'o,²⁴²

"The struggle is not new; the popular agitation for political reform has, in many senses, always been a constant element of Africa's political history."

Yet, on reading books and articles or listening to the news or statements by prominent scholars, top journalists, world leaders or international financial institution managers, one gets the impression that nobody is left alive in Africa. For some, Africa is an "agonising" and crying continent.

Much of the literature fails to outline the fact that despite hardships, there are people who never gave up, were or are still engaged in the combat against authoritarianism and fight for constitutionalism and democracy.

As Shivji rightly observed, "for us, this is a fighting continent not a crying one"²⁴³. Unfortunately, this struggle has gone unnoticed not only by Western leaders, but also in much of the literature. According to Claude Ake, it is because it was partly directed against the West that the international community did not grant African struggles for democracy the label of legitimacy.²⁴⁴

²⁴⁰ Greenberg, D., "Introduction", in Greenberg, D. et al. (eds.), *Constitutionalism and Democracy...* 2.

²⁴¹ Olukoshi, A., "State, Conflict..." 462.

²⁴² Anyang' Nyong'o, P., quoted by Olukoshi, A., "State, Conflict, and Democracy in Africa..." 455.

²⁴³ Shivji, I.G., *Fight My Beloved Continent* 8.

²⁴⁴ Ake, Cl. "L'Afrique vers la démocratie", *Africa Forum*, Vol.1, No.2, 1991, 13.

Another neglected question is the role played by the international community since independence, especially by the Western countries, in support of their African agents they helped seize power and remain in office in many African States.

When they could not do so through direct intervention,²⁴⁵ the self-proclaimed “custodians of democracy and freedom” very often granted support in international conferences or simply used the silence language when massive human rights violations were being committed against African democracy and freedom fighters.

Without glossing over the African responsibility, there is a tendency in Western and Africanist discourses, to absolve the West and former colonial powers from responsibility for African crises and failure on the road to constitutionalism, democracy and development.

The negative role of the international community, especially of the West, and their local or regional agents is not sufficiently addressed in the literature.

Such neglect may be to accredit the old colonialist and racist thesis still perceptible in the literature and media alleging a congenital incapacity of African peoples to govern themselves and to achieve constitutionalism and democracy.

Olukoshi shed light on three other themes or questions neglected in the study of democratisation.

²⁴⁵ France, for instance, intervened several times in French-speaking Africa to keep her allies in power. Among the most spectacular foreign (Western) interventions in Africa and in Zaire, it is worth reminding of the joint intervention of Belgian commandos and French parachutists in Kolwezi to secure Mobutu's power during Shaba War I in 1978. However, Africa should not forget the French intervention in the Central African Republic. Decades after independence, David Dacko who had been hosted by Paris in preparation of the coup was finally “inaugurated” President in a French palace and flown back to the Central African Republic in a French military plane. Accompanied by elements of the French army, he landed in Bangui as the new President of the country in replacement of Jean-Bedel Bokassa who himself came to power decades earlier, proclaimed himself president for life and thereafter Emperor Bokassa the 1st (unfortunately also the last) with the full support of Republican France.

These include the need to rehabilitate the state, the role of the military in the political reform process, and the impact of influential regional players on the direction and content of change.²⁴⁶ The first two questions deserve a much closer attention.

As far as the rehabilitation of the state is concerned, it was largely ignored due to the long neglect or disregard of the state itself in Africanist vocabulary on democracy in Africa.²⁴⁷ Ronen emphasised the “unexplored area of structural change of the State”²⁴⁸ and Olukoshi warned:

“The work of democratic renewal and consolidation cannot be fully undertaken without attention to the task of rehabilitating the State in Africa.”²⁴⁹

According to Olukoshi, rethinking or reconstructing the State in Africa is another challenge facing students of Africa:

“The presence of effective and legitimate state structures is essential to the construction of stable and sustainable democratic systems...here is a sense in which state rehabilitation is, at this historical juncture, a central part of the African democratic project and should be more fully factored into our conceptual apparatuses.”²⁵⁰

On the other hand, Joseph Hyden remarked that trying to study politics at the regime level poses new challenges that comparativists are beginning to appreciate.²⁵¹

Hyden then proposed a third area of study he found empirically pertinent and methodologically challenging: the politics that surrounds the reconstruction of the political order in Africa.

How a political order should be constituted, legitimised, and managed is, according to Hyden, the core of the governance field, and it waits to be fully developed, both at the theoretical and methodological level.²⁵²

²⁴⁶ Olukoshi, A., “State, Conflict...” 460-462.

²⁴⁷ Ronen D, “The State and Democracy in Africa”, in Ronen, D., (ed.), op.cit. 203, 199, 201.

²⁴⁸ Idem, 199, 201.

²⁴⁹ Olukoshi, A., op.cit. 460-462. See also Ibrahim, J., “Transition démocratique: le défi d’un nouveau programme”, in Chole, E. & Ibrahim, J., (eds.) op.cit.136.

²⁵⁰ Olukoshi, A., “State, Conflict...” 460.

²⁵¹ Hyden, G., op.cit.183.

²⁵² Idem 194 .

He considered himself laying the foundations for a field in which the politics of setting the rules and getting people to abide by them becomes a legitimate and sustained focus among comparativists.²⁵³

In the same vein, Mamdani wrote:

“In the present context of Africa, a general movement towards constitutionalism and the rule of law that calls for a reorganisation of state structures so as to institutionalize the principle of the division and checks of powers must be welcomed as a step towards democratisation.”²⁵⁴

The rehabilitation (Olukoshi), the structural change of the state (Ronen), or the reorganisation of state structures so as to institutionalise the principle of division and checks of powers (Mamdani) and the politics of setting the rules and getting people abide by them (Hyden) are primarily a legal concern.

That is a formidable challenge confronting African legal scholars in comparative studies on constitutionalism and democracy in Africa.

Africanist and African scholars also stressed the neglect of the military despite a number of works.²⁵⁵

According to Hutchful, democratising regimes and States in Africa are confronted with a number of issues in relation to the military.²⁵⁶

²⁵³ Hyden, G., op.cit.184.

²⁵⁴ See Mamdani, M., “Social Movements” 243; Shivji, I. G., “Contradictory Class...”, 255.

²⁵⁵ On military and military rule, see Bratton, M. & Van de Walle, N., “Popular Protest and Political Reform in Africa”, in Nyang’oro, J.E., op.cit.220; Decalo, S., *Coups and Army Rule in Africa*, 2nd ed. New Haven, CT: Yale University Press, 1990; Idem, *Coups and Army Rule in Africa*, supra; Enloe, C., *Ethnic Soldiers: State Sovereignty in Divided Societies*, Athens: University of Georgia Press, 1980; Joseph, R. A., “Democratization Under Military Rule and Repression in Nigeria” in Beckett, P. A. & Young, C., (eds.), *Dilemmas of democracy in Nigeria*, Rochester, NY: University of Rochester Press, 1997; Harbeson, J. W., (ed.), *The Military in African Governance* 67-92; Adekanye, J.B., “The Military” in Diamond, L. et al.,(eds.), *Transition Without End: Nigerian Politics and Civil Society Under Babangida*, Boulder, CO: Lynne Rienner Publishers, 1997,55-80; Anyang’ Nyong’o, P., “L’Etat, les Militaires et la Gauche”, in idem, (ed.), *Afrique: la longue marche vers la démocratie...* 7-21.

²⁵⁶ Hutchful, E., “Military Issues in the Transition to Democracy”, in Hutchful, E. & Bathily, A., (eds.), op.cit. 600.

Military-led authoritarianism has been an important ingredient in the decay of the state and the disintegration of the military itself.²⁵⁷

The military is a wild card in the process of transition, sometimes intervening to either hasten or impede reform.²⁵⁸

Recent African history has taught us that the military, as in Mali and Nigeria, may be a positive agent for change.

However, that still remains an exception to the rule that the army is generally an obstacle to democratisation.

The capacity of the military to obstruct or roll back the political reform process is one that must not be underestimated.²⁵⁹

Hutchful regretted that “the military dimension of democratisation is not sufficiently taken into consideration”²⁶⁰ and “little attention has been paid to the military dimensions of democratisation processes in Africa”.²⁶¹

Very few scholars are positive and suggest the way the military should be dealt with to promote and consolidate democracy in Africa.

The question of restoring or upgrading military professionalism has to be seen as an essential part of democratic consolidation. The challenge is how to get the military to respect and uphold the Constitution.²⁶²

²⁵⁷ Hutchful, E. & Bathily, A., “Introduction”, in *idem*, *op.cit.* IV.

²⁵⁸ Bratton, M. & Van de Walle, N., *op.cit.* 220; Ronen, D., “The Challenges of Democracy in Africa...”, in Ronen, D., (ed.), *op.cit.* 4.

²⁵⁹ See Olukoshi, A., “State, Conflict, and Democracy...” 460; Anyang’ Nyong’o, P., “L’Etat, les Militaires et la Gauche” 19.

²⁶⁰ Hutchful, E. & Bathily, A., “Introduction” XI; Hutchful, E., “Military Issues...” 599.

²⁶¹ Hutchful, E., “Military Issues” 599.

²⁶² Olukoshi, A., “State, Conflict...” 460-461.

However, the question of the military and its related issues, such as the civil-military relations, conversion of soldiers, submission of the military to the civilian authorities, the military and ethnicity, military restructuring and budgets, and the international dimension of militarisation have not been sufficiently dealt with in the literature.²⁶³ That is, according to Hutchful, “a crucial and potentially costly omission”.²⁶⁴

Another question that has not been much discussed is the linkage between human rights as a component of constitutionalism and constitutional regimes.

Human rights can only be promoted and respected in democratic states and regimes based on constitutionalism and the rule of law. Many studies on human rights in individual African States unfortunately fall short in questioning their constitutional regimes.

Related to the above questions insufficiently addressed in the literature is the omission of the relationship between international and domestic law and the influence of the former on the establishment and consolidation of constitutionalism and democracy.

“Contemporary Africa is exceptionally tributary to the international system,” Young contended.²⁶⁵

Conac also ventured the view that the problem of a constitutional state can no longer be addressed outside international law and a contemporary constitutional state is necessarily subject thereto.²⁶⁶

²⁶³ Hutchful, E., “Military Issues...” 599.

²⁶⁴ Hutchful, E. & Bathily, A., “Introduction”, in idem, (eds.), op.cit. IV.

²⁶⁵ Young, C., quoted by Joseph, R., “State, Conflict...” 6.

²⁶⁶ Conac, G., “Etat de droit et démocratie”, in Conac, G., (ed.), op.cit.505-507: “Le problème de l’Etat de droit ne peut plus être traité en dehors du droit international... L’Etat de droit contemporain doit être soumis au droit international”.

Furthermore, related to the neglect of institutions is the omission of the importance of the judiciary. According to Adama:

“When we speak of democracy, pluralism and rule of law, the key question is that of the independence of the judiciary”.²⁶⁷

The judiciary is the guardian of the constitution and rule of law and its independence is essential to constitutionalism and democracy.

Unfortunately, also due to empiricist imperialism, very little attention is paid to its role and status in the conventional discourse on constitutionalism and democracy in Africa.

Another neglected question in studies on comparative constitutionalism and democracy in Africa is that of local government. According to Olowu,

“Discussions of African governance have tended to concentrate on the national level. Very few scholars or policy makers have addressed the significance of local governance for democracy and development.”²⁶⁸

Most of the studies unfortunately tend to concentrate on democracy at the national level, on what Bakary called “top-down democracy”.²⁶⁹

Sono considered democracy (at the national level) a “mystification” and democracy at the local level or “participatory democracy” the true one.²⁷⁰

²⁶⁷ Adama, D., “Démocratie et primauté du droit”, in Conac, G., (ed.), *op.cit.*467; see also Hinden, R., *op.cit.*5.

²⁶⁸ See Olowu, D., “Local Governance, Democracy, and Development”, in Joseph, R., (ed.), *op.cit.* 285; Ziavula, R.E., “L'échelle locale dans l'organisation administrative du territoire congolais”, in Jaglin, S. & Dubresson, H., (eds.), *Pouvoirs et cités d'Afrique noire. Décentralisations en question*, Paris: Karthala, 1993, 35; Venard, J.-L., “Bailleurs de fonds et développement local”, in Jaglin, S. & Dubresson, H., (eds.), *op.cit.*, 19-33.

²⁶⁹ Bakary, T., *supra*.

²⁷⁰ Sono, T., *Comments on Democracy & Its Relevance in Africa*, African Perspectives: Selected Works, No.3, 1992, 16.

However, Sono's views on this question are problematic and contentious. So are his contentions that democracy and representation or partyocracy are irreconcilable; that democracy does not exist anywhere in the world, or is impossible in large modern societies.²⁷¹

One should, however, agree with him on local democracy as basic to national democracy and deplore that democracy at the local level is not thoroughly and comprehensively addressed in the literature.

This research will address some of the questions that have been neglected or insufficiently addressed in the existing literature.

However, it would be too much to expect it fill into all the gaps, redress all the shortcomings and meet the intellectual challenges associated with the study of constitutionalism and democracy in post-colonial Africa.

1.6. Research Questions

The research purports to address the following questions:

1. How can post-colonial Africa be considered *en route* to constitutionalism and democracy since independence?
2. What are constitutionalism and democracy? Are these concepts merely Western or even narrowly Anglo-Saxon and French conceptions of the good polity or are they of universal value, that is to say also African? What have been the voices heard in this regard, from both inside and outside the continent?

²⁷¹ Sono, T., op.cit. 16, 29,32.

3. Are constitutionalism and democracy feasible on the continent? How can the hope be fulfilled? What are the chances of achieving and consolidating constitutionalism and democracy?
4. Since constitutionalism and democracy are not established or consolidated overnight, how far is post-colonial Africa on its road or in its struggle for constitutionalism and democracy? What is the current state of affairs and what are the primary challenges and prospects?
5. As far as challenges and obstacles are concerned, how are we to understand the challenges that have occurred – and are still present – in the African political landscape?²⁷² What are the obstacles? Are they insurmountable and if not, how can they be overcome?
6. Dealing with the prospects, what are the factors that would allow a conclusion that constitutionalism and democracy will be established and consolidated? What are the strengths and the weaknesses of the movement for constitutionalism and democracy in post-colonial Africa?
7. What has been the influence of the international community, especially the West, America and the former colonial powers on the struggle for constitutionalism and democracy in post-colonial Africa? How have they been promoting the struggle for constitutionalism and democracy in Africa since independence, the Cold War era and the emergence of the new context of globalisation? How did or can the international community and international law assist African peoples in their struggle for constitutionalism and democracy?

²⁷² Olukoshi, A., "State, Conflict..." 456.

8. In relation to our case study, what has been the particular road to constitutionalism and democracy in the DRC since independence from Belgium in 1960? What have been the constitutional texts and the basic political institutions that sustained or undermined constitutionalism and democracy? To what extent did they conform to the principles and ideals of constitutionalism and democracy? How do we understand the chronic or unfinished crisis in the Congo? Authoritarianism being more contagious and attractive than constitutionalism and democracy, what is the impact of the regional and sub-regional environment in Africa on the promotion and consolidation of constitutionalism and democracy in individual African States such as the DRC? What are both the challenges and prospects for constitutionalism and democracy in former Zaire?

9. Finally, with the debate over constitutionalism and democracy in post-colonial Africa revolving around the State, what is the relationship between constitutionalism, democracy and the State in Africa? What are the implications of constitutionalism and democracy for the State? What has failed in post-colonial Africa, constitutionalism, democracy or the State? How can the African State be reconstructed to sustain constitutionalism and democracy? What is the role of Constitution-making in this regard? What is the way forward to promoting constitutionalism and democracy in independent Africa in general and in the DRC in particular?

1.7. Hypotheses and Expected Findings and Conclusions

Shortly after many African States gained their independence in the 1960s, the famous French agronomist Dumont wrote his *L'Afrique noire est mal partie*.²⁷³

Ever since, very few in Africa and outside Africa believe in the future of the continent and its peoples. Africa is widely acclaimed in the Western media and literature as a continent of virtually unrelieved tyranny, dictatorship, economic bankruptcy, administrative incompetence, and violence. That is an overall gloomy assessment.²⁷⁴

Africa has come to be regarded as a source of problems rather than of opportunities.²⁷⁵

Among many Africanist and African researchers and policymakers of different hues, the last few years have witnessed the growth of profound pessimism, even outright disillusionment about the overall prospects of the African continent.²⁷⁶

This state of mind has been labelled Afro-pessimism. Afro-pessimism regained currency and momentum in the 1990s.

The feeling is that all things are falling apart and nothing good is seen as presently or potentially coming out of Africa in the short term.²⁷⁷

The discourse on Africa is even gloomier about some regions of the continent, such as the Great Lakes region and Central Africa where our case study is located.²⁷⁸

²⁷³ Dumont R, *L'Afrique Noire est Mal Partie* (Black Africa: False Start), Paris: Le Seuil, 1962.

²⁷⁴ Legum, C., "Democracy in Africa: Hope and Trends", in Ronen, D., (ed.), *op.cit.* 175.

²⁷⁵ Joseph, R., "The Reconfiguration of Power...", in Joseph, R., (ed.), *op.cit.* 58.

²⁷⁶ On Afro-pessimism, see Olukoshi, A., "State, Conflict..." 451. See also Joseph, R., "The Reconfiguration of Power in Late Twentieth Century Africa", in Joseph, R., (ed.), *op.cit.* 57; Kaplan, R., "The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of Our Planet." *Atlantic Monthly*, Vol.273, No.2, 1994, 44-65; Banock, M., *Le processus de démocratisation en Afrique. Le cas camerounais*, Paris: L'Harmattan, 1993; Coulon, Ch. & Martin, D.C., (eds.), *Les Afriques politiques*, Paris: La Découverte, 1991, 7.

²⁷⁷ See Olukoshi, A., "State, Conflict..." 451.

²⁷⁸ In fact, the geographical position of the DRC at the heart of the continent makes that it does not belong to one or two, but several sub-regions. It is at the same time part of the Great Lakes Region, Central Africa, and Southern Africa.

In Conrad's terms, this region of Africa forms part of the "Heart of Darkness",²⁷⁹ manifesting the "Anarchy" prophesied by Morton Kaplan in the early 1990s.²⁸⁰ The DRC, which is the heart of the continent, is generally referred to as the "heart" of the "Heart of Darkness" and "Anarchy".

There is preponderance of what Sindjoun called the "literature of pathology" that is a "guarantee of the literary and so-called scientific success of Central Africa".²⁸¹ Sindjoun even asked:

"Is it possible and acceptable in the scientific milieu, which has so far dominated the production of knowledge on Africa, to write on central Africa without using, for example, the conceptual categories of 'dictatorship', 'authoritarianism', 'civil war', 'crisis of nation-state'?"²⁸²

According to him, the normalisation or "routinisation" of the discourse on the pathology of Africa in general and Central Africa in particular is not only the verdict of reality, but also an effect of the institutionalisation of a particular tradition of research on Africa through referential journals, classic authors, great associations and meetings.²⁸³

Sindjoun recommended an "epistemological vigilance" with respect to the quality of publications on Central Africa.²⁸⁴

To some extent, this study may be disappointing as we deliberately choose not to follow the "masters" and "authorities" in their footsteps, but move away from the single-minded style or the beaten track of the discourse of pathology.

²⁷⁹ Conrad, P., *Au Coeur des Ténèbres*, Paris: Editions Mille et Une Nuit, 1999.

²⁸⁰ Kaplan, M., "The Coming Anarchy..." 44-65.

²⁸¹ Sindjoun, L., "Politics in Central Africa..." 7.

²⁸² Idem.

²⁸³ Idem 2.

²⁸⁴ Idem, 1.

Accordingly, despite the current state of affairs, this work is not Afro-pessimistic. Far from celebrating “The End of History and The Last Man”²⁸⁵ and entering a debate that suits religion rather than social sciences, we share with Pennock the view that without being novel or associated with the post-colonial era, “the issue of constitutionalism and democracy will never die”.²⁸⁶

Therefore, although we cannot predict the future or the forms it will take, we should disagree with Chandler, Enslin and Renstrom that “constitutionalism’s future is not guaranteed”,²⁸⁷ in Africa or elsewhere.

The major working hypothesis of the study is that since independence, itself a victory of constitutionalism and democracy over the authoritarian colonial rule, Africa and the Congo have been limping along and struggling for constitutionalism and democracy however uneven the path followed by each individual African State. Constitutionalism and democracy are not Western inventions.

The forms they take may differ and rightly so, but they are also feasible in Africa, and belong to Africa. That is why African peoples never lost faith in them.

Many crises have beset African countries. The study intends to test the hypothesis that the absence of constitutionalism and democracy is the main cause of the chronic crisis on the continent or the major factor hampering the much-called African Renaissance.²⁸⁸

Most of the African Constitutions failed to bring about constitutionalism and democracy as political institutions hardly conformed to the principles and values enshrined therein.

²⁸⁵ Fukujama, F., *The End of the History and the Last Man*, New York: Free Press, 1992.

²⁸⁶ See Pennock, J.R., “Epilogue”, in Pennock, J.R. & Chapman, J.W., (eds.), *op.cit.* 378.

²⁸⁷ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., *The Constitutional Law Dictionary...* 19.

²⁸⁸ See also Ake, Cl., *Democracy and Development in Africa...* 134, 138; Preamble to the African Charter for Popular Participation in Development and Transformation adopted in February 1990 in Arusha, Tanzania.

Another hypothesis to be investigated, but which stands as a truism, is that the road to constitutionalism and democracy in post-colonial Africa is particularly replete with obstacles and a hard way still lies ahead.

Obstacles and challenges to constitutionalism and democracy emanated and still emanate not only from the internal environment, but also from the international one. Western countries have played a crucial role in the negative record of constitutionalism and democracy in Africa and the Congo by coalescing with authoritarian rulers to serve their strategic and economic interests and allowing them to “hijack change” at crucial moments of the struggle.²⁸⁹

Accordingly, their positive contribution is required for both the reestablishment and consolidation of constitutionalism and democracy on the continent.

The absence of a favourable political, diplomatic, economic and social environment in the country, across and beyond its borders and lack of support from both inside and outside is disastrous for the development of a constitutional and democratic state.

Prospects for constitutionalism and democracy in Africa will also be tested to confirm optimism about the success of the struggle. As Suberu pointed out, “The challenges to democratic constitutionalism are enormous...not insurmountable, however.”²⁹⁰

The history of American and European States since the Middle Ages and Modern Times teaches us how Americans and Europeans struggled themselves and ultimately got rid of their authoritarian regimes.

²⁸⁹ See Nzongola-Ntalaja, G., “State and Democracy in Africa”, in Nzongola-Ntalaja, G. & Lee, M., (eds.), *op.cit.* 17-17; Schatzberg, M.G., “Hijacking Change...” *supra*.

²⁹⁰ See Suberu, R.T., “Institutions, Political Culture, and Constitutionalism in Nigeria”, in Franklin, D.P. & Baun, M.J., (eds.), *op.cit.* 215.

Until the middle of the 20th century, rights were denied to an immense portion of the population, including women and Black Americans. There is no reason to believe that Africa, which has been independent for less than half a century, should fail in the same struggle or to consider them congenitally doomed to fail.

Despite setbacks, slowness, halts and occasional standstills and even retreats, there is a future for constitutionalism and democracy in Africa, including the Congo.

Furthermore, central to the issue of constitutionalism and democracy in Africa is the question of the State. According to Mamdani, "At the root of the political crisis in Congo is the crisis of the Congolese State."²⁹¹

The promotion and consolidation of constitutionalism and democracy in post-colonial Africa cannot go without rehabilitating the State itself.²⁹²

We are prepared to test the hypothesis that the status of the state and its organisation are crucial to the study of and struggle for constitutionalism and democracy in Africa, as elsewhere. This question mainly refers to the foundation of the State, to the constitutional design.

Constitutionalism is a step towards democracy and the later should be based on constitutionalism to stand a chance of being consolidated.²⁹³

Next door to the DRC is the sister Republic of Congo (Brazzaville). The former Congolese military ruler, General Denis Sassou Nguesso, commanded a rebellion and managed to return to power in violation of the Constitution that had been approved by the overwhelming majority of the people during a successful transition following the national conference and relatively free and fair elections.

²⁹¹ Mamdani, "Discussing the Democratic Republic of Congo" 2.

²⁹² Olukoshi, A., "State, Conflict..." 460, Ibrahim, J., "Transition..." 136; Franklin, D. & Baun, M.J., (eds.), *op.cit.* 231-232.

²⁹³ See also Franklin, D. & Baun, M.J., "Preface", in *idem*, *Political Culture and Constitutionalism* 10; Conac, G., "Etat de droit..." 483, 507; Thompson, K.W., "Preface" VII; Hyden, R., *op.cit.* 179-197.

Countries such as the Republics of Angola, Burundi and Congo unfortunately help confirm Harbeson's thesis that pacts, as well as elections, are by no means a necessary and sufficient condition for sustainable democratic transition.²⁹⁴

Nevertheless, looking at the inter-Congolese dialogue as provided by the Lusaka Agreement to get out of the Congolese crisis, we shall test lessons learned from experience with democratisation in countries such as Benin²⁹⁵ and South Africa²⁹⁶ in French- and English-speaking Africa respectively.

African circumstances make it more likely that transitions will result in democratic progress to the extent that they commence with comprehensive multiparty agreements on the fundamental rules either through constitutional reform or by constitution-like pact-making, than if they begin with initial multiparty elections in advance of such rule-making.²⁹⁷

The history of constitutionalism and democracy in the USA and France, for instance, does not teach otherwise.

Constitutional agreements should be comprehensive and tackle the thorny issue of power sharing and limitation while providing for the protection of the rights of all to avoid that those who might feel marginalised and excluded threaten the new order in turn.

Constitutional agreements will only succeed in rebuilding the State and advancing constitutionalism and democracy if they enjoy support from the people, the international and regional community, the neighbouring countries, and if the different parties feel compelled to abide by them.

²⁹⁴ Harbeson, J.W., "Rethinking Democratic Transitions", in Joseph, R., (ed.), op.cit. 43.

²⁹⁵ The first National Conference was held in Benin in March 1990. The Bénin "*Conférence des Forces Vives*", as it was called had a contagion effect and other African countries emulated it. Gabon, Congo, Zaire, Togo, Chad and Niger, for instance, also convened their national conferences to deal with pro-democracy pressures. On national conferences in Africa, see Eboussi-Boulaga, F., *Les Conférences Nationales en Afrique Noire: Une Affaire à Suivre*, Paris: Karthala, 1993.

²⁹⁶ In South Africa, negotiations (CODESA) also took place to prepare the political transition from apartheid to democratic rule.

²⁹⁷ See Harbeson, J.W., "Rethinking..." 43.

Finally, it is contended that international law, whether universal or regional, may positively impact on the establishment of constitutionalism and democracy in African States. It may also be crucial for their consolidation.

Findings and conclusions of the study are expected to confirm all of the above hypotheses or some of them.

1.8. Research Methods

In terms of methodology, the study requires a good knowledge of the continent and the case study. As an African student from African universities, the author has visited a handful of African countries and can modestly claim research experience in three of them, namely the DRC,²⁹⁸ Senegal,²⁹⁹ and South Africa.³⁰⁰

²⁹⁸Mangu, Mbata B., *Les rapports entre le gouvernement et le parlement sous la deuxième République au Zaïre*, unpubl. Undergraduate Dissertation, Kinshasa: University of Kinshasa, 1984; Idem, *Démocratie, régime pluraliste, et tribalisme au Zaïre*, supra; Idem, "International Human Rights Law: Application..." supra; Idem, "International Human Rights Law and African Constitutionalism..." supra; Idem, "African Renaissance Compromised..." supra; "Zaire: Another Hell for Academic Freedom", in CODESRIA, (ed.), *Academic Freedom in 1995 Africa*, Dakar: CODESRIA, 1997; Idem, "Maintenance and Restoration of Peace in the Great Lakes Region: A Reflection on the Crisis in the Democratic Republic of Congo", Paper presented at the 12th Annual Conference of the African Society of International and Comparative Law, Accra, Ghana, 7-9 August 2000; Idem, "Armée, Tribalisme et Transition vers la Démocratie en Afrique: le cas du Congo-Zaïre", *Monograph and Paper* read during CODESRIA 9th General Assembly on "Globalisation and Social Sciences in Africa" within the framework of the Multinational Working Group on "Ethnicity and Democratisation in Africa", Dakar, Senegal, 5-8 December 1988.

²⁹⁹ See Mangu, Mbata B., *Les régimes pluralistes africains*, supra; Idem, "Enforcement of Human Rights Law: Development of African Jurisprudence", in HURISA, (ed.), *Theories and Practices. A Selection of Summaries of Lectures* (compiled by Titus, A.), Updated Ed., Johannesburg: HURISA, 2001, 23-57; idem, "International Human Rights Law: Application in African Legal Systems", in HURISA, op.cit. 1-21.

³⁰⁰ See Mangu, Mbata B., "Enforcement of Human Rights Law..." supra; Idem, *The Impact of the Constitutional Court on Human Rights in South Africa*, unpubl. Monograph for HURISA, Johannesburg 1999; Idem, "Advancing African Jurisprudence: Contribution of South Africa's Constitutional Court", Paper for the African Human Rights Camp, HURISA, Arusha, October 1999; Idem, "Domestication of International Human Rights Law in African Legal Systems", Paper for HURISA, supra; Idem, "International Human Rights Law and African Constitutionalism in Congo and the Republic of South Africa", Paper for UNITAR Fellowship Programme in International Law, The Hague, The Netherlands, July 1999; Idem, *Separation of Powers and Federalism in Post-colonial Africa: The South African Case*, unpubl. LLM Dissertation, Pretoria: UNISA, 1998; Idem, "African Renaissance Compromised on the Eve of the Third

In the main, extensive use is made of the work of others, with due acknowledgement. Methodological approaches used here are not new or novel. They are inspired by those used in similar research and which are reviewed below to outline both their strengths and weaknesses.

1.8.1. Review of the Major Methodological Approaches generally Used in Similar Research and Assessment of their Strengths and Weaknesses

1.8.1.1. Traditional Approaches

Two main methodological approaches are used in similar research on constitutionalism and democracy: the legal and empirical approaches.

The first derives from the normative theory while the latter relates to the empirical one.³⁰¹

The two methodological approaches remind us of the distinction made in the literature between constitutional and normal politics,³⁰² normative and empirical theories,³⁰³ political and behaviourist approaches,³⁰⁴ and juridical and empirical state.³⁰⁵ These methods once divided scholars into two different camps.

1.8.1.1.1. The Legal, Juridical or Normative Approach

The legal approach is institutional, normative and exegetic insofar as its focus is upon institutions, norms or rules that are to be interpreted.

The primary concern is more with the rules enacted to regulate the functioning and organisation of institutions than with their functioning itself, facts and political practice.

Millennium, Western Responsibility and Lessons from South African Constitutionalism", *CODESRIA Bulletin*, No.1, 1998.

³⁰¹ Harbeson, J.W., "Rethinking..." 39.

³⁰² See Owusu, M., "Democracy and Africa. A View From the Village", in Nyang'oro, J.E., (ed.), op.cit. 275, 285; Dahrendorf, R., *Reflections on the Revolution in Europe*, New York: Times Books, 1990, 34-37.

³⁰³ See Harbeson, J.W., "Rethinking Democratic Transitions..." in Joseph, R., (ed.), op.cit.39-43; Sartori, G., *Democratic Theory Revisited*, Chatham, NJ: Chatham House Publishers, 1987,7.

³⁰⁴ Vile, M.J.C., *Constitutionalism and the Separation of Powers*, Oxford: Clarendon Press, 1967, 254.

³⁰⁵ Joseph, R., "The Reconfiguration..."57-58; Jackson, R.H., & C.G. Rosberg, "Why Africa's Weak States Persist..." , supra.

Lawyers tended to analyse constitutions and other rules without addressing the question of their enforcement, whether or not they were applied and abode by.

In the mid-20th century, the legal approach came under heavy attack by the proponents of the behavioural theory, mostly political scientists.

The behavioural attack was accompanied by a related, but separate attack on the idea that “Constitutions” play an important role in the operation of the political system.³⁰⁶ The legal method dominated studies of African systems during the first decade of independence, before falling into disrepute among social scientists, including legal scholars themselves.

1.8.1.1.2. The Empirical, Sociological or Behavioural Approach

The empirical approach was and is still dominant in American social sciences. It is based on facts and practice.

The emphasis here is on normal or real politics behind the rules, which are not held important. The behaviourist’s concern was with “social forces” and the real stuff of politics.

The behaviour was seen as the sole content of politics, not affected by the structure of constitutional rules, but wholly determined by economic, racial, class, and other factors.³⁰⁷ The empirical or realistic approach is the conventional approach in political science.

³⁰⁶ Vile, M.J.C., *op.cit.* 295-296.

³⁰⁷ *Idem.*

Unlike law and constitutional law in particular, political science does not prescribe what should be, but it describes what it is. Political science is positivist. It studies how political phenomena come into being, and what economic and social forces explain the nature of such or such a political regime.

Once the causes are known and interaction established, the work of the political scientist is over. He explains and observes.

According to Dean Vedel,³⁰⁸ political science has as object power phenomena amongst which the state has a central or privileged place, but not an exclusive one.

Political science envisages these phenomena not from a normative viewpoint, as a matter for rules of conduct, but from a "factual" perspective.

It was held that "political theorists can set the aims, can rule out certain courses of action, can set certain limits, but like the military strategists they will be the more successful the more they keep in mind the hard facts of the terrain they survey."³⁰⁹

Behaviourism was the brainchild of the American school of political science. The French scholar Alexis de Tocqueville may be associated with this school.

It is easy to consider the rejection of constitutions, rules and forms by the behaviourist school and other schools related thereto a fulfilment of an early prophecy pronounced by the author of *Democracy in America* when he wrote:

"Men living in a democratic age do not readily comprehend the utility of forms: they feel an instinctive contempt for them...Forms excite their contempt and often their hatred; as they commonly aspire to none but easy and present gratifications, they rush onwards to the subject of their desires, and the slightest delay exasperates them. This same temper, carried with them into political life, renders them hostile to forms, which perpetually retard or arrest them in some of their projects."³¹⁰

³⁰⁸ Quoted by Leclercq, Cl., op.cit. 17.

³⁰⁹ Vile, M.J.C., op.cit. 297.

³¹⁰ Tocqueville, quoted by Pennock, J.R., "Epilogue" 379.

Translated in academic literature, Tocqueville's prophecy resulted in contempt of law and lawyers.

According to Vile, the attack upon "constitutions" as significant elements in political life may be illustrated by the work of three influential authors: William Penn, Sir Lewis Namier, and Robert A. Dahl.

These three writers provide us with the three main characteristics of the behaviourist approach, namely the emphasis upon "human nature" to the exclusion of the mechanics of government, the underlying assumption that it is the relative power of "groups" that provides the independent variables of the political system upon which all other factors depend, and the consequent relief that institutional structures can have little or no significant effect upon the outcome of political situations.³¹¹ Accordingly, the theory of "government of men" instead of law triumphed with the behaviourists.

William Penn insisted on the importance of "human nature" in the government of men. For Penn, an early behaviourist writing in 1682, governments were machines that like clocks work according to the motion that men give them. He then concluded,

"Let men be good, and the government cannot be bad; if it be ill they will cure it. But if men be bad, let the government be never so good."³¹²

Following this is a popular view of the British system of government in the mid-twentieth century that principles are unimportant; all that matters is the character of those who run the government.³¹³

³¹¹ Vile, M.J.C., *op.cit.* 297-299.

³¹² Penn quoted by Vile, M.J.C., *op.cit.* 297, 298.

³¹³ Vile, M.J.C., *idem*, 298.

With Namier, the emphasis shifted to “social forces” to the point where “government” seemed to disappear altogether.³¹⁴

Constitutionalism was assimilated to conservatism in politics. On this point, behaviourists did not differ from Marxist-Leninist or Leftist intellectuals who concentrated on the class struggle and historical and dialectic materialism to explain the history of human government.

Dahl’s *Preface to Democratic Theory*³¹⁵ is generally considered the most distinguished work in the behaviourist tradition where Dahl extended the behaviourist despise of constitutions, constitutional rules and institutions.

Dahl’s attack upon constitutions was aimed at proving that the relative importance of constitutional rules in general is trivial when compared to that of social forces or non-constitutional factors.³¹⁶

Constitutionalism was therefore among the unnoticed victims of the behavioural revolution of the 1950s. Part of the achievement of behaviourism was to turn attention from institutions to behaviour, from laws and formal structures to systems and social settings, and from normative philosophy or “constitutional politics” to “scientific” and “value-free” theoretical generalisation or “normal politics”.³¹⁷

Empirical theories or approaches to the detriment of the legal, constitutional or institutional ones dominate the existing literature on transitions.

³¹⁴ See Vile, M.J.C., op.cit. 300, 301.

³¹⁵ Dahl, R. A., *A Preface to Democratic Theory*, Chicago: University of Chicago Press, 1956 & 1970.

³¹⁶ Vile, M.J.C., op.cit.303.

³¹⁷ Gordon, J.S., op.cit.6.

Most of the studies on African systems since the 1970s may be characterised as “behaviourist” or “empirical” as they have been influenced or inspired by the American school of political science or even by the Marxist-Leninist school.

Amongst social scientists, Okoth-Ogendo lamented, “Academic disregard of constitutions remains the rule rather than the exception”.³¹⁸

1.8.1.2. Assessment of Strengths and Weaknesses of the Traditional Approaches

Each approach has got its own strengths and weaknesses that are respectively the weaknesses and strengths of the other.

1.8.1.2.1. The Legal, Juridical or Normative Approach

The main strength of the legal, juridical or normative approach lies in the fact that it deals with constitutions, rules, and institutions that are primarily concerned in any study on constitutionalism and democracy in Africa or elsewhere.

However, it suffers from a number of weaknesses as outlined in the massive criticism levelled against it and its legal champions by other social scientists, especially political scientists, economists, historians and sociologists.

It is suggested that the legal or institutional approach is deficient; that it cannot help apprehend the entire ebb-flux phenomenon that results from the tendency of law to capture the real world and that of the latter to break the legal framework and revolt against it. Legal exegesis very often leads to superficial or erroneous conclusions, the political power being rebellious to the legal order, which is static by nature.³¹⁹

³¹⁸ Okoth-Ogendo, H.W.O. “Constitutions Without...” in Shivji, I.G., (ed.), op.cit. 4.

³¹⁹ Ntumba, L., *Rapports entre la parti unique et l'Etat en Afrique Noire: Cas de la Côte d'Ivoire, de la Guinée et du Zaïre*, unpubl. LLB Dissertation, Kinshasa: UNAZA, 1977, 5.

According to Mahiou, any approach concentrating only on the analysis or interpretation of legal texts would be absolutely an unsatisfactory one, especially when it comes to the study of African systems:

“Characterising the political regime of an African state by reference only to the constitutional text would be projecting an abstract and empty schema on a different reality never to be known.”³²⁰

Amissah’s view was that:

“Lawyers often discuss constitutionalism without reference to the economic and social conditions prevailing in the countries affected. The results are an imperfect appreciation of the actual causes of success or failure ...

The exercise may be likened to a survey of faults in the superstructure without consideration of the foundation. In so far as that may fail to properly diagnose the cause of the disease, any remedy it proposes would have nothing except luck to recommend its success.”³²¹

As for Olukoshi,

“It is not enough, when we assess political developments in Africa as part of our study of the transitional process, simply to say that the actions of governments were in accordance with the constitution and the law, since the constitution and the law can themselves become instruments of exclusion and oppression.”³²²

In Romdhane’s words,

“The Tunisian experience shows that a Constitution is not enough to define a regime, and that it can even act like a distorted mirror.”³²³

According to Hyden,

“In the study of African countries...informal and unofficial relations often influence political outcomes. Rules that govern political behaviour in Africa tend to be unwritten and may overshadow those enshrined in laws and even in the constitution...This has been identified by many scholars as one of the key characteristics of “prebendal” or “neopatrimonialist” politics in Africa.”³²⁴

³²⁰ Mahiou, A., *L'avènement du parti unique...*12: “Vouloir caractériser le régime politique d’un Etat africain par référence seulement au texte constitutionnel, c’est projeter un schéma abstrait et vide sur une réalité différente que l’on se condamne à ne jamais connaître”.

³²¹ Amissah, A., “Constitutionalism and Law in Africa”, in Ronen, D., (ed.), op.cit.41.

³²² Olukoshi, A., “State, Conflict...” 456.

³²³ Romdhane, M.B., “Constitutionalism and Social Movements in Tunisia...” 235.

³²⁴ Hyden, G., op.cit. 182.

Brautigam also noted:

“In most African countries, the informal logic of neopatrimonial politics casts doubts on the utility of a framework that privileges formal rules, since one of the defining characteristics of a neopatrimonial leader is that he or she does not follow formal rules”.³²⁵

Hence “the emphasis on formal structures and the incentives that they provide for political action may strike some observers of African politics as misplaced.”³²⁶

Mahiou concluded that the institutional approach does not assist much in understanding the constitutional evolution of African States that is only a reflection of the political evolution.³²⁷

Law in Africa is being dictated by politics. Constitutional and legislative change almost always obeys change of politics.

On the other hand, Gonidec contends that democratic constitutions very often tend to cover authoritarian regimes that could be ignored by a strictly legal approach. Moreover, the maintenance of a Constitution does not mean it is still in operation.

It sometimes happens in Africa that an altogether different regime comes into being under the cover of a specific constitution in such a way that two different constitutional regimes are confronting, the one set up by the constitution and the other emerged from practice.³²⁸

Accordingly, Mahiou recommended getting away of “*juridicism*” and to stick to apparent or hidden facts and ideas to capture some deep strings of the African political system.³²⁹

³²⁵ Brautigam, D., “The Mauritius’ Miracle: Democracy, Institutions, and Economic Policy”, in Joseph, R., (ed.), op.cit.139.

³²⁶ Brautigam, D., op.cit. 139.

³²⁷ Mahiou, A., op.cit. 12-13.

³²⁸ Gonidec, P.F., Les systèmes politiques africains, Paris: L.G.D.J., 2e ed., 1978, 249.

³²⁹ Mahiou, A., op.cit.12-13.

1.8.1.2.2. The Empirical, Sociological or Behavioural Approach

The empirical and behaviourist approach is the most suitable for the analysis of facts. However, when it comes to the study of political regimes, constitutionalism and democracy, it is not more satisfactory than the legal approach. It claims to concentrate on facts, phenomena and the functioning of institutions.

Yet, one cannot understand the functioning of institutions while ignoring the rules. A study that is exclusively based on facts would be as incongruous as the facts themselves and fail to tackle comprehensively its object.

Harbeson criticised the empirical theory or approach and its inspired literature that came to be problematic with regard to Africa.³³⁰

1.8.2. Methodological Approaches Used in the Study and Motivation: Multidisciplinary and Interdisciplinary Approaches

1.8.2.1. Legal and Empirical Approaches

Our first method is a legal one. We shall focus on constitutions, rules, forms and institutions in this study of constitutionalism and democracy in Post-colonial Africa and the Congo.

We are firstly constitutional lawyers and not political scientists. Understandably, we are not concerned with Dahl's command that "the first and crucial variables to which political scientists must direct their attention are social and not constitutional."³³¹ Grey remarked that the primary object of discourse in the study of constitutionalism and democracy should be constitutional norms.³³²

³³⁰ Harbeson, J.W., in Joseph, R., (ed.), op.cit. 41.

³³¹ Dahl quoted by Vile, M.J.C., op.cit. 303; Gordon, J.S., "Introduction", in Pennock, J.R. & Chapman, J.W., (eds.), op.cit.13-14.

³³² Grey, T.C., "Constitutionalism: An Analytic Framework", in Pennock, J.R. & Chapman, J.W., (eds.), op.cit.191.

A democratic society is of necessity an *Etat de droit* or a state based on the rule of law.³³³ Hence the establishment within the Council of Europe of a “European Commission for Democracy through Law”.

Amor is right that democracy is not only a set of forms and institutions.³³⁴ However, in the modern era, there cannot be democracy without the rule of law, which implies the supremacy of the law.³³⁵

Taken very seriously by behaviourist scholars, Tocqueville’s prophecy of an “informal age” has still to come true. Even in America, De Tocqueville has so far proven wrong since it is not in the USA that we are witnessing the contempt or the hatred for the forms. The more democratic the society the higher respect for laws and rules.

The argument of precedence of the “informal” over the “formal” invoked by some empiricist scholars to despise law, rules, constitutions and lawyers does not hold water.

Bourdieu insisted on the “weigh of the law”.³³⁶ In Sindjoun’s words, “the fact or the informal bears a sense of conformity or dissidence only in relation to a norm which pretends to regulate the social action and vice-versa.”³³⁷

Arguably, the rejection of constitutions, rules, forms, and institutions in the dominant literature as well as the marginalisation of the role of lawyers in society result from a partial and superficial understanding of constitutionalism, democracy and state.

³³³ Karpen, U., “The Significance of a Legal Framework for Democratic Development”, *Law and State*, Vol.47, 1993, 93-110.

³³⁴ Amor, A., *op.cit.*55.

³³⁵ Conac, G., “Etat de droit...”467-469, 485,486-487; Bangura, Y., “Authoritarian Rule and Democracy...”, in Nyang’oro, J.E., (ed.), *op.cit.*98, 126, Mamdani, M., “Social Movements...” 243.

³³⁶ Bourdieu, P., “La force du droit. Eléments pour une sociologie du champ juridique”, *Actes de la recherche en sciences sociales*, No. 81, 86-96.

³³⁷ Translation mine. See Sindjoun, L. *op.cit.*7.

It is regrettable to have to rely upon the gap between law and reality or non-respect for constitutions in Africa to rule out the legal approach, the significance of constitutions and the role of lawyers.

As Sindjoun rightly put it, “the possible disrespect for a rule is not a decisive condition for an altogether rejection of public law.”³³⁸

He referred to a Weberian example according to which “the thief does not nullify the validity of a criminal law rule prohibiting theft because ... he hides himself.”³³⁹

In public law, as the conduct of States in international affairs clearly shows, violations of the rules of public international law, are seldom followed by a vindication of responsibility for criminal acts. They give rise at the best to denials or at least to justifications based on the same law.³⁴⁰

Different arguments heard from Iraq when it invaded Kuwait in the 1990s and those from the USA and United Kingdom in continuation of their military offensive campaign against Iraq long after the end of the Gulf War bear testimony to the above.³⁴¹

It is true that there is a huge gap between constitutional texts and daily reality in Africa and the constitution is regularly violated. However, as Bakary aptly noted, that is not a typically African phenomenon.³⁴²

Without attempts to and violations of laws, there would not be constitutional courts or judicial review in the legal systems of American and European States which have happened to be crucial to the survival of constitutionalism and democracy in these States.

³³⁸ Sindjoun (L., op.cit. 7) held: “L’irrespect éventuel de la norme n’est pas une condition suffisante de déclassement absolu du droit public.”

³³⁹ Sindjoun, L., supra, 7-8.

³⁴⁰ Idem.

³⁴¹ Iraq, the USA and UK invoked international law to justify their respective actions.

³⁴² Bakary, T., op.cit.16.

Riggs rightly pointed out that “the rules of the game are always important not only when they are abided by, but also when they are violated since it then matters to know why.”³⁴³

According to Okoth-Ogendo,

“Even when constitutions are being violated, subverted or otherwise ignored, it is important for scientists to examine them and practitioners to maintain faith in them... Constitutions ... therefore, do matter.”³⁴⁴

In Ronen’s words, “Although not sufficient, structural changes are necessary steps for attaining more democratic and human polities”.³⁴⁵

In the same vein, Brautigam noted:

“Formal structures are never completely irrelevant, and their importance in shaping democratic governance should become increasingly important in the African context.”³⁴⁶

Burdeau insisted:

“To study the rule of law, particularly in the constitutional domain, is to follow as an attentive witness the motion which has ever pushed political societies to organise following a certain order. But also, to understand this movement, to know the forces stimulating it and the figures it takes.”³⁴⁷

He then added:

“Such an enterprise requires of course enlarging analysis beyond the strict comment on texts, but it does not imply to consider *périmé* (old-fashioned) the viewpoint of the legal scholar.”³⁴⁸

³⁴³ Riggs, F.W., “Fragilité des régimes du Tiers-Monde”, in *Revue Internationale des Sciences Sociales*, No. 136, 1993, 238-239.

³⁴⁴ Okoth-Ogendo, H.W.O., (in Shivji, I.G., (ed.)), op.cit. 20.

³⁴⁵ Ronen, D., “The State...”, 201

³⁴⁶ Brautigam, D., op.cit. 39.

³⁴⁷ Burdeau quoted by Leclercq, Cl., op.cit.6.

³⁴⁸ Idem.

If democracy is left “the only one game in town”,³⁴⁹ every game is played according to specific rules.

Therefore, it may be interesting to ask how one can play, understand and explain the game without knowing its rules, rejecting them or excluding the “referee”, as some behaviourist tended to do.

Leclercq warned that a world, fortunately such a world does not exist, without law and where “doctors of law” are banned is a world doomed to disappear in a particularly violent manner.³⁵⁰

Politics and law interact everywhere and it is not only in Africa or the so-called Third World that constitutional changes are dictated by political evolution.

Vile rightly dismissed the full confidence of William Penn in “good men” to secure a good government as based on an over-simplification. Societies are not solely composed of “good” men or of “ill men”.³⁵¹

The essential point about constitutions is not that they could restrain a society full of bad men, but that they may channel political behaviour in certain directions rather than others, that the ordinary citizen will not be subject to the whims of good or bad men, but will have some certainty of essential continuities of action when there is a change of government.

³⁴⁹ On analogy between politics or political competition and game, see Bailey, F.G. *Stratagems and Spoils: A Social Anthropology of Politics*, Oxford: Basil Blackwell, 1969; Brautigam, D., op.cit. 137; Bratton, M. & D. Posner, op.cit. 378; Sandbrook, R., “Liberal Democracy in Africa...” in Nyang’oro, J.E., (ed.), op.cit. 147; Holmes, S., “Gag Rules and the Politics of Omission”, in Elster, J. & Slagstad, R., (eds.), op.cit. 19-58. Holmes compared Constitutions to “the rules of a game or even to the rules of grammar” (Holmes, S., “Precommitment and the Paradox of Democracy”, in Elster, J. & Slagstad, R., (eds.), *Constitutionalism and Democracy*, Cambridge University Press, New York – New Rochelle – Melbourne – Sydney, 1988, 227). However, that democracy is “the only one game left in town” is a contentious argument. Even if “town” may refer to “Western democracies” as implied in the bulk of the Africanist and Western literature, it is hard to believe that numerous human rights violations and other scandals, which are reportedly committed in these countries, are also parts of the “democratic game”.

³⁵⁰ Leclercq, Cl., op.cit. 17-18.

³⁵¹ Vile, M.J.C., op.cit. 298.

If the aspiration for a government of laws and not of men is inherently unrealistic; a government of men subject to the restraints of certain rules is not.³⁵²

Vile responded to Namier's criticism equating constitutionalism and the legal approach with conservative attitudes. That is true to some extent, since some conformism is unfortunately the price to be paid for order, predictability and stability in a political order, as opposed to anarchy or absence of rules.

Finally, it is with Dahl himself that we should disagree. Constitutional factors are not irrelevant. Nor is their significance trivial.

As Vile wrote, it cannot be asserted that the American constitutional system has been of little significance in the development of the American polity.³⁵³

Harbeson attempted to justify the neglect of institutions by empirical theoreticians on the ground that it resulted from an inaccurate reading of Dahl's prerequisites³⁵⁴ for democratic government.³⁵⁵

³⁵² Vile, M.J.C., *op.cit.* 298.

³⁵³ *Idem* 303.

³⁵⁴ Dahl, R.A., *Polyarchy: Participation and Opposition*, New Haven, CT: Yale University Press, 1971; *Idem*, *Dilemmas of Pluralist Democracy*, New Haven, CT: Yale University Press, 1982.

³⁵⁵ Harbeson, J.W., "Rethinking Democratic Transitions...", in Joseph, R., (ed.), *op.cit.* 39-43.

Arguably, it is less a misreading of Dahl than a contradiction in terms by Dahl himself. His three requisites for achieving governmental responsiveness on a continuing basis,³⁵⁶ and his eight³⁵⁷ and thereafter seven³⁵⁸ “institutional guarantees” necessary for the empirical realisation of democratic responsiveness, presuppose the existence and importance of norms and institutions yet considered trivial by the empirical theory.

As Vile noted, the fundamental error of all three of our behaviourists is that they drew a false dichotomy between constitution or constitutional structures and social forces in their reaction against legalism and formalism which once dominated the study of politics.³⁵⁹

Whilst adopting a legal or political approach, we do not altogether reject the empirical or behaviourist approach. Constitutional law and political science go together and interact.³⁶⁰ The contribution of law is important to political science and vice-versa.

³⁵⁶ Dahl believes that the key prerequisites for achieving this end are citizen opportunity to formulate preferences, “signify their preferences to their fellow citizens and the government by individual and collective action” and have those preferences “weighed equally in the conduct of government”. (Dahl, R.A., *Polyarchy*.3). Also see Harbeson, J.W. op.cit.39

³⁵⁷ “From the three prerequisites, Dahl derives the frequently cited eight “institutional guarantees ... :

- 1) freedom to form and join organisations;
- 2) freedom of expression;
- 3) universal adult suffrage;
- 4) the eligibility, in principle, of any citizen to seek public office;
- 5) the right of political leaders to compete freely for votes and support;
- 6) the existence of alternative sources of information;
- 7) free and fair elections; and
- 8) electorally accountable governmental policymaking institutions”. See Dahl, R.A. op.cit. 3; Harbeson, J.W., op.cit.p.40

³⁵⁸ In *Dilemmas of Pluralist Democracy* (p.11), Dahl reduced the eight previous requisites to seven, treating the fifth – the right of political leaders to compete freely for votes and support – as implicit in the requirement of free and fair elections and of freedom of political association. See Harbeson, J.W., op.cit. 40.

³⁵⁹ Vile, M.J.C., op.cit. 312.

³⁶⁰ On interaction between constitutional law and political science, see Favre, P., *Naissance de la science politique en France 1870-1914*, Paris: Fayard, 1989, 83-110; Colas, D. & Cl. Emeri, (eds.), *Droit, institutions et systèmes politiques. Mélanges en hommage à Maurice Duverger*, Paris: PUF, 1987; Poirmeur, Y., “Thèmes et débats autour du constitutionnalisme”, *Droit et Politique*, Paris: PUF/ CURAPP, 1993, 34-39; Chevallier, J., “Science du droit et science politique: de l’opposition à la complémentarité”, *Droit et Politique*, 1993, 251-261; Lijphart, A., *Democracies*, New Haven and London, 1984; Sindjoun, L., *La formation du patrimoine constitutionnel commun des sociétés politiques...* op.cit.7. Such interaction, wrote Sindjoun, “is fruitful in so far as it is not tainted with imperialism by the one in relation to the other.” (My translation).

According to Sartori and Harbeson, "What democracy is cannot be separated from what democracy should be".³⁶¹

The study of facts should complement the study of forms and rules since they inform one another.

We are not glorifying the constitution, law and lawyers or legal approaches that also have their weaknesses in this imperfect world of man and science.

Poirmeur and Bernard advised constitutional lawyers to guard against a "triumphing *juridicisation*" or not to make fetishism of the legal approach.³⁶²

As Gwyn told us, "No constitutional arrangement can guarantee effective solution to all public problems."³⁶³ Nor is it a panacea.

On the other hand, Conac holds that it would be unrealistic to think that constitutional structures *per se* can have magic effects in countries facing underdevelopment, with most of them still searching for their national identity.³⁶⁴

While priority is given to the legal approach, its insufficiencies will be corrected by recourse to positive aspects of the empirical, political and other methodological approaches. That will transpire from the study where an institutional or legal approach will generally be followed by an inquiry into the practice and functioning of institutions. In the process, history also plays a crucial role.

³⁶¹ See Sartori, G., *Democratic Theory Revisited*, 7; Harbeson, J.W. op.cit.39.

³⁶² Poirmeur, Y. & A. Bernard, "Présentation", *La Doctrine Juridique*, Paris: PUF/CURAPP, 1993, 5-12.

³⁶³ Gwyn, W.B., "Political Culture and Constitutionalism in Britain", Franklin, D. & Baun, M.J., (eds.), op.cit.38.

³⁶⁴ Conac, G., ("Les processus de démocratisation en Afrique", in Conac, G., (ed.), op.cit. 41):

"Il serait ... peu réaliste de penser qu'à elles seules des structures constitutionnelles peuvent avoir des effets magiques dans des pays en proie au sous-développement et dont la plupart sont encore à la recherche de leur identité nationale."

1.8.2.2. Historical Approach

The historical approach is particularly important for this inquiry in so far as the study deals with the road to and struggles for constitutionalism and democracy in post-colonial Africa. It will require the knowledge of the post-colonial history and the different stages Africa went through since independence.

Historians always remind us of the importance of history. When one does not know one's past, one cannot know where one comes from or even where one is going. People are never immune from and always carry with them part of their past. Knowing the past, people may prepare their future by avoiding some mistakes or by benefiting from some methods that helped them get out of crises in the past.

The fate of constitutionalism and democracy in post-colonial Africa cannot be attributed to some sort of spontaneous generation. Conflicts in the Great Lakes Region or many other regions of the continent, for instance, have their roots in the colonial and post-independence past.

The DRC case shows how history has been repeating itself and how some procedures such as round tables and national conferences, used in the past, may still be of relevance decades later to settle crises.

1.8.2.3. Comparative Approach

Other countries on other continents, especially America and Europe, went through the same struggle for constitutionalism and democracy: cycle of royal dictatorship or colonisation; struggle for freedom or independence; independence; struggle for better protection of human rights and consolidation of democracy; wars, conflicts, and rebellions; pacts or agreements to end wars or conflicts; transition; establishment and consolidation of democracy.

It is no shame for Africa to learn from others' experiences in order to address her internal crises and conflicts. Africa should also learn from Africa.

Countries that have already gone a long way to building and consolidating democratic institutions and achieving nationhood should inspire others while also learning from them not to recede into authoritarianism and conflicts.

The comparative approach in a study like this is therefore a necessity, in addition to being requested by the research topic.

The comparative approach has gained momentum in recent literature. Whilst this move should be welcomed and encouraged, case studies remain important to redress the shortcomings of over-generalisation and simplification.

All the above methodological approaches and others related thereto are used in a complementary and interdisciplinary manner to meet the intellectual challenges raised by the study.

The analysis of constitutionalism and democracy is ideally the domain of multidisciplinary and interdisciplinary research.

As Ela pointed out, "Interdisciplinarity has come to be the fundamental rule of research in the social sciences."³⁶⁵

There is a need for a balanced, integrated and holistic approach that goes beyond the legal one to embrace several other approaches offered by other human and social sciences.

Such an integrated or holistic methodological approach should be given more attention in our research works.

³⁶⁵ Ela, J.M., "Les sciences sociales à l'épreuve de l'Afrique: les enjeux épistémologiques de la mondialisation", *Paper presented at CODESRIA 9th General Assembly on Globalisation and Social Sciences in Africa, Dakar, Senegal, 14-18 December 1998*, 12.

1.9. Research Plan

The work represents a move away from the habitual case study format, which nevertheless provides the dominant approach to the inquiry, by starting with and returning to a wider canvass in the examination of its object. This study consists of 5 chapters, the first of which is a general introduction to the research.

In Chapter 2, the key concepts of constitutionalism and democracy are critically revisited. The content of these admittedly contentious concepts, the interaction between them and the state and other related issues are closely scrutinised. This is basically a theoretical analysis. The relevance and application of these concepts to post-colonial Africa are also looked at.

Chapter 3 offers a transition from the theoretical analysis in the previous chapter and the case study in the next. It appraises some strong voices heard on constitutionalism and democracy from both Africans and non-Africans. It also explores the major trends of constitutionalism and democracy in independent Africa.

Chapter 4 deals with constitutionalism and democracy in the DRC: the past, the present situation and the way forward. This is essentially a study of the constitutional law and political institutions of the African State since independence, going from the First Republic through the Second Republic and the One Party State to the troubled and unfinished transition to constitutionalism and democracy.

Chapter 5 concludes the study with some findings and recommendations for further research and investigation to help the African peoples build and consolidate constitutionalism and democracy so crucial for African Renaissance in the new millennium.

CHAPTER 2 REVISITING CONSTITUTIONALISM AND DEMOCRACY:

A THEORETICAL ANALYSIS

2.1. Introduction

Carl Schmitt, who defended the principle of “methodological situationalism”,³⁶⁶ taught that “every political concept is a polemic concept.”³⁶⁷

Constitutionalism and democracy seem to qualify as and fit in Gallie’s definition of “essentially contested concepts”.³⁶⁸ As Ihonvbere remarked, constitutionalism is a quite controversial concept.³⁶⁹

According to Mamdani, “The discourse on human rights and constitutionalism in contemporary Africa remains a contested terrain and should not be seen as a settled issue.”³⁷⁰ The controversy is spirited in so far as the debate over constitutionalism and democracy has been ideologised.

Notwithstanding volumes of essays, there is no common understanding of the concepts of constitutionalism and democracy. Constitutionalism and democracy are not unitary, but “complex” concepts.³⁷¹ Definitions are abundant, contentious, and very often vague.

³⁶⁶ Carl Schmitt, quoted by Slagstad, R., “Liberal constitutionalism and its critics”, in Elster, J. & Slagstad, R., (eds.), op.cit. 111. According to Schmitt, “Methodological situationalism” implies that all political concepts can be understood only on the basis of the concrete, polemic situation in which they belong, otherwise they become “misunderstandable, meaningless abstractions.” This principle is debatable since depending on concrete situations, one might end up receding into a conceptual chaos or landing in an intellectual “Tower of Babel”. That would hamper the development of knowledge with every concept meaning different things at once without any common understanding by scholars and peoples.

³⁶⁷ Idem.

³⁶⁸ Gallie, quoted by Schochet, G.J., “Introduction: Constitutionalism, Liberalism...” 6.

³⁶⁹ Ihonvbere, J.O., *Towards a New Constitutionalism...* 13.

³⁷⁰ Mamdani, M., “Social Movements...” 239. Whilst agreeing with him, we should, however, make it clear that the “terrain” is not less contested in Africa than in other parts of the world.

³⁷¹ See Andrews, W.G., *Constitutions and Constitutionalism...* 13; Sunstein, C.R., “Constitutions and democracies: an epilogue” 352.

Finally, “What is constitutionalism”³⁷² and “What is democracy”?³⁷³ It is imperative that we be as precise as possible about the concepts we are using and how we understand them in the present study.

This chapter examines the concepts of constitutionalism and democracy, the dialectic existing between, their relationship with the state as well as their development in our changing world. Dealing with these issues cannot go without a literature review.

2.2. Constitutionalism

According to Chandler, Enslin and Renstrom,

“The historical development of constitutionalism begins in a technical sense when the English term constitution was first used in its current political science context in the late seventeenth century. Constitutionalism was introduced in the mid-eighteenth century.”³⁷⁴

Constitutionalism is part and parcel of constitutional and democratic theory.³⁷⁵ Schochet wrote that “The ‘veneration’³⁷⁶ of constitutionalism is among the enduring and probably justified vanities of liberal democratic theory.”³⁷⁷

Despite “veneration” or “worship”, the “god” largely remains unknown, as is illustrated by numerous and sometimes inconsistent and confusing definitions of constitutionalism.

³⁷² Henkin, L., “A New Birth of Constitutionalism...”40-42.

³⁷³ Touraine, A., *Qu'est-ce que la démocratie?* supra.

³⁷⁴ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 16.

³⁷⁵ On the relationship between constitutionalism and constitutional and democratic theory, see Vile, M.J.C., op.cit. 8; Schochet, G.J., “Introduction...” 1-15.

³⁷⁶ With a great amount of criticism levelled by behaviourists, Critical Legal Studies' scholars and Leftist or socialist intellectuals, it may be exaggerated to speak of “veneration”. Applying the critical legal studies approach to the concept of constitutionalism, Tushnet, for instance, argued that constitutionalism was impossible and favoured “a government of men not law.” (Tushnet, M., “Constitutionalism and Critical Legal Studies” 150, 164).

³⁷⁷ Schochet, G.J., “Introduction...” 1.

An attempt is made here to survey the different perspectives of constitutionalism and the core of the concept without going through its history and different developments, which were already examined by more talented and famous scholars.³⁷⁸

2.2.1. Defining Constitutionalism: Competing and Contradictory Perspectives

Arguably, constitutionalism is a concept borrowed from Anglo-American political science. Constitutionalism has no equivalent in French literature. The major study edited by Conac does not contain any single definition of the concept.³⁷⁹

On the other hand, Anglo-American scholars do not have a clear-cut and common understanding of it.

The definition of constitutionalism is quite controversial.³⁸⁰ Perspectives on constitutionalism are contradictory, competing and confusing.³⁸¹

Thomas Grey was among the most critical about constitutionalism when he remarked:

“Constitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse.”³⁸²

³⁷⁸ For a comprehensive and authoritative account of the history of constitutionalism, see, for instance, McIlwain, C.H., *Constitutionalism: Ancient and Modern*, supra; Idem, *Constitutionalism in the Changing World*, supra; Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 3-67; Andrews, W.G., supra; Pennock, J.R. & Chapman, J.W., (eds.), supra; Vile, M.J.C., supra; Wormuth, F.D., *The Origins of Modern Constitutionalism*, supra; Friedrich, C., *Limited Government: A Comparison*, supra; Idem, *Man and His Government*, supra; Idem, *Constitutional Government and Politics*, supra; Idem, *Constitutional Government and Democracy*, supra.

³⁷⁹ Conac, G., “Les processus de démocratisation en Afrique” 11. Constitutionalism is generally confused with *Etat de droit*, *constitution*, *constitutionnalité* and *pluralisme*.

³⁸⁰ Ihonvbere, J.O., *Towards a New Constitutionalism...* 13.

³⁸¹ According to Shivji (“Contradictory Class Perspectives...” 249, 255), it is not only definitions of constitutionalism that are contradictory, but also the concept itself:

“As a political movement, constitutionalism is a contradictory phenomenon, on the one hand a limitation on popular sovereignty and popular movements imposed from above, on the other hand an achievement of these very movements won from below.”

³⁸² Grey, T., “Constitutionalism: An Analytic Framework” 189.

Grey even seemed somewhat too sceptical in his expectations about the possibility of an intelligent and transparent debate about constitutionalism.

Rosenbaum also observes that “constitutionalism is understood differently.”³⁸³

Gregor, for instance, holds:

“In the context of political theory, ‘constitutionalism’ often signifies concern with the problem of how the institutions of a state are to be organized in order to secure the basic rights of men or citizens.”³⁸⁴

In the same vein, Zoethout and Boon contend that constitutionalism refers to a political ideal regarding the organisation of the state.³⁸⁵

As for Ihonvbere, he considers constitutionalism not an idea, a spirit or a principle, but rather a constitution-making process:

“By constitutionalism, we refer to a process for developing, presenting, adopting and utilizing a political compact that defines not only the power relations between political communities and constituencies, but also defines the rights, duties, and obligations of citizens in any society. Essentially, the focus of what we mean by constitutionalism is on two issues: first the *process* of constitution-making and the extent to which it is popular and democratic; and second, the available openings, institutions, and processes of making the constitution a *living* document by taking it to the people so that they are in a position to not just have access to it, but that they understand it, claim ownership, and deploy it in defense of their individual and collective rights and the democratic enterprise.”³⁸⁶

³⁸³ Rosenbaum, A.S., “Introduction” 4.

³⁸⁴ Gregor, M.J., “Kant’s Approach to Constitutionalism” 69. This conception of constitutionalism is narrow in the sense that constitutionalism implies more than a protection of basic rights and it would be the more questionable should men be understood as excluding women and children.

³⁸⁵ Zoethout, C.M. & Boon, P.J., “Defining Constitutionalism...” 4.

³⁸⁶ Ihonvbere, J.O., *op.cit.* 15. Ihonvbere’s definition, which reduces constitutionalism to the process of constitution-making or to the making of a democratic and legitimate constitution, is problematic. It cannot assist in understanding constitutionalism in countries with constitutions that have been in operation for centuries with little or minor amendments and where the people do not need go through a new process of constitution-making. For instance, several generations of Americans did not take part in the making of the American constitution that was elaborated more than two centuries ago and Ihonvbere would hardly contend there is no constitutionalism in the United States. Constitutionalism does not imply that every generation should embark on the process of constitution-making. On the other hand, Ihonvbere’s conception would be even more contentious as it might deny constitutionalism to countries without fully written Constitution, such as the United Kingdom.

Arato defined constitutionalism as a political form in which a body of fundamental laws establishes the powers of government and institutionalises important limits for its operation.³⁸⁷

According to De Smith,³⁸⁸

“Constitutionalism is a genuinely accountable entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize and to campaign in between as well as immediately before elections with a view to presenting themselves as an alternative government, and where there are effective legal guarantees of basic civil liberties enforced by an independent judiciary.”

On the other hand, Armour contended that “It is ‘constitutionalism’ – the view that men may safely be left free provided they agree to conduct themselves within the limits of certain rules.”³⁸⁹

Carl Friedrich noted six senses, in which the idea of constitutionalism is used. The six senses are (1) philosophical, including Aristotle’s definition of *politeia*; (2) structural, including the general organisation of any actual government; (3) legal, including the basic law of a political entity; (4) documentary, including written constitutions; (5) procedural, requiring more intricate amendment procedures for constitutions than for ordinary statutes; and (6) what he called its ‘modern and normative sense’, including the theory and practice of effective, systematic, and institutionalised restraints on political and governmental power in order to prevent the violation of individual rights.³⁹⁰

Constitutionalism is sometimes confused or identified with human rights, written constitutions, separation of powers, and judicial review.

³⁸⁷ Arato, A., “Dilemmas Arising From the Power to Create Constitutions in Eastern Europe” 167-168.

³⁸⁸ Quoted by Nzombe, S., *Democracy, Human Rights and Constitutionalism in Post-Colonial Africa* 1.

³⁸⁹ Armour, L., “John Locke and American Constitutionalism” 10.

³⁹⁰ Carl Friedrich, quoted by Chandler, R.C., Enslin, R.A. & Renstrom, P.G., *op.cit.* 16. In fact, Friedrich’s six senses of constitutionalism may be reduced to three or two. His sixth sense already embodies many of the first five senses.

According to Henkin, "Constitutionalism is nowhere defined. We speak of it as if its meaning is self-evident, or that we know it when we see it."³⁹¹ There appears to be no accepted definition of constitutionalism.³⁹²

Henkin certainly referred to a "common definition" of constitutionalism, since scholars have always proposed definitions of constitutionalism, whatever contradictory, competing and confusing.

As Chandler, Enslin and Renstrom wrote, "Precise language is a basic requirement of every intellectual discipline. This is particularly true in the field of law."³⁹³

Yet, as they acknowledged:

"The political and social sciences suffer more than most disciplines from semantic confusion. This is attributable, *inter alia*, to the popularization of the language, and to the focus on many diverse foreign political and social systems."³⁹⁴

The legal discipline has particularly been blamed and demeaned by other social scientists and even by lawyers themselves, especially the proponents of the Critical Legal Studies Movement and positivists, for its lack of precision. However, even in natural or the so-called "exact" sciences, precision or exactitude is as impossible as the absolute truth.

The primary aim Chandler, Enslin and Renstrom had in view when they undertook to write the *Constitutional Law Dictionary* was to arrive at "clear and precise legal language."³⁹⁵ It is hard to say whether they succeeded in that enterprise.

³⁹¹ Henkin, L., "A New Birth of Constitutionalism..." 40.

³⁹² *Idem* 39,40. Also see Rosenfeld, M., "Modern Constitutionalism..." 3.

³⁹³ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., *op.cit.* XIV.

³⁹⁴ *Idem.*

³⁹⁵ *Idem.*

Where so many established scholars have broken their necks so badly and the issue remains “unsettled” as Mamdani insisted, we cannot unfortunately assure that this study is going to settle it once for all or that we will come up with very “precise” legal language on constitutionalism and democracy.

Depending on whether constitutionalism is perceived as a legal principle, a set of rules aimed at achieving a specific end or a body of values underlying the government of a society, two main approaches to constitutionalism may be distinguished, the traditional and the modern approaches.³⁹⁶

Legal scholars generally favour the first, which are based on rules and institutions, while political scientists, sociologists, historians, and economists tend to adopt the latter. We shall strive to review these different and sometimes competitive and contradictory approaches before indicating our own understanding of constitutionalism, which lies in between.

2.2.1.1. Traditional Approaches: Procedural and Negative Constitutionalism

Traditional definitions of constitutionalism stress liberal, procedural, negative and formal constitutionalism.

According to Ihonvbere and Shivji, the liberal concept of constitutionalism rests on two main pillars, namely limited government and individual rights.³⁹⁷

³⁹⁶ Epithets are less important in law than in other social sciences. The distinction between “traditional” and “modern” approaches to constitutionalism is drawn from Schochet’s and Pennock’s “traditional” and “modern” constitutionalism (See Schochet, G.J., “introduction” 2-4; Pennock, J.R., “Epilogue” 378-379). The dichotomy between “Traditional” and “Modern” is only used here for the sake of presentation. The distinction is based on chronology and should not be understood to mean that “traditional approaches” have come to be old-fashioned or that they are totally unrelated to the “modern approaches” (See, for instance, Carl Friedrich as quoted by Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 16; and Rosenfeld, M., “Modern Constitutionalism as Interplay Between Identity and Diversity”3). “Tradition” and “Modernity” are not necessarily inimical; they rather complement, inspire and enrich one another.

³⁹⁷ See Ihonvbere, J.O., *Towards a New Constitutionalism...*13; Shivji, I.G., “State and Constitutionalism...” 28.

Schochet considered that “the hallmark of modern constitutionalism is its reliance upon formal limitations on political power that are directly tied to popular sovereignty.”³⁹⁸

Rosenfeld held that in the broadest terms, “Modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of human rights.”³⁹⁹

As McIlwain once put it,

“The most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.”⁴⁰⁰

In Andrews’s view, “If one were to attempt a description of this complex concept in two words, we might call it ‘limited government.’”⁴⁰¹

Mojekwu also regarded constitutionalism as “a man-made device to limit the arbitrariness of governments.”⁴⁰²

Zoethout and Boon took it for an expression of the conviction that no government should ever have unlimited power to do whatever it wants, since every political system is likely to relapse into arbitrary rule, unless precautions are being taken.⁴⁰³

As Rosenbaum also stressed, “Constitutionalism has evolved to mean the legal limitations placed upon the rightful power of government in its relationship to citizens.”⁴⁰⁴

³⁹⁸Schochet, G.J., op.cit.4.

³⁹⁹ Rosenfeld, M., “Modern Constitutionalism as Interplay Between Identity and Diversity”3.

⁴⁰⁰ McIlwain, C.H., *Constitutionalism: Ancient and Modern* ... 22.

⁴⁰¹ Andrews, W.G., op.cit. 13. See also Vile, M.J.C., op.cit. 11.

⁴⁰² Mojekwu, C.C., op.cit. 184.

⁴⁰³ Zoethout, C.M. & Boon, P.J., “Defining constitutionalism...”1,11.

⁴⁰⁴ Rosenbaum, A., “Introduction” 4.

The Classic “Friedrichian” definition of constitutionalism is “an institutionalized system of effective regularized restraints on governmental action.”⁴⁰⁵

In all its successive phases, McIlwain and Schochet observed, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.⁴⁰⁶

According to Nwabueze, “There is something logically incoherent about the modern doctrine of constitutionalism, for it places a limit on supreme political authority without denying its existence.”⁴⁰⁷

Henkin echoed the same view:

“In sum, American constitutionalism – which is not novel – implies a government subject to the Constitution; it implies limited government, government with agreed powers for agreed purposes, subject to the rule of law; it implies fractionalized authority to prevent concentration of power and the danger of tyranny. Constitutionalism implies also the reservation of a large private domain and retained rights for every individual.”⁴⁰⁸

The problem has always been how to limit the arbitrariness of political power which man can manipulate in a government.

It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism.⁴⁰⁹

⁴⁰⁵ See Friedrich, C., *Man and His Government* 271; Sigmund, P., “Carl Friedrich’s Contribution to the Theory of Constitutionalism – Comparative Government” 34.

⁴⁰⁶ McIlwain, C.H., *Constitutionalism: Ancient and Modern*...21-22; also quoted by Grey, T.C., “Constitutionalism: An Analytic Framework” 189; Schochet, G.J., op.cit.5.

⁴⁰⁷ Nwabueze, B.O., *Constitutionalism* ... 1.

⁴⁰⁸ Henkin, L., *Constitutionalism, Democracy and Foreign Affairs* 6, 7.

⁴⁰⁹ See Zoethout, C.M. & Boon, P.J., op.cit. 1; Nwabueze, B.O., quoted by Mojekwu, C.C., op.cit.164.

Traditional definitions of constitutionalism are therefore grounded on the notion of limitation of state power by means of law.⁴¹⁰ The focus here is on the extent to which the constitution is meant to limit the damage a state can do.⁴¹¹ Constitutionalism as defined is a negative one.

According to Ivison,

“Negative constitutionalism... focuses on the limiting functions of the constitution. It coordinates to a definition of what the state cannot or should not do. So constitutionalism is a means of opposing, in fact it does not oppose things already opposed, state power, where constitutions are primarily inhibiting and preventing mechanisms meant to protect individuals and society against arbitrary exercises of power.”⁴¹²

That is the logic of what Ivison called “Hobbesian Constitutionalism”.⁴¹³ Protection of individuals against arbitrary exercise of power or despotic government is to be anchored in certain pre-determined political norms, such as the fundamental principles of the rule of law. These are said to exist over and above the political community, and are not subject to the ‘politics’ of bargaining and compromise.⁴¹⁴

Negative constitutionalism is procedural, formal and relates to the “normative *Verfassung*”, “normal politics”, or politics made in terms of the norms and based on the rules of law. Power is proscribed and procedures prescribed.⁴¹⁵

⁴¹⁰ On “legal limitation of power” as essential to constitutionalism as traditionally understood, see also Grey, T., *op.cit.* 1; Vile, M.J.C., *op.cit.* 1; Mojekwu, C.C., “Nigerian Constitutionalism” 164; Chandler, R.C., Enslin, R.A. & Renstrom, P.G., *op.cit.* 35; Rosenbaum, A.S., “Introduction” 4; Arato, A., “Dilemmas...” 167-168; Armour, L., “John Locke and American Constitutionalism” 10; Botha, H., “The values and principles underlying the 1993 Constitution” 242; De Villiers, B., “Federalism in South Africa: implications for individual and minority protection” 375; Olivier, P.J.J., “Constitutionalism in the new South Africa” 20-21; Lenaerts, K., “Constitutionalism and the Many Faces of Federalism”, *The American Journal of Comparative Law*, 1990, 205.

⁴¹¹ Ivison, D., “Pluralism and the Hobbesian Logic of Negative Constitutionalism” 83.

⁴¹² *Idem* 85.

⁴¹³ *Idem* 83-89.

⁴¹⁴ *Idem* 83-98.

⁴¹⁵ Andrews, W.G., *Constitutions and Constitutionalism...* 13, 26.

According to some scholars, constitutionalism is a doctrine that is prescriptive rather than descriptive, an ideal of how the authority should be exercised not how it is being exercised in practice.⁴¹⁶

However, in a system such as the South African where “constitutionalism has become central to the ...jurisprudence”⁴¹⁷ and courts of law, especially the Constitutional Court have to ensure that it is actually practised, constitutionalism acquires both prescriptive, normative and descriptive dimensions.

Insofar as it restricts the state to what it can do, constitutionalism tends to create a “minimal state”, that is a state which leaves greater space to individual freedom and activities.

The concept of “minimal state”⁴¹⁸ is itself problematic since what is being limited is not in fact the state, as understood in constitutional and international law, but the government which is but a component of statehood according to article 33 of the Montevideo Convention referred to earlier.

Born in the golden age of liberalism in the West, negative constitutionalism shares its ideology and is closely associated with it. Accordingly, it is generally labelled as “liberal constitutionalism” by both its protagonists and its opponents and criticism against liberalism generally follows constitutionalism.

⁴¹⁶ See Boule *et al.*, *Constitutional and Administrative Law* 20; Carpenter, G., “Public Law: Constitutional Law”, in Hosten, W.J. *et al.*, (eds.), *Introduction to South African Law and Legal Theory*, Durban: Butterworths, 1997, 948-949; Henkin, L., “A New Birth of Constitutionalism...” 41.

⁴¹⁷ Statement made by Mokgoro J in *S v Makwanyane and Another* 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) at paragraph 301.

⁴¹⁸ Olivier, P.J.J., “Constitutionalism...” 20, 21.

Constitutionalism was and still is perceived as a “bourgeois concept” to serve the dominant class, “an imperialist design imposed by the imperialist state with the power of its monopolies”.⁴¹⁹

Behaviourist and Marxist scholars also alleged that this kind of constitutionalism was an instrument in the hands of conservative economic elites to prevent or impede social and economic change.⁴²⁰

Constitutionalism was said to focus more on limitation of power, individual and negative rights and on a minimal state at the expense of collective rights rather requiring positive action by the government and more than a minimal state for their enforcement.

Iverson argues that negative constitutionalism seems “an incomplete formulation of what constitutionalism means. Constitutions are about preventing abuses of powers, but are also about more positive things too.”⁴²¹

On the other hand, scholars such as Zoethout and Boon hold that because of its main procedural nature, traditional constitutionalism is unable to respond adequately to contemporary problems of the welfare society, since it is primarily aimed at protecting (negative) individual rights and freedoms.

Therefore, so the argument goes, we should re-define or reconceptualise the concept.⁴²²

Constitutionalism ought to transcend this negativism; not only should it provide for individual rights and freedoms, but it should also include (some) social and economic, and collective rights (in other words the second and third-generation rights).⁴²³

⁴¹⁹For a criticism against liberal constitutionalism, see, for instance, Slagstad, R., “Liberal constitutionalism and its critics” 103-129; Holmes, S., *op.cit.* 230-232; Nzombe, S., *op.cit.* 3; Shivji, I.G., “State and Constitutionalism...”27-28; *Idem*, “Class Perspective...”255-260.

⁴²⁰ See Sigmund, P., “Carl Friedrich’s Contribution to the Theory of Constitutionalism...”41.

⁴²¹ Iverson, D., *op.cit.* 83.

⁴²² Zoethout, C.M. & Boon, P.J., “Defining constitutionalism...”1,15.

⁴²³ *Idem* 2.

Hence the tendency to move away from traditional approaches to constitutionalism, from legal, procedural, formal and negative constitutionalism to modern approaches favouring political, substantive and positive constitutionalism.

2.2.1.2. Modern Approaches: Substantive and Positive Constitutionalism

Unlike traditional constitutionalism with its overemphasis on procedure and restraint, modern constitutionalism is said to be more concerned with values. It is value-laden, teleological or purposive constitutionalism.

Modern constitutions are value-based. The 1996 Constitution of South Africa,⁴²⁴ for instance, provides that the Republic is based on a number of core “values”⁴²⁵ and these democratic values “must” be promoted in the interpretation of the Constitution in general and of the Bill of Rights in particular.⁴²⁶

Modern approaches champion substantive and positive constitutionalism. To give effect to democratic values, the state should be more effective and more active and be given more powers than under negative constitutionalism.

⁴²⁴ Act 108 of 1996, Preamble, Section 1, 7 (1), 195 (1).

⁴²⁵ Section 1 of the Constitution provides:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

On values and principles in the South African 1993 Constitution, for instance, see Botha, H., *op.cit.* 233, 241; Olivier, P.J.J., “Constitutionalism...”21-22.

⁴²⁶ According to Section 39(1) (a),

“When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”

A powerful version of this kind of constitutionalism is what Ivison called “rights-based constitutionalism.”⁴²⁷

Rights promoted by such constitutionalism are not only individual and first-generation rights, but also collective, second, and third-generation rights.

Understandably, criticism against substantive and positive constitutionalism came from the proponents of procedural and negative constitutionalism who denied a more active role to the state and argued against the inclusion of socio-economic demands in a Bill of Rights except as directive principles.⁴²⁸

Zoethout and Boon, for instance, pointed out that “Whatever the merits of the social and economic objectives, we believe they should not be given constitutional status.”⁴²⁹

They warned against the erosion of constitutionalism that could result from the insertion of substantive values or positive rights.

According to them,

“Including positive rights into the notion of constitutionalism entails the problem of how to unite the idea of state action (as needed for realising second and third-generation rights) with the constitutional premise of limiting state power.”⁴³⁰

Caught between “tradition” and “modernity” in comparative constitutional law, between negative, formal and procedural constitutionalism necessitating a minimal state on the one hand, and positive, substantive and teleological constitutionalism directed at a maximal state on the other hand, how do we understand constitutionalism in this study?

⁴²⁷ Ivison, D., op.cit.85.

⁴²⁸ Davis, D., “The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles”, *SAJHR*, 1992, 475-490.

⁴²⁹ Zoethout, C.M. & Boon, P.J., op. cit. 15.

⁴³⁰ *Idem*, 2.

2.2.1.3. Constitutionalism as Understood in the Study

In line with the holistic or integrated methodological approach embraced in the study, our approach to constitutionalism inserts in the “great tradition” as enriched by recent developments occurred in both constitutional and international law.

Traditional and modern approaches as well as rules and values are not mutually exclusive, but reinforcing.

According to Carpenter, “In short, constitutionalism is a doctrine which is concerned with values.”⁴³¹

Formal, procedural, and negative constitutionalism should not be stressed at the expense of substantive and positive constitutionalism and *vice versa*.

We take the view that constitutionalism is a legal⁴³² and political idea, principle or doctrine; it is based on both rules and values.

The distinction between procedural, formal and negative constitutionalism on the one hand and substantive and positive constitutionalism on the other hand has become blurred or insignificant. That is the result of the constitutionalisation of individual and collective, first, second and third-generation rights through enforceable Bills of Rights as well as important developments in universal and regional human rights-law with several conventions that were adopted, ratified and are now nearly binding on every state. Today’s constitutionalism includes procedure and substance, rules and values.

⁴³¹ Carpenter, G., “Public Law” 949.

⁴³² Dealing with democracy, legitimacy and constitutionalism, Carpenter held:

“These terms feature strongly in writings on constitutional law, but in fact only constitutionalism can really lay claim to being a legal concept.” See Carpenter, G., “Public Law...” 948.

Botha also ventured the view that legitimacy was a “sociological concept” (Botha, H., op.cit.234-236). We fully agree. However, constitutionalism, democracy and legitimacy are not only sociological or political but also legal or constitutional-law concepts. Therefore, constitutional scholars should not develop any complex *vis-à-vis* other social scientists in excluding them from their realm.

In view of the above, our understanding of constitutionalism is thus a holistic one. Furthermore, as captured in the topic of this work, constitutionalism is discussed without epithets “traditional”, “ancient” or “modern”, “old” or “new”, “negative” or “positive”, “formal” or “substantive”, which are generally source of controversies.

In the main, the “traditional” and “ancient” still remain with us. Constitutionalism that could be and was considered “modern” in the 1930s or the 1940s, for instance, was not new altogether.⁴³³ Nor did it remain unchanged throughout the twentieth century.

In the same vein, the “new constitutionalism” heralded by such scholars as Ihonvbere⁴³⁴ in the 1990s was still marked by the past.

Its exact contours still need to be outlined and it is unlikely that we will very soon witness what Francis Fukujama⁴³⁵ would term “the end of the history of constitutionalism”.

In the changing world, constitutionalism can only be changing too.⁴³⁶ Arguably, it is both an evolutionary and a revolutionary concept.

As far as the state is concerned, a holistic understanding of constitutionalism calls for an effective and proactive state.

Conac rightly emphasised that “The *Etat de droit* is not a minimal state, indifferent to sufferings and injustices, or impassible in face of economic and social crises.”⁴³⁷ It must take initiatives.

⁴³³ See McIlwain, C.H., *Constitutionalism: Ancient and Modern*, supra; idem, *Constitutionalism in the Changing World*, supra.

⁴³⁴ Ihonvbere, J.O., *Towards a New Constitutionalism in Africa*, supra.

⁴³⁵ Fukujama, F., *The End of History...* supra.

⁴³⁶ Gauba, O.P., *Constitutionalism in a Changing Perspective*, New Delhi: Segment Books, 1996.

⁴³⁷ “*L’Etat de droit n’est pas un Etat minimum insensible aux souffrances et aux injustices, impassible face aux crises économiques et sociales*” (Translation mine). See Conac, G., “Etat de droit...”486.

When necessity obliges and market mechanisms and social conditions do not guarantee to all people the minimum without which men are actually demeaned, excluded and unable to enjoy the most elementary rights related to human dignity, the state should intervene.⁴³⁸

The reference to *Etat de droit* offers the opportunity to examine its scope and relationship with Rule of law, Constitutionalism, *Rechtsstaat*, and *Regstaat* briefly and without any pretension to dwell on these fascinating, rich and intertwined concepts which have given rise to much debate. Quite a lot has been written about the linguistic difficulties to translate one into another.

The concept of rule of law, popularised by AV Dicey and closely associated with the Westminster system, is not readily definable although it is often used in every day speech and in the press in particular.

Scholars even in the same system diverge on its meaning and even on their reading of the Diceyan conception. That is particularly true in the South African context.

According to Carpenter,

“In its original sense, as defined by AV Dicey, it means three things; first, that no-one is punishable except for a distinct breach of the law, to which everyone is subject; secondly, that all are equal before the law; and thirdly, that the rights of the individual are not formally protected in a constitution, but by the ordinary courts of the land.”⁴³⁹

⁴³⁸ It is perhaps noteworthy to highlight the full quotation of the French scholar, when he wrote:
“L’Etat de droit n’est pas un Etat minimum insensible aux souffrances et aux injustices, impassible face aux crises économiques et sociales. S’il n’a pas à traiter les hommes en assistés ni à se transformer en unique entrepreneur et unique employeur, il faut bien qu’il prenne des initiatives lorsqu’en raison des circonstances ou des localisations certains besoins essentiels d’une population ne peuvent être satisfaits par les mécanismes du marché. L’Etat a le devoir d’intervenir s’il apparaît que les mécanismes de l’économie et les solidarités de la vie sociale ne garantissent pas à tous le minimum sans lequel les hommes deviennent des exclus ou des dégradés, dans l’incapacité d’exercer de fait les droits les plus élémentaires liés à la dignité de la personne humaine.” (Conac, G., “Etat de droit...”⁴⁸⁶)

⁴³⁹ Carpenter, G., “Public Law...” 959.

Dicey's reading by Davis, Chaskalson and De Waal, also South African writers, is however slightly different:

"Briefly stated, Dicey's concept of the rule of law comprised three fundamental tenets: the regular law of the land was supreme so that individuals should not be subject to arbitrary power; state officials were subject to the jurisdiction of the ordinary courts of the land in the same manner as individual citizens; and the Constitution was the result of the ordinary law of the land so that the courts should determine the position of the executive and the bureaucracy by principles of private law."⁴⁴⁰

In its modern sense, the doctrine of the rule of law has come to include principles such as the independence of the judiciary; legal certainty; control over the exercise of discretionary powers and over subordinate legislatures; limitation of governmental powers by way of checks and balances; minimum procedural standards to ensure that no-one can be found guilty unless she / he has been dully proved so; equality before the law, which implies more than equality before the courts; and effective judicial remedies for the enforcement of fundamental rights.⁴⁴¹

The French concept of *Etat de droit* has generally been understood as the French conception of the Anglo-Saxon Constitutionalism and Rule of Law principles, the German *Rechtsstaat* or the Afrikaans *Regstaat*. However, a few points are in order here.

First, constitutionalism and rule of law as principles and doctrines cannot be identified to *Etat de droit*, which refers more concretely to an entity, the State under Law.

The translation of rule of law by *Etat de droit* is therefore unfortunate and misleading.

The best French translation of rule of law would be *gouvernement de droit* (government subject to law, government understood less as institution, the Cabinet, than a managerial process or governance). On the other hand, *Etat de droit* in English would translate to mean Legal State closer to the Afrikaans and German concepts of *Regstaat* and *Rechtsstaat*.

⁴⁴⁰ Davis, D., Chaskalson, M. & De Waal, J., op.cit 1.

⁴⁴¹ Carpenter, G., "Public Law..." 959-960.

In Conac's view, *Etat de droit* is synonymous with *Rechtsstaat*. The latter was conceived in Germany (Prussia) at the end of the nineteenth century as opposed to the state of police (*Etat de police*) to limit administrative arbitrariness and discretionary power in order to enhance efficiency and protect citizens. It implied intervention by the judge to ensure that executive authorities abide by the law. It was essentially an administrative *Etat de droit* where administration was subject to law.⁴⁴²

Carpenter ventured that the *Rechtsstaat* idea tallies to a large extent with the English law concept of constitutionalism, as it distinguishes between the state founded on law and the totalitarian or Power State.⁴⁴³ Scholars distinguish between the formal and material *Rechtsstaat*.

The formal *Rechtsstaat* complies with criteria such as the rule *nulla poena sine lege*; the idea of a legislature which functions in accordance with certain predetermined rules; adherence to the doctrine of separation of powers, particularly in regard to functions, and the presence of checks and balances between the organs of government; adherence to certain rules in criminal proceedings; legal certainty; trust in or commitment to the legal order; and the recognition of the independence of the judiciary. The list of elements is not exhaustive, as the concept is dynamic and not static.

The material *Rechtsstaat*, on the other hand, is concerned with legal values (such as material or substantive justice rather than formal or legal certainty, fairness) and complements the first.

The material *Rechtsstaat* demands a system of judicial supremacy while the requirements of formal *Rechtsstaat* like those of the rule of law may be met in a system of legislative or parliamentary supremacy.⁴⁴⁴

⁴⁴² Conac, G., "Etat de droit..." 483.

⁴⁴³ Carpenter, G., "Public Law: Constitutional Law" 960.

⁴⁴⁴ *Idem*.

The distinction between the formal and material *Rechtsstaat* is unknown in the French literature. With regard to the *Etat de droit*, the closest equivalence might be the distinction between democratic and non-democratic *Etat de droit*.

In Conac's terms, democracy is the political transposition of the *Etat de droit* and the latter the legal transposition of the first.⁴⁴⁵ An *Etat de droit* is necessarily a democratic state.

According to Badinter, the adjective is important.⁴⁴⁶ What is therefore required by constitutionalism and democracy is not merely an *Etat de droit*, but a constitutional and democratic one.

As far as the Afrikaans *Regstaat*⁴⁴⁷ is concerned, it is also directly derived from the German *Rechtsstaat*, as the French *Etat de droit*.

To sum up, the concepts of *Etat de droit*, *Rechtsstaat*, *Regstaat*, Rule of Law, and Constitutionalism are historically, theoretically and philosophically different from one another. Nevertheless, because of the awkwardness of "Legal State" or "State Law", *Etat de droit* and *Rechtsstaat* are generally called "Rule of Law".

⁴⁴⁵ Conac, G., "Etat de droit..." 485. On *Etat de droit*, other French and Francophone authorities include Amor, Abdelfattah, "L'émergence démocratique dans les pays du Tiers-Monde: le cas des Etats africains", in Conac, G., (ed.), op.cit. 55-68; Chevallier, J., *L'Etat de droit*, Paris: Montchrestien, 1992; Conac, G., (ed.); Dynamiques et finalités des droits africains, Paris: Economica, 1980; Dieng, A., "Démocratie et Primauté du droit", in Conac, G., (ed.), *L'Afrique...* 467-469; Dumont, R., *Démocratie pour l'Afrique. La longue marche de l'Afrique noire vers la liberté*, Paris: Le Seuil, 1991; Fares, Z., *Afrique et Démocratie. Espoir et illusions*, Paris: L'Harmattan, 1993; Hamon, L., *L'Etat de droit et son essence*, Paris: RDP, 1991; Leclercq, Cl., *Institutions politiques et droit constitutionnel*, supra; Mpongo, Bokako, B.E., *Institutions politiques et droit constitutionnel*, Tome 1, Kinshasa : Editions Universitaires Africaines, 2002.

⁴⁴⁶ Badinter, R., op.cit. 9.

⁴⁴⁷ On the comparison between *Regstaat*, *Rechtsstaat* and the Rule of Law, see, for instance, Blaauw L. "The *Rechtsstaat* Idea Compared with the Rule of Law as a Paradigm for Protecting Rights" 76-96.

Rule of Law and Constitutionalism have a distinct English or Anglo-American flavour. Rule of Law is particularly less fleshed out than the continental *Rechtsstaat* and *Etat de Droit*, which are German and French concepts respectively.

Rule of law is close to and even implicit in constitutionalism. Both are supplementing and enriching one another.⁴⁴⁸ On the other hand, the rule of law, *Etat de droit*, *Rechtsstaat*, and *Regstaat* entail a government subject to the law. All of them are interrelated and supportive of constitutionalism and democracy.

2.2.2. Elements of Constitutionalism

Democratic deliberation, respect for individual rights and adherence to the rule of law are, according to Nino,⁴⁴⁹ three crucial facets of constitutionalism.

On the other hand, Rosenfeld considered constitutionalism “a three-faceted concept”,⁴⁵⁰ consisting of three general features, namely limited government, adherence to the rule of law and protection of human rights.⁴⁵¹

We draw from the above as constitutionalism in this study is analysed through what are held to be its main elements, namely separation of powers, human rights and the constitution as embodying the rule of law. These three constitutive elements of constitutionalism are intertwined and not a single one would suffice to define constitutionalism.

⁴⁴⁸This results from a broad conception of the rule of law since, as narrowly understood in the Diceyan conception, the rule of law would be opposed by constitutionalism based on a supreme constitution with a justiciable Bill of Rights and embodying judicial review of the legislation. Needless to say that AV Dicey based his concept of rule of law on the observation of the Westminster system that knows parliamentary sovereignty or supremacy of laws enacted by Parliament and ignores a Bill of Rights.

⁴⁴⁹ Quoted by Rosenfeld, M., “Modern Constitutionalism...” 27-28.

⁴⁵⁰ Rosenfeld, M., op.cit. 28.

⁴⁵¹ Idem 4-5.

2.2.2.1. Separation of Powers

Scholars such as Vile have devoted entire works to the separation of powers.⁴⁵² A major problem with the literature on the doctrine of the separation of powers is that few writers define exactly what they mean by the doctrine, what its essential elements are, and how it relates to other ideas.⁴⁵³

We shall briefly review the literature and especially focus on the principle of separation of powers, its justification and different forms. Emphasis will also be on federalism as another aspect of the separation of powers.

2.2.2.1.1. Principle, Justification, and Forms

The separation of powers is the most ancient and enduring element of constitutionalism. The principle is known in numerous societies.

Vile considered it the great pillar of Western political thought.⁴⁵⁴ Its first modern design is to be found in John Locke's writings, especially his *Second Treatise of Government*.⁴⁵⁵ Locke's theory of government embodied the essential elements of the doctrine of separation of powers.

⁴⁵² Vile, M.J.C., *Constitutionalism and the separation of powers*, supra.

⁴⁵³ Idem 12.

⁴⁵⁴ Idem 2. Vile may be commended for his documented account of the separation of powers in the "Western political theory": its history dating back to ancient Greeks in Athens and Romans; related theories such as the "theory of mixed government" (pp.26-52) and the "theory of the balanced constitution" (pp.53-75); and the English (pp.37-46), American (pp.119-175) and French (pp. 176-211) contributions and experiences with separation of powers.

⁴⁵⁵ According to Vile (op.cit. 49), "some thirty years before the publication of Locke's *Second Treatise*, the doctrine of separation of powers had been evolved as a response to the problems of the Civil War and the Commonwealth and had, in its seventeenth-century formulation, reached a high degree of development." Precursors cited by Vile include Sadder, George Lawson, Charles Dallison, Philip Hunton, Herle, and Milton.

Charles Louis de Secondat, better known as the Baron de Montesquieu is, however, the first who gave it paramount political importance and remains the “oracle who is always consulted and cited on this subject.”⁴⁵⁶

As Vile rightly noted, Montesquieu did not invent the doctrine of separation of powers, and much of what he had to say in his *De L'Esprit des Loix (The Spirit of Laws)* was inspired by contemporary English writers, and by John Locke.⁴⁵⁷ However, his contribution surpassed that of all earlier writers.

Montesquieu contributed new ideas to the doctrine; he emphasised certain elements in it that had not previously received much attention, particularly in relation to the judiciary, and he accorded the doctrine a more important position than most writers before him.

Montesquieu's view of the function of government was much closer to modern usage than that of his predecessors. He emphasised the judicial function and its equality with other branches of government and the independence of the judiciary while providing a clearer view of the separation of legislative and executive branches.

Vile held that with Montesquieu, the separation of powers was no longer an English theory; it had become a universal criterion of a constitutional government.⁴⁵⁸

De L'Esprit des Loix was hailed as the first systematic treatise on politics since Aristotle. The doctrine assumes that power corrupts and separation of powers is essential to liberty and democracy.

⁴⁵⁶ See Vile, M.J.C., op.cit. 76-97; Cooper, S.W., “Considering ‘power’ in separation of powers” 362-363; Levi, E.H., “Some aspects of separation of powers” 373-374; Van der Vyver, J.D., “Political power constraints and the American Constitution” 419; Idem, “The separation of powers” 177.

⁴⁵⁷ Vile, M.J.C., op.cit. 76.

⁴⁵⁸ Idem 96-97.

The underlying idea of Montesquieu's thought was that Man, though a reasoning animal, is led by his desires into immoderate acts and "Constant experience shows us that every man invested with power is apt to abuse it, and carry his authority as far as it will go".⁴⁵⁹ The end result of concentration or accumulation of all powers is despotic government, tyranny or suppression of all form of liberty.⁴⁶⁰

According to Gordon Wood,⁴⁶¹ abuse of power by any branch of the government, even by the traditional representatives of the people, is a "tyranny". Abuse of power by people's representatives was labelled "elective despotism" and Jefferson made it clear that "elective despotism was not the government we fought for."⁴⁶²

To prevent abuse of power, Montesquieu demanded that everything be done to ensure that "*le pouvoir arrête le pouvoir*".⁴⁶³ As he held, "it is necessary from the very nature of things that power should be a check to power".⁴⁶⁴

Madison⁴⁶⁵ later on echoed the same view and urged that "ambition (of one power should) be made to counteract ambition (of another power)".

To guarantee liberty and freedom against tyranny and dictatorship, Montesquieu thus recommended the separation of powers:

"All would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers; that of making laws; that of executing public resolutions; that of judging crimes and disputes of individuals."⁴⁶⁶

⁴⁵⁹ Montesquieu, quoted by Vile, M.J.C., op.cit. 78.

⁴⁶⁰ See Levi, E.H., op.cit. 375-376; Tenekides, G., "The Relationship between Democracy and Human Rights" 14; Mangu, Mbata B., *Separation of Powers...* 6.

⁴⁶¹ Gordon Wood, quoted by Levi, E.H., op.cit. 375.

⁴⁶² Quoted by Levi, E.H., op.cit. 375.

⁴⁶³ Translation for: "Power should stop power".

⁴⁶⁴ Lafrance, G., "Montesquieu and Rousseau on Constitutional Theory" 60.

⁴⁶⁵ Levi, E.H., op.cit. 378.

⁴⁶⁶ See Vile, M.J.C., op.cit. 85; Cooper, S.W., op.cit. 362-363; Levi, E.H., op.cit. 373-374; Van der Vyver, J.D., "The separation of powers..." 177-178.

Separation of powers may be horizontal or vertical. The principle as developed by Locke, Montesquieu and others may be designated as that of horizontal separation of powers or separation of power *stricto sensu*. But it is also related to federalism, which is considered another version of the separation of powers. Federalism is a vertical, spatial, territorial or geographic separation of powers.⁴⁶⁷

As Vile once observed, separation of powers and federalism are interlocking elements in a thoroughgoing philosophy of the division of power.⁴⁶⁸

2.2.2.1.2. Horizontal Separation of Powers

2.2.2.1.2.1. Components of the Separation of Powers Principle

Vile distinguished between what he called “the pure doctrine of separation of powers”, which in his view is a complete separation of powers, and its modification essentially by the Fathers of the American Constitution, who championed a partial separation of powers or the modification of the “pure doctrine” by a system of checks and balances.⁴⁶⁹

Taking stock of the above developments, Van der Vyver held that the idea of separation of powers propounded eventually developed into a norm comprising four basic precepts or principles: the principle of *trias politica*, the principle of the separation of personnel, the principle of the separation of functions, and the principle of checks and balances.⁴⁷⁰

⁴⁶⁷ On federalism as territorial separation of powers, see Chandler, R.C, Enslin, R.A. & Renstrom, P.G., op.cit. 31, 58.

⁴⁶⁸ Vile, M.J.C., op.cit. 171.

⁴⁶⁹ Idem 85-86.

⁴⁷⁰ See Van der Vyver, J.D., “Political power constraints...” 419-420; Idem, “The separation of powers” 178-179.

The first principle requires a formal distinction to be made between three independent branches of state authority, namely the legislative, executive and judicial branches.

According to the second principle, there should be a separation of personnel in such a way that the same people should not be allowed to serve more than one branch of government at one time.

The third principle calls for a separation of functions between the three branches of state authority to avoid one interfering with or assuming functions vested by law in another branch or state organ.

The fourth and last principle requires that each organ be entrusted with special powers designed to serve as checks on the exercise of functions by the others in order to come to equilibrium.

The three first principles are characteristics of what Vile called “the pure doctrine of the separation of powers”⁴⁷¹ as inherited from the Masters, especially Montesquieu.

According to the Fathers of the American constitution, the three principles as “parchment barriers” were not enough:

“Unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”⁴⁷²

⁴⁷¹ Vile, M.J.C., op.cit. 12, 13. In fact, the use of expressions such as “pure doctrine” is problematic since no doctrine is really “pure”. Vile was certainly aware of it when he painfully strove to justify himself as using it “simply to indicate that it represents a coherent, interrelated set of ideas, with the complicating factors of related theories removed.” (p.12)

⁴⁷² See Vile, M.J.C., op.cit. 159-160, quoting *Federalist* No.48.

Checks and balances were therefore indispensable. This fourth principle represents the major American contribution to the theory of separation of powers. It brought about significant change to the "pure doctrine", as it requires a partial separation of powers instead of an absolute one.

Sometimes, rather than a component of the broad principle of the separation of powers, checks and balances is equated with it as a separate doctrine.⁴⁷³

One of the checks and balances is judicial review by independent courts. This principle deserves a brief comment as it is arguably the most discussed in the literature, especially by American scholars.

As a requirement of the principle of the separation of powers, judicial review was instituted to allow courts to strike down laws enacted by elected representatives of the people in Congress.⁴⁷⁴

That was a fundamental shift away from the conception of the British legal order founded on the supremacy of Parliament.⁴⁷⁵

According to Feliciano, "Judicial review is essential for the maintenance and enforcement of the separation of powers and the balancing of power among the three departments of government."⁴⁷⁶

⁴⁷³ See, for instance, Vile when he held

"The doctrines of the separation of powers and checks and balances are two theories of constitutionalism." Vile, M.J.C., op.cit. 263.

⁴⁷⁴ See Feliciano, F.P., "The Application of law: some recurring aspects of the process of judicial review and decision-making" 19, 24.

⁴⁷⁵ Levi, E.H., op.cit. 376.

⁴⁷⁶ Feliciano, F.P., op.cit. 23.

Yet, it is also a limitation on the principle of the separation of powers in that by striking down laws or acts of Parliament, the judiciary encroaches upon the functions of other branches of state authority, especially the legislature.

There lies the paradox of judicial review.⁴⁷⁷ The conclusion reached was that the people, not the institutions of government, were sovereign.

Each branch served the sovereign people and no branch could rightly claim to be its sole representative. Each branch, in its own way, was the people's agent, its fiduciary for certain purpose, whatever its manner of selection.⁴⁷⁸

Montesquieu intended the judiciary to be independent of the legislative and executive branches, but he did not accord the judicial branch the status and importance they ultimately achieved in American thought.⁴⁷⁹

The principle of checks and balances in general and judicial review in particular supplanted the three other principles of separation of powers. Worse, in much of the literature, if judicial review is not confused with separation of powers of which it is but a component, it is considered synonymous with constitutionalism itself.

This conceptual confusion between judicial review and separation of powers on the one hand, and judicial review and constitutionalism on the other hand is among the most regrettable in the literature and poses the problem of the definition of the concepts themselves. Judicial review rightly lies at the heart of constitutionalism.⁴⁸⁰ However, constitutionalism cannot be reduced to it, as it may exist without it.⁴⁸¹

⁴⁷⁷ Mangu, Mbata B., *Separation of powers...* 5.

⁴⁷⁸ See Levi, E.H., *op.cit.* 385 - 386; Mangu, Mbata M., *Separation of Powers...* 5.

⁴⁷⁹ Vile, M.J.C., *op.cit.* 88, 93.

⁴⁸⁰ Davis, D., Chaskalson, M. & De Waal, J., "Democracy and constitutionalism: the role of constitutional interpretation" 121.

⁴⁸¹ Pennock, J.R., "Epilogue" 380. The United Kingdom, is a case in point. However, we shall return later on to the UK when we shall discuss Okoth-Ogendo's case for "Constitutionalism without Constitution".

2.2.2.1.2.2. Separation of Powers and Political Regimes

As Hyden emphasised, political regime must be distinguished from government and state.⁴⁸² The distinction between state and government was drawn earlier and there is no need to repeat it here.

The key concept remains that of “state”, without which there is no legitimate government or regime.⁴⁸³

Hyden portrayed the relationship between state, regime and government:

“a regime is typically a more permanent form of political organization than a specific government...but less than a state. Governments ...change more often than do regimes. Sometimes they may change simultaneously, as for instance, when the resignation or overthrow of a government also implies the end of the very basic rules that had guided political action before.”⁴⁸⁴

The expression “political regime” was envisaged with regard to either the global political organisation, which is to mean both the forms of the state and government, or only the latter.⁴⁸⁵

In legal terms, a political regime is nowadays considered a complete set of political institutions of a state as they result not only from the constitutional rules that organise them, but also from their actual functioning as determined by various political, economic, social and cultural factors.⁴⁸⁶ It refers to the fundamental rules that organise and regulate political institutions and their functioning.

It also relates to the political institutions themselves. In the latter sense, a political regime becomes a constellation with political institutions as its stars.⁴⁸⁷

⁴⁸² Hyden, G., “Governance and the Reconstitution of Political Order” 185.

⁴⁸³ Of course, one also speaks of “Government in exile” for countries under authoritarian colonial or foreign rule, but this is a borderline and unstable situation. The government only becomes a real and legal one when it “governs” a state.

⁴⁸⁴ Hyden, G., “Governance...” 185.

⁴⁸⁵ Mangu, Mbata B., *Les régimes pluralistes africains* 5.

⁴⁸⁶ Idem.

⁴⁸⁷ Ibidem.

The concepts “political regime” and “political system” are generally used interchangeably.

Legal scholars generally use the former while political scientists and other social scientists go for the latter in the Eastonian sense where the political system is perceived as a sub-system of a large social system constituted by a set of political interactions. As used in the political scientist discourse, “political system” is broader than “political regime”.

Political regimes differ from one another depending on the relationship between the main political organs of state authority; namely the “government” in the sense of the cabinet and the legislature. The major criterion seems to be the degree of separation of powers between the central organs of state authority, especially between the legislature and the executive, which has given rise to the primary division of political regimes into the parliamentary and presidential regimes. An intermediate type is the semi-presidential or mixed regime that is, however, closer to the parliamentary than the presidential regime.⁴⁸⁸

2.2.2.1.2.2.1. Parliamentary Regimes

The Westminster system is generally referred to as the classic parliamentary regime. It is characterised by a number of features.⁴⁸⁹

First, the executive is two-headed”. It consists of a Head of State and a Prime Minister. The Head of State is an elected president in a Republic if he or she is not a monarch.

⁴⁸⁸This is generally said to be a traditional classification of political regimes. With the advent of political parties and the change they have brought in modern political life, regimes are divided into pluralistic and monist regimes depending on whether they entrench political pluralism or not. See Mangu, Mbata B., *Les régimes pluralistes...* 5; Idem, *Separation of Powers ...* 18.

⁴⁸⁹ On the main features of a parliamentary regime, see Duverger, M., *Institutions politiques et droit constitutionnel* (1963) 184-188; Idem, (1975) 153-155; Leclercq, Cl., op.cit. 157; Mangu, Mbata B., *Les régimes pluralistes...* 21; Idem, *Démocratie...* 20; Mpongo, Bokako B., op.cit. 295-308.

The Head of State is the chief of the Executive whilst the Prime Minister leads the Cabinet that comprises ministers and deputy ministers.⁴⁹⁰

Secondly, the Head of State is a figurehead. Theoretically, he or she takes the most important political decisions. Actually, they are proposed and the Head of State only acts as a rubberstamp of decisions made by the Cabinet.

Thirdly, the Head of State is not politically responsible or accountable. Only the Cabinet is. Accordingly, the Prime Minister or another member of the Cabinet who thereby takes political responsibility for their implementation must countersign any decision made by the Head of State. No presidential decision is constitutionally valid if a member of the Cabinet has not countersigned it.

Fourthly, the Prime Minister is formally appointed and dismissed by the Head of State. Actually, the latter will only appoint the political leader whose political party or coalition won elections in Parliament. The Head of State also appoints and dismisses other members of the Cabinet and senior officials. As said earlier, he really signs decisions made by the Prime Minister and the Cabinet.

Finally, the Cabinet is accountable to Parliament or at least its lower chamber called National Assembly or the Commons.⁴⁹¹ It must enjoy confidence of Parliament to take office and keep governing the country. Members of the Cabinet are also members of Parliament. The Cabinet may be removed from office by Parliament through the vote of a motion of no confidence. Inversely, the Head of State may dissolve Parliament or the National Assembly on a proposal by the Prime Minister. A new election is then called and if a different majority or coalition that favours the Cabinet is voted in Parliament, the Cabinet will survive. Otherwise, the leader of the new majority or coalition will be appointed the new Prime Minister.

⁴⁹⁰ Mpongo, Bokako B., *op.cit.* 295-300.

⁴⁹¹ In countries such as Italy, Cabinet (Council) is accountable to the two Chambers, the National Assembly and the Senate.

According to Maurice Duverger, the accountability of the Cabinet to Parliament and concurrently, the probability for the latter to be dissolved are the key elements of the parliamentary regime. The regime is essentially characterised, at least formally, by the pre-eminence of Parliament. Hence its name.

The parliamentary regime is also known as a regime of collaboration of powers, especially between the executive and the legislature. Many modern democracies in the world are under parliamentary regimes.

2.2.2.1.2.2.2. Presidential Regimes

The political regime of the United States of America is considered the model of the presidential regime.⁴⁹² The American regime is characterised by a stricter separation of powers and the predominance of the President who is the very "*clé de voûte*" of state authority or the keystone of the regime. Hence the name "presidential regime".

Duverger distinguished the presidential regime from the parliamentary one on three grounds.

First, the executive is not two-headed. The full executive authority is vested in the President who appoints and may also dismiss ministers and deputy ministers. There is no need for presidential decisions to be countersigned by ministers to become valid. Ministers do not form a real and collective cabinet and are but administrative officials and president's collaborators, counsellors or assistants.

Secondly, there is no Prime Minister and the President, who is both the Head of State and of Government, is elected by universal franchise.

⁴⁹² See Mangu, Mbata B., *Les régime pluralistes...* 23; Leclercq, Cl., *op.cit.* 157; Mpongo, Bokako B., *op.cit.* 291-292.

Thirdly, the President and Congress (Parliament) are independent from one another while forming a “marriage without divorce”.⁴⁹³ The President and his Secretaries are not accountable to Congress and cannot be dismissed by it except for the first in the very serious and rare case of impeachment. On the other hand, Congress cannot be dissolved.

Many attempts to adopt the American model in the Third World and especially in Africa have failed so far. The presidential regime has been caricatured and resulted in what has been called “presidentialism”.⁴⁹⁴

The “presidentialistic regime” is a corrupt presidential regime characterised by the concentration of powers in the hands of the President.⁴⁹⁵

There is no separation of powers but, in Buchmann’s words, “a real hierachisation of powers where one institution, actually a man dominates all other institutions including Parliament that is left a very derisory role.”⁴⁹⁶ A state under such a regime cannot be taken for a constitutional state.

2.2.2.1.2.2.3. Mixed Regimes

Some political regimes borrow from both parliamentary and presidential regimes. This may be illustrated by an inquiry into the French regime under the Fifth Republic and also the South African regime under the 1996 Constitution.

In France, the executive consists of an executive and not a figurehead President directly elected by universal franchise and of a Prime Minister. The former is the Head of State whilst the latter leads the Cabinet whose members are appointed by the President.

⁴⁹³ See Duverger, M., op. cit. (1975) 167; Mangu, Mbata B., *Les régimes pluralistes...* 23.

⁴⁹⁴ See Duverger, M., supra 178; Baldwin, F.N., “Constitutional Limitations on Government in Mexico, the United States and Uganda”, in Claude, R.P., (ed.), *Comparative Human Rights*, The Johns Hopkins University Press, 85; Mangu, Mbata B., *Démocratie ...* 25; Idem, *Les régimes pluralistes...* 33; Buchmann, J., *L’Afrique noire indépendante* 252-278 ; Mpongo, Bokako, B., op.cit. 292.

⁴⁹⁵ See Duverger, M., op.cit. 168 ; Mangu, Mbata B., *Les régimes pluralistes...* 23 ; Mpongo Bokako, B., op.cit. 292.

⁴⁹⁶ Buchmann, J., *L’Afrique noire indépendante* 252-278. Also quoted by Mangu, Mbata B., *Les régimes pluralistes africains...* 33.

When the Prime Minister belongs to the same party or majority as the President, he or she is actually appointed and may be dismissed by him. On the contrary, the President only appoints the leader of the majority in Parliament.

The President enjoys great powers unknown in the classic parliamentary regime. Yet, his powers are not the same as those of the American president and his government remains accountable to the *Assemblée Nationale* (National Assembly) which may be dissolved. With the advent of the system of *cohabitation* in the 1980s, France has known a president with no majority in the *Assemblée Nationale* and who had to share powers with a cabinet led by the leader of his opposition in Parliament. The regime then looks like a parliamentary regime without the Head of State becoming a figurehead. This constitutional and political situation in France since the 1980s troubled some French constitutional lawyers in their categorisation of the French regime.

According to scholars who looked at the powers of the president, the French regime was a *sui generis* presidential regime.⁴⁹⁷ However, the *cohabitation* is not a permanent situation.

Following the landslide victory won by the party of President Jacques Chirac, namely the *Rassemblement pour la République* (RPR), and their allies during the parliamentary elections held on 16 June 2000, the French regime has returned to the normal. President Chirac who was himself reelected in early May 2000 is now also the leader of the majority in Parliament.

During his new term of office, he will certainly enjoy more power than during the first one, as he appoints the Prime Minister among the members of his majority.

⁴⁹⁷ See Leclercq, Cl., op.cit. 327-402; Mangu, Mbata B., *Les régimes pluralistes...* 23-24; Mpongo, Bokako, B., op.cit. 293-294.

Despite important powers accruing to the President, the French regime borrows more from the parliamentary than the presidential regime and meets the two main criteria once advocated by Duverger for the parliamentary regime.⁴⁹⁸

Accordingly, it would not be wrong to categorise it as a parliamentary regime, but a special one given the powers enjoyed the President.

The South African political regime under the 1996 Constitution comes closer to a mixed regime.⁴⁹⁹ From the parliamentary regime, it borrows the pre-eminence of Parliament,⁵⁰⁰ indirect election of the president in the National Assembly,⁵⁰¹ ministerial countersigning of presidential decisions,⁵⁰² membership of the National Assembly of the President, Deputy President, ministers and deputy ministers,⁵⁰³ accountability of members of the Cabinet to Parliament,⁵⁰⁴ and possible dissolution of the National Assembly.⁵⁰⁵

From the presidential regime, the South African regime borrows the predominance of the President who is an executive president and a *de facto* Prime Minister assisted by a Deputy President,⁵⁰⁶ and the responsibility of members of the Cabinet to the President who appoints and may also dismiss them.⁵⁰⁷

⁴⁹⁸ Duverger, M., quoted by Mangu, Mbata B., *Les régimes pluralistes africains...* 24.

⁴⁹⁹ On the South African regime, see Mangu, Mbata B., *Separation of Powers...* 18-21.

⁵⁰⁰ The legislature takes precedence over the executive and other state organs (Section 8(1) of the 1996 Constitution.

⁵⁰¹ Section 86(1) of the 1996 Constitution.

⁵⁰² Section 101(2).

⁵⁰³ Sections 87, 91(3), and 93. However, the President, on election, vacates his or her seat in the National Assembly.

⁵⁰⁴ Sections 92 (2), 102 (1), and 102.

⁵⁰⁵ Sections 49 (2) and 50.

⁵⁰⁶ Sections 83, 84, 85, 90, and 91 of the 1996 Constitution of the Republic of South Africa.

⁵⁰⁷ Section 91, 92, and 93.

The South African political regime borrows extensively from Parliamentarianism and some of its aspects in regard to the President and National Executive are germane to the presidential regime. This is a hybrid political regime, but in essence another *sui generis* parliamentary regime.

2.2.2.1.2.3. Assessment and Evolution of Horizontal Separation of Powers

Absolute and extreme separation of powers as systematised by Montesquieu was a mere abstraction. Vile who labelled it “pure doctrine” of the separation of powers admitted that it was an “ideal”.⁵⁰⁸

No country in the world strictly applies the norms included in the theory of the separation of powers and many differences have emerged in the approach thereto, as evidenced by the difference in forms of government even among constitutional and democratic states.

No constitutional scheme can reflect a complete separation of powers; the scheme is always one of partial separation.⁵⁰⁹

The politics of deadlock, implicit in the “pure doctrine” of the separation of powers, would make any country ungovernable. Even in America, following the principle of checks and balances, there is no drastic separation of powers. The Founders did not erect walls as a way to defend each branch’s authority.⁵¹⁰

All powers have to collaborate, given that they all have to serve the same sovereign, namely the people. Moreover, the advent of political parties has reinforced collaboration and undermined the principle of the separation of powers, as one winning party may lead both the legislature and the executive.

⁵⁰⁸ Vile, M.J.C., op.cit. 13, 18, 85-86.

⁵⁰⁹ *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at paras 1298 G, 1299 A-H, 1300 A-F, 1301 A.

⁵¹⁰ See Levi, E.H., op. cit. 376-391; Cooper, S.W., op.cit. 363-364.

Of all the components of the separation of powers, the only one to have survived in full in all the states, is the principle of the *trias politica* requiring a formal classification of the repositories of state authority into the legislative, executive, and judicial branches of government.⁵¹¹

The most fundamental aspect of the separation of powers is that there must be a separation between the judiciary and the other two “political” branches of government.⁵¹²

The doctrine of the separation of powers was for centuries the main constitutional theory that claimed to be able to distinguish the institutional structures of free societies from those of non-free societies.

In the 20th century, it was disregarded in the same way as law and other legal principles. However, very little was offered in place of this relatively coherent body of political doctrine as a framework for the analysis of political systems.⁵¹³

Accordingly, despite modification it necessarily had to undergo and which occurred, the principle still remains the benchmark for any constitutional and democratic government.

2.2.2.1.3. Federalism or Vertical, Spatial or Territorial Separation of Powers

Federalism is also a form of “separation of powers”, albeit not in the sense in which the latter is generally understood by the doctrine.

It is concerned with the “vertical” separation of powers between the central authority of the State and its provincial or regional units. The principle of federalism does, however, have its own origin and justification.

⁵¹¹ Mangu, Mbata B., *Separation of Powers* ... 7.

⁵¹² Rabkin J “The Success of the Separation of Powers and its Contemporary Failings” 1008.

⁵¹³ Vile, M.J.C., *op.cit.* 9.

2.2.2.1.3.1. The Federal Principle and Its Justification

The first and most serious constitutional application of federalism in the modern era is found in the United States of America. Federalism is linked to constitutionalism in the 10th Amendment to the United States Constitution.⁵¹⁴

Alexander Hamilton, John Jay, and James Madison gave modern federalism its classical exposition in the *Federalist*. Federalism became the territorial version of the separation of powers and the bulwark of constitutional democracy.

By contrast, the French Revolution's emphasis on the centralised rule of the majority left no room for federalism.⁵¹⁵

Federalism or the "spatial" division of powers is the particular aspect of constitutionalism with which Carl Friedrich was particularly concerned.⁵¹⁶

In Friedrich's judgment, it is this aspect of American constitutionalism that has had the greatest impact upon other countries.⁵¹⁷

However, despite its popularity in the American context, Friedrich rightly pointed out that federalism was not essential to constitutionalism.⁵¹⁸

⁵¹⁴ Lenaerts, K., op.cit. 205 (Footnote 1).

⁵¹⁵ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 31.

⁵¹⁶ Sigmund, P., "Carl Friedrich's Contribution to the Theory of Constitutionalism – Comparative Government" 39.

⁵¹⁷ *Idem*, 40.

⁵¹⁸ Carl Friedrich, as quoted by Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit.35. In his *Constitutional Government and Democracy* (1968), Friedrich even predicted:

"The pressures and exigencies of a compact and highly industrialized national economy may eventually force the US to abandon federalism." (See Chandler, R.C., Enslin, R.A. & Renstrom, P.G., *supra*, 32)

However, industrialisation does not necessarily oppose federalism and the tendency may well be in the opposite direction, since all industrialised countries favour some kind of federalism. On the other hand, it is obvious from such a statement that Friedrich himself ended up confusing federalism and the federal form of a state.

On the other hand, it may be essential to constitutional democracy, as the “federalists” forcefully contended, but there are also “pluralists” who argue that other forms of separation of powers can secure the foundations of constitutional democracy instead of federalism.⁵¹⁹

Federalism is a political idea, doctrine or principle. It is a normative and philosophical concept based on the notion that the greatest human fulfilment is to be found through participation in a wider community that, at the same time, favours diversity and protects individuality.

The federal principle therefore expresses a philosophical and/or ideological idea that a political organisation should seek to achieve both political integration and political freedom by combining shared rule on some matters with self-rule on others, in other words through cooperation and autonomy.⁵²⁰

Federalism may be seen as “The theory and practice of joining several entities into a larger political unity while preserving the basic political integrity of each entity.”⁵²¹ It implies a way of constitutional and political thinking, in other words, a culture.⁵²²

A cogent argument for federalism is that it tends to facilitate and foster democracy. It also has to do with the protection of minorities and human rights.

⁵¹⁹ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 31, 32.

⁵²⁰ On the definition of federalism, see De Villiers B “Federalism in South Africa...” 375-382; Elazar, D.J., op. cit. 29; Klaaren, J., “Federalism” 5.1-5.2; Lenaerts, K., op.cit. 205-208; Mangu, Mbata B., *Separation of Powers* ...22; Van Wyk, D., “Looking at the ‘new’ South Africa: thoughts about federation and federalism”, *SAPR/PL*, 1991, 97-98; Watts, R., op.cit. 76-78.

⁵²¹ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 30.

⁵²² See Van Wyk, D., op. cit. 98; Elazar, D.J., op. cit. 29.

Federal solutions are the means to enhance democratic republicanism in complex societies. They are often the best ways of resolving intractable ethnic conflicts and protecting diversity through a combination of self-rule and shared rule within a framework of power-sharing. Federal government therefore possesses several merits.⁵²³

The federal principle and separation of powers *strictu sensu* are based on the same ground: distribution of powers to protect human rights and prevent dictatorship, authoritarianism or despotism, but also to ensure and enhance good and democratic governance.

2.2.2.1.3.2. Models of Federalism and Forms of States

2.2.2.1.3.2.1. Models of Federalism

Broadly speaking, federalism is not necessarily a political or juridical principle; it may also be fiscal or economic.⁵²⁴ It is not necessarily linked or related to the state or a political entity.

In the present study, federalism is dealt with as a constitutional, legal or political concept linked to independent states.

As a political and legal philosophy, federalism adapts itself to all political contexts on both municipal and international levels, wherever and whenever two basic prerequisites are fulfilled: the search for unity combined with genuine respect for autonomy and legitimate interests of the participant entities.⁵²⁵

⁵²³ See Devenish, G.E., "The prospects for constitutional litigation in relation to the powers of the central and provincial governments as contained in the interim Constitution, and related issues" 35-36; De Villiers, B., "Federalism in South Africa..." 379-382, 384-387; Elazar, D.J., "Form of State: federal, unitary or ..." 29; Watts, R., "Is the new South African Constitution federal or unitary?" 76.

⁵²⁴ Chandler, R.C., Enslin, R.A. & Restrom, P.G., op.cit. 30.

⁵²⁵ Pescatore quoted by Lenaerts, K., op. cit. 206 (Footnote 4).

Lenaerts⁵²⁶ contends that the many faces of federalism can be propounded in two basic models, namely integrative federalism and devolutionary federalism. The former refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities.

Devolutionary federalism, on the other hand, refers to a constitutional order that redistributes the powers of a previously unitary state amongst its component entities.

Some scholars made a distinction between “territorial federalism” and “personal, corporate or non-territorial federalism”, depending on whether the self-rule and shared rule should benefit territorial entities or national groups, no matter where they are established in the country.⁵²⁷

“Territorial federalism” is more likely to be preferred to “personal federalism”, which is more complex and very often means racial, tribal, or ethnic federalism that seemed mostly favoured by the Afrikaner and the Zulu peoples when they claimed their own states or self-determination in South Africa.⁵²⁸ This kind of explosive federalism is also the underlying principle on which the Belgian State is based.⁵²⁹

Federalism and federation or confederation are usually confused or used interchangeably.⁵³⁰

⁵²⁶ Lenaerts, K., op.cit. 206-207.

⁵²⁷ See De Villiers, B., “Federalism in South Africa...” 377-382; Devenish, G.E., op.cit. 37.

⁵²⁸ Mangu, Mbata B., *Separation of Powers*... 27.

⁵²⁹ The Belgian State is divided into regions and communities, the French- (the *Walloons*), Dutch - (the Flemish) and German- (Germans) speaking communities.

⁵³⁰ See Van Wyk, D., “Looking at the ‘New’ South Africa...” 98.

Chandler, Enslin and Renstrom, for instance, noted that “the term federalism is usually reserved for federations at the national political level.”⁵³¹ And yet, despite their closeness, with the one nurturing the other, federalism and federation are not synonymous.

Federation and confederation are the major practical embodiments of federalism. Federalism as a political / ideological idea is wider than both of them, but a federation or a confederation without some matching kind of federalism is impossible.⁵³² On the other hand, unitary systems can also have strong federalist features.⁵³³

Federalism is opposed to unitarianism, which requires unity or centralisation of power. However, the contrast is not an absolute one since unitarianism itself may go hand in hand with either centralisation or decentralisation or devolution of power.

The modern trend is towards federalisation and devolution in unitary states. An extreme centralisation is hardly possible and in our modern times every society is “federalist” to some extent. “Federalising” is a common trait of all human life.⁵³⁴

Opponents of unitarianism and proponents of federalism argue that the first fosters authoritarianism or despotism whilst the latter supports democracy and human rights. While it is true that authoritarianism and despotism generally emerged in unitary states or fake federations, some unitary countries feature among the acclaimed models of constitutionalism and democracy.⁵³⁵

⁵³¹ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 30.

⁵³² Van Wyk, D., “Look at the ‘New’ ...” 98.

⁵³³ Mangu, Mbata B., *Separation of Powers*... 9.

⁵³⁴ Idem 32.

⁵³⁵ Federalism postulates democracy and all genuinely federal states (the USA, Canada, Germany, Australia, India, Belgium), as opposed to disguised unitary or fake federal states (for instance, the USSR and Nigeria), are constitutional and democratic states. Federalism is an obstacle to authoritarian rule. However, some countries, which are not fully-fledged federations, such as the United Kingdom, France, Italy, Spain, The Netherlands, Japan, Sweden, South Africa, and many others, are also and undeniably constitutional and democratic states.

On the other hand, champions of unitarianism (in fact of a unitary state) and opponents of federation contend that the unitary state builds unity and discourages the rising of tribal and ethnic demons that are responsible for internal conflicts and secessions that are favoured by federalism.

History does not, however, teach that the national sentiment is weaker and the secessionist trend stronger in federations such as the USA, Canada, Germany or Australia than in most unitary states, especially on the African continent.

2.2.2.1.3.2.2. Federalism and Forms of States

Unlike the horizontal separation of powers that defines forms of government, the federal principle refers to forms of state.

As we have seen, forms of government have got to do with the manner in which different state organs operate at the national level and power is distributed among them.

Forms of state, on the other hand, refer to the way the power is distributed between the central government and the various territorial entities, which form the state, and how these entities participate in the central government.

The embodiment of the federal principle in a constitutional design of a state mainly gives rise to two forms of state, federal and confederal states.

2.2.2.1.3.2.2.1. Federal States

A federal state or federation is a union of state-like bodies in which legislative and executive powers are divided between a central or federal government on the one hand and the governments of the constituent parts on the other.

For the purposes of international law, such a union is a single state.⁵³⁶ A federation may be the practical embodiment of either integrative federalism or devolutionary federalism.

As a rule of thumb, the accession to federation by means of a centrifugal process, that is devolutionary federalism or top-down federalisation, is more difficult and takes longer than the traditional process whereby states come together to form a closer union by integrative federalism.⁵³⁷

The combination of shared rule and self-rule in a federal framework entails some principles on which a federation is based, namely, autonomy, co-operation, subsidiarity, participation and judicial umpire.⁵³⁸

The constitutional division of powers between the central and regional governments, guaranteeing that each has a certain sphere of autonomy, is considered the most important characteristic of a federal form of state or the most common denominator for federalism.⁵³⁹

The assessment whether a political system is a fully-fledged federation must be based not solely on the constitutional structure, but also on the way in which the political system actually operates.⁵⁴⁰

It must be stressed that there is no single and pure model of federation.⁵⁴¹ On the other hand, a federal state does not necessarily go by that name.

⁵³⁶ Dugard, J., "The quest for a liberal democracy in South Africa" 241.

⁵³⁷ De Villiers, B., "Federalism in South Africa..." 382.

⁵³⁸ See De Villiers, B., "Regional government in the new South Africa: the experience of India and Nigeria" 91-92; Lenaerts, K., *op. cit.* 207; Watts, R., *op. cit.* 77-85.

⁵³⁹ See Bernhardt quoted by De Villiers, B., "Regional government..." 91; Riker quoted by Devenish, G.E. *op. cit.* 40.

⁵⁴⁰ Watts, R., *op. cit.* 77.

⁵⁴¹ *Idem* 78.

There are countries that are called federal republics but that do not meet all the requirements for federation. Moreover, there are unitary states that are so decentralised that they come close to federations.

Some borderline situations exist as a result of compromise among constitutional makers. That is the case of quasi-federal states or regionalised unitary states.

South Africa under the 1996 Constitution is said to be such a state.⁵⁴² The Constitution presents strong federalist features without establishing a full-blown federal state.

In the end, the qualification of a state as unitary, federal or confederal will depend on the constitutional division of powers and relationship between the state and its entities and the participation of the people of the different entities in the central government.

2.2.2.1.3.2.2.2. Confederal States

A confederal state or confederation is an alliance between a number of sovereign, independent states, based on a treaty which serves to advance a number of common goals such as defence or economic co-operation.

The separate existence of the members as states under international law is in no way affected; a confederation is a “constellation of states” without legal personality in international law.⁵⁴³

⁵⁴² See Devenisch, G.E., *op.cit.* 37-38; Elazar, D.J., *op.cit.* 35; Klaaren, J., *op.cit.* 5.1; Mangu, Mbata B., *Separation of Powers...* 24; Watts, R.L., *op.cit.* 85.

⁵⁴³ See Dugard, J., “The quest ...” 241; Mangu, Mbata B., *Separation of Powers...* 24.

In this sense, the designation of Switzerland as a “confederation” is inaccurate and more historical than real. It may still be a confederation of tribes, ethnic groups or nationalities but it is certainly not a confederal state as understood in international law. Switzerland is a federal state with cantons as autonomous entities. The European Union, on the other hand, has emerged as a true confederal state.⁵⁴⁴

2.2.2.1.3.3. Assessment and Evolution of the Federal Principle

Not too long ago, the federal state was as much the exception as the unitary state was the rule.

Even in the USA, the feeling was that federalism had lost momentum. Accordingly, Rabkin contended that federalism had become “a fighting banner with no more inspirational force than wet laundry”.⁵⁴⁵

However, the contrary is being proven by the changes that have recently occurred, are still occurring or are being demanded in Eastern Europe, Western Europe and Africa. The number of federal states has increased.

On the African continent, segments of populations and political leaders in opposition have fallen in love with federalism and demands for a federal state are always in the shape of a “revolt” against or “dissidence”⁵⁴⁶ from the existing unitary state. The multiplicity of sub-regional structures within the framework of the OAU and the AU also epitomises the renaissance of the principle of federalism as an opportunity for the African Renaissance.

⁵⁴⁴ The ongoing debate in some European states is whether Europe should be satisfied with this or rather develop into a fully-fledged European federal state.

⁵⁴⁵ Rabkin, J., op. cit. 1004.

⁵⁴⁶ Ben Arrous, M., *L'Etat, ses dissidences et leurs territoires. La géographie par le bas en Afrique*, supra.

2.2.2.2. Human Rights

Human rights and constitutionalism are closely related.⁵⁴⁷ Constitutionalism is basically about the limitation of governmental power and perhaps the most important reason why the power should be limited is the protection of human rights.

Human rights are both a means and an end to constitutionalism. According to Rosenfeld, "Protection of human rights is considered the third general feature of modern constitutionalism."⁵⁴⁸

In Sigmund's words, "The guarantee of the protection of individual freedom ... is the overall purpose of constitutionalism."⁵⁴⁹

Carl Friedrich saw "the protection of individual rights against the tyranny of government" as "central to genuine constitutionalism."⁵⁵⁰

As for Nwabueze, "individual civil liberties ... are the very essence of constitutional government."⁵⁵¹

Iverson shares the same view when he notes that "Constitutionalism is essentially about protecting individual legal rights".⁵⁵² This basically liberal and Western conception of rights, which is founded on individual and civil rights, should be broadened to encompass collective rights, socio-economic rights, and environment and development rights.

⁵⁴⁷ In the South African perspective, for instance, see Chapters 1 and 2 of the 1996 Constitution.

⁵⁴⁸ Rosenfeld, M., op. cit. 13, 3-4.

⁵⁴⁹ Sigmund, P., op. cit. 39.

⁵⁵⁰ Quoted by Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 35.

⁵⁵¹ Nwabueze, B.O., op. cit. 10.

⁵⁵² Iverson, D., op.cit. 85.

As outlined earlier, constitutionalism goes beyond human rights and includes whatever mechanism designed to limit the power of the government and to avoid abuse of power. However, what are human rights and how are they protected? At this juncture, it may be worth reviewing the concept very briefly and outlining human rights protection in both international and domestic law.

2.2.2.2.1. Concept and Categorisation of Human Rights

Also called “fundamental rights”, human rights are those rights without which there can be no human dignity.⁵⁵³ They are to be recognised to every man or woman solely by reason of being human. They are moral and individual rights, but they can also be collective rights.

Human rights are usually categorised into three “generations”. The first generation comprises civil and political rights. The second generation consists of social, economic and cultural rights. The third generation comprises groups’ rights, rights to development, self-determination, peace, social identity and clean environment rights, sometimes labelled “community rights”.

First-generation rights are said to require a minimal, passive and abstentionist State and are relatively easier to be enforced than second- and third-generation rights that need a positive and effective State as well as necessary resources.

Such a classification of human rights is questionable since it triggers the idea that some rights (those of the first generation, for instance) should be asserted before the others. Yet the so-called three generations of rights are intertwined. They should not be insulated from each other, but considered as a whole.

⁵⁵³ See Davis, D., “The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles” 475-490; Macfarlane, L.J., *The Theory and Practice of Human Rights* 3; Sachs, A., “Towards a Bill of Rights in a democratic South Africa” 4-16; Sanders, D., “Collective Rights” 368-386.

South Africa's Constitutional Court already made history with its judgment in *S v Makwanyane and Another*.⁵⁵⁴ Faced with the silence of the 1993 Constitution, on a purposive interpretation of the Bill of Rights, it declared the death penalty to be inconsistent with the rights to life and human dignity and therefore unconstitutional and invalid in South Africa. The *Makwanyane* case still remains a jewel of human rights jurisprudence on the continent.⁵⁵⁵

In *Government of RSA and Others v Grootboom and Others*,⁵⁵⁶ the Court made a new contribution to the development of human rights jurisprudence so much dominated by civil and political or first-generation rights litigation.⁵⁵⁷

In this case, the Constitutional Court was confronted with the most contentious issue of enforcement of socio-economic rights, particularly problematic in underdeveloped countries that lack the necessary resources.⁵⁵⁸

⁵⁵⁴ 1995 (6) BCLR 665 (CC), *supra*.

⁵⁵⁵ Mangu, Mbata B., "Enforcement of Human Rights Law..." 43.

⁵⁵⁶ 2001 (1) SA 46.

⁵⁵⁷ Mangu, Mbata B., "Enforcement of Human Rights ..." 32-44.

⁵⁵⁸ This case raised the state's obligations under Section 26 of the Constitution, which gives everyone the right of access to adequate housing, and Section 28(1) (c), which affords children the right to shelter. Mrs. Grootboom was one of a group of 510 children and 390 adults living in appalling circumstances in Wallacedene informal settlement in the Western Cape. They then illegally occupied nearby land earmarked for low-cost housing but were forcibly evicted, their shacks were bulldozed and burnt and their possessions destroyed. Their places in Wallacedene had been filled and in desperation they settled on its sports field and in an adjacent community hall. The Cape High Court found that the children and through them their parents were entitled to shelter under Section 28(1)(c) and ordered the national and provincial governments as well as the Cape Metropolitan Council and the Oostenberg Municipality, immediately to provide them with tents, portable latrines and a regular supply of water by way of minimal shelter. The Constitutional Court issued a declaratory order which required the state to devise and implement a programme that included measures to provide relief for those desperate people who had not been catered for in the Cape Metropolitan area before the introduction of the Accelerated Managed Land Settlement Programme. This judgement signalled a step forward in the development of human rights jurisprudence in South Africa and on the continent and heralded a new era where socio-economic rights so far ignored and rejected outside the courts should be taken very seriously even in African underdeveloped countries.

In a unanimous decision, written by Justice Yacoob, it was noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The Court stressed that all the rights in the Bill of Rights are inter-related, indivisible and mutually supporting.

Realising socio-economic rights enables people to enjoy the other rights in the Bill of Rights and is the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

Human dignity, freedom and equality are denied to those without food, clothing and shelter. The right of access to adequate housing can thus not be seen in isolation. The state must also foster conditions that enable citizens to gain access to land on an equitable basis. The state must give effect to these rights within its available resources and, in appropriate circumstances, the courts can and must enforce these obligations.

However important they are in a constitutional and democratic society, human rights are not absolute.⁵⁵⁹

Democracy requires and is compatible with some restrictions on human rights. Limitations on and derogation of human rights are permissible in public international⁵⁶⁰ and domestic law.

⁵⁵⁹ See Carpenter, G., "Internal modifiers and other qualifications in bills of rights – Some problems of interpretation", *SAPL*, 1995, 260; De Ville, J., "Interpretation of the general limitation clause in the Chapter on fundamental rights", *SAPL*, 1994, 287-289; Erasmus, G., "Limitation and Suspension", in Van Wyk, D. *et al.*, (ed.), *op.cit.* 629, 639, 644; Strayer, B.L., "Life under the Canadian Charter: Adjusting the balance between legislature and courts", *SAPL*, 1988, 17.

⁵⁶⁰ See Daes E-IA, *The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights* 117, 131-138; Du Plessis and Corder *Understanding South Africa's Bill of Rights* 123.

Limitations on human rights must, however, comply with some basic principles.⁵⁶¹

Constitutionally tenable or justifiable limitations on rights can be affected in basically two ways, namely a "general limitation clause"⁵⁶² and/or "internal limitations".

Internal limitations, also called internal modifiers or specific limitations, are those limitations entrenched within the same clauses in which rights are enshrined.⁵⁶³

A suspension or derogation of rights is different from their limitation. It is possible only as a consequence of a declaration of a state of emergency.⁵⁶⁴

Unlike limitation, suspension or derogation of rights is a temporary measure, which is to end with the state of emergency.

Any legislation enacted in the aftermath of a declaration of a state of emergency may derogate from the Bill of Rights only if it complies with the suspension clause. Some rights are even non-derogable, whether entirely or partially.⁵⁶⁵

See Daes, E-I.A., op. cit. 132-136; "Syracusa principles" in Erasmus, G., op.cit. 644; Carpenter, G., "The importance of the limitation clause in the South African Constitution of 1996", in Idem (ed.), *South Africa in Transition. Focus on the Bill of Rights*, UNISA: Verloren van Themat Centre, 1996, 106, 115-116.

⁵⁶² Section 36 of the 1996 Constitution of South Africa, for instance, reads as follows:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- a) the nature of the right;
- b) the importance of the purpose;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

⁵⁶³ See Carpenter, G., "The importance ..." 109-110; Idem "Internal modifiers..." 261-262.

⁵⁶⁴ See, for instance, Section 37 of the 1996 South African Constitution.

⁵⁶⁵ See Section 37 (5) of the 1996 South African *Constitution*. The Table of Non-Derogable Rights includes equality (Section 9), human dignity (Section 10), life (Section 11), freedom and security of the person (Section 12); slavery, servitude and forced labour (Section 13); children's rights (Section 28); and arrested, detained and accused persons' rights (fair trial) (Section 35).

2.2.2.2.2. Protection of Human Rights

2.2.2.2.2.1. National Human Rights Law

National human rights law consists of rules and principles aimed at promoting and protecting human rights as they may be found in national legislation.

In domestic law, the main legal instrument to protect human rights is the Constitution.

Most constitutions contain an important chapter dealing with human rights, the Bill of Rights. Human rights are not only enshrined in the Constitution, they may be and are also protected by other pieces of legislation. However, given the primacy of the Constitution, they enjoy higher protection when entrenched in the supreme law of the land.

It is crucial for human rights protection that the Bill of Rights be made part and parcel of the Constitution, which is the supreme law of the land.

It will therefore be binding on all organs of state and natural and juristic persons or applying both vertically and horizontally since not only the state and its organs tend to encroach upon human rights, but private persons, whether individual or juristic persons, also do.⁵⁶⁶ In some cases, this is, however, a hot point of debate.

Human rights protection at the domestic level requires not only an enforceable Bill of Rights,⁵⁶⁷ but also enforcement mechanisms or institutions to sanction violations and provide appropriate relief.

⁵⁶⁶ See, for instance, sections 7(2) and 8 of the South African 1996 Constitution.

⁵⁶⁷ Section 38 of the 1996 Constitution, the "enforcement of rights clause", is very broad and interesting in this regard as it provides:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of a group or class of persons;
- d) anyone acting in the public interest; and
- e) an association acting in the interest of its members."

Some states opt for institutions such as human rights commissions, ombudsman and other administrative organs.

However, courts of law and especially constitutional courts are arguably the strongest bulwarks against human rights violations in their capacity as guardians of the constitutional and legal order,⁵⁶⁸ and guarantors and interpreters of the Constitution.⁵⁶⁹

Ackermann aptly emphasised the task of the judiciary, especially the members of the Constitutional Court, to vindicate the fundamental rights of those litigants who come before them, to interpret the provisions of the Constitution, give them meaning and content, and set the bounds of constitutionally permissible limitations on these rights.⁵⁷⁰

Courts of law must be independent and subject only to the Constitution and the law. Without independence of the courts, there is no constitutional or democratic state and the courts will do very little to protect human rights.⁵⁷¹

It allows "anyone" to approach a court for appropriate relief, including a declaration of rights, when a right in the Bill of Rights has been infringed or just threatened. The person, group or association approaching the court for relief does not need demonstrate that her personal rights have been infringed or threatened. Nor do they need prove a direct interest in the case. A right in the Bill of Rights should have been infringed or threatened no matter who is entitled thereto. Therefore a Court cannot oppose an application on the ground that the applicant does not have any personal interest. On the other hand, there are no specific courts to deal with human rights infringements. Any court may be approached in one way or another to uphold human rights and grant relief. Considering human-rights enforcement provisions, Section 38 is one of the most revolutionary mechanisms we have ever come across.

⁵⁶⁸ See Devenish, G.E., *op.cit.* 48; Stern, K., "The Genesis and Evolution of European - American Constitutionalism: Some Comments on the Fundamental Aspects", *CILSA*, XVIII, 1985, 199.

⁵⁶⁹ See Daes, E.-J.A., *op.cit.* 113 (pt 143), 114 (pt 146); Wachtler, S., "Judicial Law-making", *New York University Law Review*, Vol.65, 1990, 2, 7.

⁵⁷⁰ Ackermann, L., *The Constitutional Court of South Africa. Upholding our Rights Without Fear or Favour*, Johannesburg: Lex Patria Publishers, 1998, 18. Also see Mangu, Mbata B., "Enforcement of Human Rights Law..." 39.

⁵⁷¹ Mangu, Mbata B., "Enforcement of Human Rights Law..." 39.

The performance of that tremendous task cannot go without constitutional and more specifically Bill of Rights interpretation.

In so doing, the "literal-cum-intentionalist" interpretation method⁵⁷² is not the most appropriate.

South Africa's Constitutional Court ordered that the principles, as embedded in the Constitution, should not be interpreted with technical rigidity, but rather applied "purposively and teleologically" and "read holistically with an integrated approach",⁵⁷³ reminding us of what Carpenter and Botha called "purposive and contextual interpretation".⁵⁷⁴

2.2.2.2.2. International Human Rights Law

Human rights protection at the international level may be divided into universal and regional human rights law depending on whether it is within the framework of universal or regional international organisations. Human rights protection within the UN and the OAU / AU is particularly important in the context of the study.

2.2.2.2.2.1. Universal Human Rights Law and Bill of Rights

The UN Charter contains several provisions dealing with human rights.⁵⁷⁵ The promotion of human rights in the UN Charter is mainly the responsibility of the General Assembly, and the Economic and Social Council (ECOSOC) under the authority of the General Assembly.

⁵⁷² Du Plessis, L.M. & De Ville, J., "Bill of Rights Interpretation in South African Context (3): Comparative Perspectives and Future Prospects", *Stell LR*, 1993, 364.

⁵⁷³ *Certification of the Constitution of the Republic of South Africa* 1996, op.cit. at paras 1275E-G,I; 1351D, *S v Makwanyane* at paras 676D-H, 777 F-H.

⁵⁷⁴ Carpenter, G. & Botha, C., "The constitutional attack on private law: are the fears well founded?" *THRHR*, 1996, 130.

⁵⁷⁵ See Preamble, Articles 1.2-4, 13, 55, 62, 63.2, 64, 73 (a) & (b), 76, and 88 of the UN Charter.

As part of its functions, ECOSOC

“2. may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence”.⁵⁷⁶

It also may co-ordinate the activities of the specialised agencies, including those operating in the field of human rights.⁵⁷⁷ It may make arrangements with the Members of the UN and with the specialised agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations made by the General Assembly on matters falling within its competence. It may communicate its observations on these reports to the General Assembly.⁵⁷⁸

Moreover, Article 68 provides:

“The Economic and Social Council shall set up commissions in economic and social fields for the promotion of human rights, and such other commissions as may be required for the performance of its functions.”

One of the commissions, which was set up was the Human Rights Commission whose mandate was defined by ECOSOC on 16 February 1946 and which played a major role in the elaboration of the Universal Declaration of Human Rights (UDHR). The UDHR was adopted by the General Assembly during its 183rd plenary meeting on 10 December 1948 and consists of thirty articles providing for a number of “universal rights”.⁵⁷⁹

⁵⁷⁶ Article 62 of the UN Charter.

⁵⁷⁷ Article 63.2.

⁵⁷⁸ Article 64.

⁵⁷⁹ Rights and freedoms to dignity (Article 1); non-discrimination (Article 2); life, liberty and security of person (Article 3); prohibition of slavery (Article 4); prohibition of torture, cruel, inhuman or degrading punishment (Article 5); right to legal personality (Article 6), equality before the law (Article 7); the right to an effective remedy by a competent national tribunal (Article 8); prohibition of arbitrary arrest and detention (Article 9); the right to fair trial (Article 10); prohibition of retroactive operation of penal legislation (Article 11); freedom from arbitrary interference with privacy, family, home or correspondence (Article 12); freedom of movement (Article 13); the right to seek asylum (Article 14); the right to a nationality (Article 15); the right to marry or to found a family (Article 16); the right to property (Article 17); freedom of religion, thought and conscience (Article 18); freedom of expression (Article 19); assembly and association (Article 20); the right to take part in the public and political affairs (Article 21); the right to

The UDHR lies down human rights as ideals or standards to be respected by all the members of the international community.

It is a declaration and not a treaty binding on states. That does not mean it should be ignored. Many of its provisions are now considered rules of customary international law.⁵⁸⁰

It paved the way for the adoption in 1966 of two international covenants fully binding upon states parties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The first protects first-generation rights and the latter second- and third-generation rights.

Broadly speaking, the Universal Bill of Rights is made up of rights and fundamental freedoms captured in all international instruments, conventions or declarations aimed at promoting and protecting human rights adopted by the United Nations and its specialised agencies (ILO, UNESCO, UNICEF, UNHCR).

These instruments include those dealing with humanitarian law and environmental law; conventions on the prevention and punishment of genocide, war crimes, crimes against humanity, torture and other cruel, inhuman or degrading treatment; conventions protecting refugees, stateless persons, migrants, workers, indigenous peoples, minorities, women, family, children, and all other conventions against discriminations.

The Universal Bill of Rights inspired many national bills of rights and regional systems of human rights protection in Europe, America and Africa.

We should, however, say a few words on the African regional system of human rights protection.

social security (Article 22); the right to work and equal pay for equal work (Article 23); rights to rest and leisure (Article 24); the right to an adequate living standard (Article 25); the right to education (Article 26); cultural rights (Article 27) and the right to a social and international order human-rights friendly (Article 28).

2.2.2.2.2.2. African Human Rights Law and Bill of Rights

The Charter of the OAU, which was adopted on 25 May 1963, contains very few provisions on human rights.

In the Preamble to the Charter, African Heads of State and Government reaffirmed their adherence to the principles of the UN Charter and the UDHR, as they were persuaded that they provided a solid foundation for peaceful and positive co-operation among states.

However, emphasis was more on the rights of the states than on human rights. The situation has changed with the Constitutive Act of the African Union, set to replace the OAU.⁵⁸¹

Heads of State and Government of the OAU Member States affirmed that they were “Determined to promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law”.⁵⁸²

Article 3 provides that the purposes of the Union shall be

“to encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;... promote democratic principles and institutions, popular participation and good governance; promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments”.⁵⁸³

This promotion and protection of human rights for their own and not for the necessity of international co-operation among states makes the Constitutive Act of the AU more human-rights prone than the OAU Charter.

⁵⁸⁰ Dugard, J., *International Law*... 34, 221, 240-242.

⁵⁸¹ The Constitutive Act of the African Union, *supra*.

⁵⁸² Preamble to the Constitutive Act of the AU.

⁵⁸³ Articles 3(e), (f), and (h) of the Constitutive Act.

Like the UN Charter⁵⁸⁴ and the Charter of the OAU,⁵⁸⁵ the Constitutive Act establishing the African Union adopts among its principles the principle of non-interference in the domestic affairs of a member state,⁵⁸⁶ which once prevented foreign intervention, to protect human rights. It does, however, go further insofar as it entrenches “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity.”⁵⁸⁷

The once sacrosanct principle of sovereignty and non-interference in domestic affairs of another State also gives way to “respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities”⁵⁸⁸ and to “condemnation and rejection of unconstitutional changes of governments”.⁵⁸⁹

Moreover, equality and non-discrimination against women is taken into account with “promotion of gender equality” retained among the founding principles of the Union.⁵⁹⁰

The Constitutive Act of the AU sends a very clear message that more than before women should count and their rights be considered more seriously.

Unlike the OAU Charter, which dismissed the people and their rights to benefit States and Heads of State and Government, the Constitutive Act of the AU adopts as principles “respect for democratic principles, human rights, the rule of law and good governance”, and “promotion of social justice to ensure balanced economic development”.⁵⁹¹ This is also an unprecedented development, signaling positive changes in the implementation of socio-economic rights, the end of impunity, and the banning of authoritarian rule and dictatorship.

⁵⁸⁴ Article 2.7 of the UN Charter.

⁵⁸⁵ Article III.2 of the Charter of the OAU.

⁵⁸⁶ Article 4 (g) of the Constitutive Act of the AU.

⁵⁸⁷ Article 4 (h).

⁵⁸⁸ Article 4 (o).

⁵⁸⁹ Article 4 (p).

⁵⁹⁰ Article 4 (l).

⁵⁹¹ Article 4 (m) & (n).

The Constitutive Act of the AU may be silent on enforcement mechanisms to achieve its purposes and principles. On paper, it nevertheless represents a step forward as compared with the OAU Charter.

The African Bill of Rights comprises rights and freedoms enshrined in human rights treaties adopted within the framework of the OAU. It is based on the African Charter on Human and Peoples' Rights.⁵⁹²

The African Charter constitutes a major African contribution to the development of international human rights law.⁵⁹³ Nevertheless, it differs from other regional human rights instruments, especially the American and European Conventions, in two important respects.

First, it enshrines not only human rights, but also human duties.⁵⁹⁴ Secondly, rights enshrined are both individual and peoples' rights.⁵⁹⁵ However progressive it may be, the African Charter provides for a very weak enforcement mechanism of rights, the African Commission on Human and Peoples' Rights,⁵⁹⁶ which is totally dependent on the will of the Assembly of Heads of State and Government.

⁵⁹² Also known as the "Banjul Charter", it was adopted in Nairobi, Kenya, on 26 June 1981 and came into force on 21 October 1986, in accordance with its article 63. The enforcement of the Charter is the competence of the African Commission on Human and Peoples' Rights (Part II). Other human rights conventions include the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted on 10 September 1969 in Addis Ababa, Ethiopia, and entered into force on 20 June 1974, in accordance with its article XI) and the African Charter on the Rights and Welfare of the Child (adopted on 11 July 1990 in Addis Ababa, Ethiopia, and entered into force on 29 November 1999 in accordance with its article 47 (3)).

⁵⁹³ On the contribution made by the African Charter, see Matringe, J., *Tradition et Modernité dans la Charte Africaine des Droits de l'Homme et des Peuples*, Bruxelles: Bruylant, 1996 (Mémoire de DEA de Droit International Public, Université Panthéon-Assas (Paris II), Faculté de Droit et de Science Politique).

⁵⁹⁴ Chapter II of the African Charter on Human and Peoples' Rights.

⁵⁹⁵ Article 19 to Article 24 of the African Charter.

⁵⁹⁶ Part II of the African Charter (Article 30 to 61).

The African Commission makes no binding decision but only recommendations to the Assembly of Heads of State and Government who decide.⁵⁹⁷

Aware of this shortcoming of the African system, governmental legal experts of the OAU Member States met in 1998 in Cape Town, South Africa, and adopted a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.⁵⁹⁸

All in all, the African Bill of Rights was inspired by the Universal Bill of Rights. It is really here that in the African context, the debate universalism *versus* relativism came into picture.⁵⁹⁹ Some scholars point out that the debate is closed. In some other quarters, it is still of some interest.

However, Article 60 of the African Charter provides:

“The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.”

⁵⁹⁷ Articles 53 & 54 of the African Charter.

⁵⁹⁸ The *Protocol* was adopted by the 34th Ordinary Session of the Assembly of Heads of State and Government, which met on 10 July 1998 in Ouagadougou, Burkina Faso. However, this Protocol has a number of shortcomings, especially regarding *locus standi*.

According to Article 5, *locus standi* or access to the African Court is granted to the African Commission and States. According to Article 5(3), “The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.”

Non governmental organisations and individuals will not have direct access to the African Court. They will bring the matter before the Court only if “At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration” (Article 34.6. of the Protocol). Unfortunately, countries that have so far ratified the Protocol failed to make such a declaration allowing NGOs and individuals to enjoy direct access to the Court, and it is likely that other states will follow suit unless citizens, peoples and human rights NGOs wake up, lobby and campaign to ensure that on ratification their governments or Parliaments make the declaration required by Article 34.6.

⁵⁹⁹ The debate long opposed “universalists” to “relativists”. The former champion the view that human rights like democracy are universal and should be enjoyed by all people no matter where they live, just because they are human beings. The latter, on the other hand, hold that human rights differ from one society to another, depending on the culture or the context. Accordingly, Africans should be denied a number of rights that would be foreign to their culture and particular conditions.

In terms of Article 61,

“The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine”.

The regionalisation and domestication of the universal bill of rights and international human rights law in African legal systems contributed to undermining the theoretical debate universality / universalism *versus* relativity/ relativism, which is sometimes over-emphasised.

Without downplaying such a debate or denying cultural differences, we wish to maintain that human rights should be regarded as universal rights.

Human beings should be treated with dignity no matter where they live and regardless of racial, religious, ethnic, linguistic, cultural and sexual or other differences amongst them. Human rights would be better served if we could champion and vindicate them as universal rights.

International human rights law and the universal bill of rights inspired not only the African system of human rights protection and municipal human rights laws and bills of rights, but also other regional systems such as the American and the European. That made it possible for international law in general and international human rights law in particular to apply in African domestic systems.

2.2.2.2.3. Relationship between National and International Human Rights Law and Bills of Rights

As a general rule, Preambles and Bills of Rights in the Constitutions of African States refer to some major international human rights instruments. Instruments generally cited are the *Universal Declaration of Human Rights* and the *African Charter of Human and Peoples' Rights*. Moreover, African States have ratified most international human rights instruments and the record is very impressive.

However, the mere fact that African States signed and ratified most human rights declarations, conventions, treaties or charters does not imply that they have come to be more human-rights friendly.

On the contrary, the continent is at the top of the list in terms of massive human rights violations. There is a tremendous dilemma, a paradox.

Two main theories were expounded on the relationship between international law, of which international human rights law is part and parcel, and municipal, domestic or national law. The one is monism and the other dualism.

Dugard aptly captured the essence of these theories. According to him, the monist school with as leading exponents Grotius, Kelsen, Verdross and Scelle, maintains that "international law and municipal law, far from being essentially different, must be regarded as manifestations of a single conception of law".⁶⁰⁰

⁶⁰⁰ Dugard, J., *International Law*...43.

International law is not foreign law and like national law, it is binding on courts. It may also be directly enforced without any further ado. When their rights have been infringed, natural or juristic persons may invoke international law to vindicate their rights and a court of law cannot rule out an argument on the pretext that it would be based on international and not national law.

The monist theory lends support to the “doctrine of incorporation”, according to which international law is automatically domesticated in municipal law. A mere signature or / and ratification is sufficient and there is no need to enact a specific law to give an international treaty full effect in domestic law. International law prevails over national legislation or domestic law since it is considered to be dictated by a superior authority (God), or premised on natural law or reason.

The monist approach is the rule in African countries that were once colonised by civil or Roman law countries (France, Belgium, Portugal, and Spain).

Article 79 of the 1992 Senegalese Constitution, for instance, provided:

“Treaties and international agreements ratified or approved have upon publication an authority superior to that of the laws provided that they are applied by the other party.”⁶⁰¹

The opposite of monism and incorporation are dualism and transformation. The dualist approach as developed by Van Bynkershoek, Triepel, Anzilotti and Lauterpacht,⁶⁰² contends that international law is different from domestic law. Accordingly, it has to be transformed into municipal law by legislation.

Signing and ratification are not sufficient to bring international law into municipal law. A national law has to be enacted. Domestic law prevails over international law.

⁶⁰¹ Translation mine.

⁶⁰² Quoted by Dugard, J., *op.cit.* 43.

Unlike the continental or Roman-Dutch law system, which tends to favour monism and incorporation, common law or the Anglo-American system is in favour of dualism and transformation.

In practice, dualism and monism are not purely applied. It is a general rule that customary international law, which is part of international law, is law without any need of transformation, and some international agreements of an administrative or technical nature are binding on the state without any need for ratification or transformation.

In this context, dualism and monism are reconciled.⁶⁰³ That is the approach adopted by the South African Constitution of 1996.

Section 231 of this Constitution provides:

“(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces,⁶⁰⁴ but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

Regarding customary international law, Section 232(1) stipulates that “it is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

The South African approach is therefore monist as regards international customary law and international agreements of a technical, administrative or executive nature which do not require either ratification or accession and do not need to be enacted into (domestic) law to become binding on / in the State. It is dualist as regards any other international agreement.

⁶⁰³ It is on this that Dugard built his “harmonisation theory” (Dugard, J., *op.cit.* 43-48).

⁶⁰⁴ The South African Parliament is bicameral. It consists of the National Assembly (whose members are directly elected by the people) and the National Council of Provinces, composed of delegates representing the Provinces (Section 42 of the 1996 Constitution).

As illustrated by the *Ministère Public & François Diouf v Habré* case,⁶⁰⁵ where the *Court d'Appel* (Court of Appeal) of Dakar, Senegal, erred in its judgment of 4 July 2000,⁶⁰⁶ the relationship between international law and domestic law has long troubled theorists, lawyers and courts, not to mention individuals and their organisations.

There is a close relationship between human rights and another element of constitutionalism, namely the constitution.⁶⁰⁷

⁶⁰⁵ The facts of the case may be summarised as follows. On 3 February 2000, Mr. Hissène Habré, former President of the Republic of Chad, who obtained refuge in Senegal after he was ousted from power in Ndjamena, was prosecuted on charges of crimes against humanity, acts of torture and barbarity committed during his reign which reportedly resulted in the killing of thousands in Chad.

The prosecution was based on Articles 669 of the Criminal Procedure Code of Senegal, Article 6 of the Constitution, Article 4 of the Criminal Penal Code and Article 27 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ratified by Senegal. As a result thereof, Mr. Habré was placed under house surveillance and denied any free movement during the prosecution.

On 18 February 2000, Habré's counsel, Adv. Madicke Niang, appealed to the Court of Appeal in Dakar to nullify the procedure brought against his client by the first judge for incompetence of the Senegalese courts, to prosecute and try a foreigner outside the three cases provided for in Article 669, for lack of legal basis and prescription of criminal facts imputed to M. Habré. In its judgment or Arrêt No.135 of 4 July 2000, the Court of Appeal granted appeal. The Court ruled that it was regularly seized.

On the merits, however, the procedure against M. Habré was nullified. The Court ruled that the first judge erred as no Senegalese court was competent to deal with the case involving a foreigner for facts not provided for by the Senegalese criminal code. Reference by both the prosecution and civil parties to the provisions of the Convention against Torture ratified and published by Senegal, namely its article 27, was found to be irrelevant. Dealing with the status and place of international law in the domestic law of Senegal through the Convention against Torture, ratified by Senegal, the Court held that it had no superiority whatsoever over national law, especially the Criminal Procedure Code. On a very strict construction of the Criminal Procedure Code, the Court held that criminal law was autonomous and should not lose to any other branch of law, including international human rights law. Accordingly, the Court ruled that the Criminal Procedure Code should be considered and not the Convention against Torture on the grounds that although it had been ratified and published by Senegal, the country had not yet taken the necessary measures required for its implementation.

The Court altogether dismissed the claim by the prosecution and civil parties that the Convention should be considered binding on Senegal upon its ratification and publication. The Court also disregarded an earlier judgment of the Supreme Court of Senegal, which declared a law to be unconstitutional and invalid for violation of international law. Such jurisprudence, said the Court, should not be allowed to prosper in the country. Finally, the Court of Appeal did not consider it worthwhile argument by the prosecution and civil parties based on the Vienna Convention on the Law of Treaties, also ratified and published by Senegal, which provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

⁶⁰⁶ Arrêt No. 134 of 4 July 2000, *supra*. For a critical appraisal of the judgment of the Senegalese Court, see Mangu, Mbata B., "Enforcement of Human Rights Law..." 50-51.

⁶⁰⁷ See Mangu, Mbata B., "Enforcement of Human Rights Law..." 33.

Article 16 of the French Declaration of 1789 even went as far as stating that “any society where the guarantee of rights is not secured nor the separation of powers determined has no constitution.”

2.2.2.3. Constitution

2.2.2.3.1. Concept and Classification of Constitutions

It is uncertain when the concept “Constitution” was used for the very first time. It is generally referred back to the Greek *politeia* and Latin *Constitutio*.

Arguably, English scholars were the first to use “Constitution” in its modern sense. The Aristotelian concept of *politeia* or the Latin *Constitutio* were for a long time rendered in English by concepts other than “Constitution”.

English scholars started dealing with the “Constitution” in correlation to corporate bodies and the body politic in the late 16th and the early 17th century.

In 1653, Samuel K. Gardiner defined the Constitution as “the instrument of government”.⁶⁰⁸

In 1758, Emmerich Vattel wrote, “The fundamental legislation which determines how public authority must be exercised is what forms the constitution of the State.”⁶⁰⁹

⁶⁰⁸ Gardiner, S.K., quoted by Stourzh, G., “Constitution – Evolution des Significations du Terme depuis le début du XVIIe siècle jusqu’à la fin du XVIIIe siècle”, *Droits, Revue Française de Théorie, de Philosophie et de Culture Juridiques*, No.29, 1999, 158.

⁶⁰⁹ De Vattel, E., cited by Stourzh, G., *supra*, 157.

According to Stourzh, it was not before the 19th century, with Benjamin Jowett's translation, that *politeia* was considered to mean "constitution", meaning "organization of magistracies in a state, particularly the highest among them".⁶¹⁰

Stourzh pointed out that the sense of the Constitution rather reached our modern conception during the debate on the American federal Constitution in 1787-1788.⁶¹¹

However, Sir James Whitelocke, an English lawyer,⁶¹² already mentioned the word "Constitution" in a phrase that stressed "the natural frame and constitution of the policy of this Kingdom, which is *jus publicum regni*".

McIlwain quoted Sir James Whitelocke's words and referred to them as the most modern use of "Constitution" he had ever come across.⁶¹³

As for the word "unconstitutional", Bolingbroke apparently used it for the first time.⁶¹⁴

Nowadays, "Constitution" is generally defined as the supreme law of the land. Besides, many African Constitutions contain a "supremacy clause".⁶¹⁵

⁶¹⁰ My translation from Stourzh, G., op.cit. 157.

⁶¹¹ Stourzh, G., idem, 166.

⁶¹² Quoted by McIlwain, C.H., *Constitutionalism: Ancient and Modern* 25; Stourzh, G., op.cit. 166.

⁶¹³ Idem.

⁶¹⁴ McIlwain, C.H., op.cit. 3. See also Stourzh, G., op.cit. 169.

⁶¹⁵ Section 2 of the Constitution of the Republic of South Africa, Act 108 of 1996, provides:

"This Constitution is the supreme law of the land; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Section 1 of the Constitution of the Federal Republic of Nigeria, Act No.24 of 1999, which came into force on 29 May 1999, even goes further, as it precludes any person or group of persons from governing the country in violation of the Constitution:

"(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.
 (2) The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
 (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."

The Constitution is the fundamental law of the State. It establishes and defines the different organs of the State authority, their powers and the manner in which they should be exercised, the relationship between the different bearers of authority, and between them and the people, as well as the rights they are entitled to and duties to which they are subjected.

Nwabueze defined it as “a document having the force of law, by which a society organizes a government of itself, defines and limits its powers, and prescribes the relations of its various organs *inter se* and with the citizen.”⁶¹⁶ Constitutional lawyers adopted several classifications of Constitutions.

The first distinction is between written or documentary and unwritten or customary constitutions. Almost all Constitutions in the world today as written documents fall within the first category.

The Constitution may consist of one single document called as such or two or more related instruments all granted the status of Constitution. The UK is the most celebrated modern exception of unwritten Constitution. There is no document called “Constitution”, but a set of Acts, legislation and customs that taken altogether form the British Constitution.

It is worth stressing that as a general rule, such a “supremacy clause” is unknown in the Constitutions of French-speaking African countries. Constitution-makers see no need to entrench it in the constitutional text, as the Constitution is considered “supreme” *per se*. Arguably, this is not convincing, as practice has shown. In the DRC case, a first attempt at introducing a “supremacy clause” was made during the Sovereign National Conference and through the Transitional Constitutional Act of 1994, of which Article 37 paras 1 and 2 read as follows:

“During the transition period, powers are exercised as provided by the present Act.

Every Zairean has the sacred right and duty to defend the Nation and its territorial integrity and to oppose to any person or group of persons who come to power by force or exercise it in violation of the provisions of the present Act.”

It is quite ironical that the “supremacy clause” is entrenched in the constitutions of those countries that were colonised by a country that was not governed by a written constitution and accordingly ignored the “supremacy clause” itself. The influence of American constitutionalism should be considered here.

Related to the first classification is the distinction between supreme and non supreme Constitutions.

The Constitution is the supreme law of the land in the sense that any act, law and conduct inconsistent with it should be declared void and null. It requires the existence of a specific institution, generally the supreme or constitutional court, which is established to enforce the Constitutional as the supreme law.

Non supreme Constitutions may exist in the system of *parliamentary sovereignty*, where judicial review is unknown.

Most Constitutions are supreme. Exceptions include not only the British Constitution and the Constitution of South Africa under apartheid, but also many other Constitutions in authoritarian regimes. In the latter, the Head of State, who is the civilian leader of the (one) party or the military officer in command of the army, reigns supreme and is not subject to the Constitution that is rather designed to suit him.

Thomas Paine⁶¹⁷ insisted that a true constitution had to be both written and supreme law while Jeremy Bentham ventured the view that it had to be written indeed, but not supreme.⁶¹⁸

According to some scholars, the classic distinction between written and unwritten Constitutions no longer serves any purpose.⁶¹⁹ Lord Bryce⁶²⁰ regarded it as “old-fashioned” and “superficial” and offered as a substitute the distinction between rigid or entrenched and flexible or non-entrenched constitutions.

⁶¹⁶ Nwabueze, B.O., *Constitutionalism*...22.

⁶¹⁷ *Idem*.

⁶¹⁸ *Ibidem*.

⁶¹⁹ See Rautenbach, I.M. & Malherbe, E.F.J., *Constitutional Law*, Revisited Second Ed., Butterworths, 1997, 29.

⁶²⁰ Quoted by Grey, T.C., “Constitutionalism: An Analytic Framework” 190.

The distinction is also said to have lost most of its practical value since almost all modern constitutions are amendable.⁶²¹ However, the distinction between supreme and non-supreme constitutions has still some importance and it would be a mistake and premature in constitutional law to throw it out altogether.

2.2.2.3.2. Relationship between Constitutions and Constitutionalism

In Schochet's words,

"There is closeness between constitutionalism per se and the having of a constitution, a closeness that is behind the easy and frequent slippage from one to the other. This closeness is both conceptual and political."⁶²²

Olukoshi and Andrews pointed out that "Constitutions as law and rule of law are instruments of constitutionalism."⁶²³

As Grey⁶²⁴ and Olukoshi⁶²⁵ wrote, there is a great deal of "confusion" between constitutionalism and constitutions. Written Constitutions have come to be identified with constitutionalism.⁶²⁶

However, one must distinguish between Constitutions and constitutionalism in Africa or constitutionalism and the constitution-making process.⁶²⁷ Constitutions may go with or without constitutionalism.

⁶²¹ Rautenbach, I.M. & Malherbe, E.F.J., op.cit. 30.

⁶²² Schochet, G. J., op.cit. 11.

⁶²³ See Olukoshi, A., op.cit. 456; Andrews, W.G., op.cit. 22.

⁶²⁴ Grey, T.C., op.cit. 189.

⁶²⁵ Olukoshi, A., "State, Conflict and Democracy in Africa..." 453.

⁶²⁶ Andrews, W.G., *Constitutions and Constitutionalism* ... 22.

⁶²⁷ See Harbeson, J.W., "Rethinking Democratic Transitions: Lessons from Eastern and Southern Africa", in Joseph, (ed.), op.cit. 7-15; Idem, "Constitutions and Constitutionalism in Africa: A Tentative Theoretical Exploration", in Ronen, D., (ed.), op.cit. 7; Olukoshi, A., "State, Conflict, and Democracy..." 456.

According to Rosenfeld,

“The relationship between constitution and constitutionalism is particularly important because constitutions are especially apt vehicles for the constitutionalization of the essential requisites of constitutionalism”.⁶²⁸

The emphasis put by scholars such as Okoth-Ogendo on “Constitutionalism without Constitution”,⁶²⁹ with reference to the British constitution, is unfortunate insofar as the scholar only understands the Constitution as a written document and ignores unwritten or customary constitutions.

Moreover, it derives from a narrow and too legalistic conception of both constitutionalism and constitution.

The majority of scholars agree that the United Kingdom has a constitution despite the fact that no single document is given the name. Important constitutional matters, such as the duration of Parliament, succession to the throne, the franchise, assent to bills, and the relationship between the Houses of Parliament, are regulated by legislation and the result is that nowadays-British constitutional law is based only partly on unwritten rules.⁶³⁰

Sometimes, states such as Israel and New Zealand are also deemed not to have written constitutions, but their constitutional law is almost completely regulated by different laws and it is incorrect to classify them as being unconstitutional states, as having unwritten constitutions or not having constitutions at all.⁶³¹

Identifying constitutionalism with written constitutions may lead to denying constitutionalism to these states and other traditional societies in America, Europe, Asia and Africa.

In the case of written or even unwritten constitutions, three major tests must be passed to find out whether the Constitution or legal system complies with constitutionalism.

⁶²⁸Rosenfeld, M., “Modern Constitutionalism...”14.

⁶²⁹ Okoth-Ogendo, H.W.O., op.cit.3-25.

⁶³⁰ Rautenbach, I.M. & Malherbe, E.F.J., op.cit. 29.

⁶³¹ Idem 29.

According to Nwabueze, "The crucial test is whether the Constitution, if any, imposes limitation upon the powers of the government."⁶³²

Although we may not find written constitutions in the traditional African governments, the test remains the same: how does the system in the society limit the arbitrary powers of those who govern?⁶³³

The second test is that of legitimacy, not only external legitimacy, but also and mostly internal legitimacy. The Constitution must be legitimate and emanate from the people. It must first serve the interests of the people and not those of the leaders who long to remain in power. It must express the will of the people and not of the government.

The people must be involved in the process of its drafting and adoption and not caught by surprise by a document foreign to them, which they are only requested to adopt by a "yes" vote.

According to Nwabueze,

"A constitution should be generally understood by the people and be acceptable by them. A Constitution cannot hope to command the loyalty, respect and confidence of the people otherwise. And to achieve this understanding and acceptance, a constitution needs to be put through a process of popularization, with a view to generating public interest in it and an attitude that everybody has a stake in it, that it is a common property of all."⁶³⁴

Nwabueze further contended:

"The people must be made to identify themselves with the Constitution. Without this sense of identification, of attachment and involvement, a Constitution would always remain a remote, artificial object, with no more real existence than the paper on which it is written."⁶³⁵

In Nwabueze's view, "A constitution need not necessarily have been enacted by the people to have legitimacy... what is important is that the people should be involved in the process of its making."⁶³⁶

⁶³² Nwabueze, B.O., op.cit. 2.

⁶³³ Idem.

⁶³⁴ Idem 24-25.

⁶³⁵ Nwabueze, B.O., *Constitutionalism* ... 25.

⁶³⁶ Idem, 27.

This was later echoed by another Nigerian scholar, Ihonvbere, when he insisted on popular participation in the constitution-making process and held that the people should not only have access thereto, but also understand and claim ownership of the Constitution.⁶³⁷

The third important test is the protection, promotion and enforcement of human and peoples' rights.

Failure to pass the above tests, a constitution or a legal system will exist without constitutionalism. Not all "Constitutions" conform to the demands of constitutionalism.⁶³⁸

There are, indeed, many countries with written Constitutions but without constitutionalism. The constitutional and political state of affairs in several African States bears testimony to this somber reality that Okoth-Ogendo referred to as an "African paradox".⁶³⁹ However, this is not paradox. Nor is it African.⁶⁴⁰

According to Okoth-Ogendo, "Primary elements of the paradox are the commitment to the idea of the Constitution, and rejection of the classical notion of constitutionalism."⁶⁴¹

Shivji also lamented that although "we have had great use, if not reverence, for the documents called constitutions, there has been little regard for constitutional principle or constitutionalism."⁶⁴²

⁶³⁷ Ihonvbere, J.O., *Towards a New...* 10, 15.

⁶³⁸ Rosenfeld, M., "Modern Constitutionalism..." 3.

⁶³⁹ Okoth-Ogendo, H.W.O., *op.cit.* 3-25.

⁶⁴⁰ The "paradox" becomes a "real" one only when constitutionalism is equated with the document known as "Constitution". Moreover, even so understood, the phenomenon cannot be typically African, as history has shown in other "Third World" countries and even in the West.

⁶⁴¹ See Okoth-Ogendo, H.W.O., *op.cit.* 6; Zoethout, C.M. & Boon, P.J., *op.cit.* 1-2.

⁶⁴² Shivji, I.G., "Contradictory Class Perspectives..." 254.

In Andrews's words,

"Tyrants, whether individual or collective, find that Constitutions are convenient screens behind which they can dissimulate their despotism...Provisions that seem to be restraints can be employed to rationalize the arbitrary use of power. Apart from these slim limitations, Constitutions can perform other pseudo-constitutional functions in despotic States...They may contribute to the stability of these regimes and guide political action through the channels desired by the despots by explicit description of the machinery of government."⁶⁴³

Therefore, instead of limiting powers of the government, Constitutions may merely describe them and limit rather the rights of the people or channel their obeisance to authoritarian leaders.

Some Constitutions manifest constitutionalism only in appearance and nearly all perform functions not integrally related to constitutionalism.⁶⁴⁴

A written constitution may proclaim lofty ideal as its objectives, but ultimately turn into a dictatorship."⁶⁴⁵

In some cases, Shivji wrote, "The only rationale for the Constitutions is international legitimacy or respectability, to constitute the sovereignty of the state in the international arena."⁶⁴⁶

In these conditions, despite the existence of a Constitution, there would be neither constitutionalism nor democracy.

⁶⁴³ Andrews, W.G., op.cit.23.

⁶⁴⁴ Idem 26.

⁶⁴⁵ Mojekwu, C.C., "Nigerian Constitutionalism"164.

⁶⁴⁶ Shivji, I.G., op.cit. 254.

2.3. Democracy

Democracy has come to be a catchall term, a fashionable buzzword. As in the case of constitutionalism, the first problem encountered is the definition of democracy. Democracy is undoubtedly the most discussed and contested notion of political theory.⁶⁴⁷

Nwabueze pointed out that "No word is more susceptible of a variety of tendentious interpretations than democracy".⁶⁴⁸

According to Sono,

"Throughout history the ideal of democracy has been the mother of all mischief. No concept has spawned such a multitude of devotees as democracy, however contradictorily conceived; nor has one, in the annals of political theory and conduct, been as disfigured, debased, and distorted as this one. Social scientists have twisted the meaning of the concept, while the other brotherhood, professional politicians and party hacks, misrepresented the concept in practice to the degree that its expression has been profoundly, wholly and permanently cast in a different hue all too foreign to its basic meaning."⁶⁴⁹

As Wiseman held,

"Many governments of quite different types wish to describe themselves as democratic. In some cases the term has even been incorporated into the official name of the state... although it is a noticeable paradox that in most cases where this happened (e.g. the German Democratic Republic, the People's Democratic Republic of Yemen, or in Africa, the Democratic Republic of Congo), the States concerned appear significantly undemocratic."⁶⁵⁰

Democracy has acquired different, even contradictory meanings. It has been suffering as much from its loyal partisans as from its opponents. Even its fierce enemies, dictators and authoritarian leaders, claim to be democrats and proclaim their faith in "democracy".⁶⁵¹

Accordingly, tyrants and authoritarian leaders such as Idi Amin, Mobutu Sese Seko, Jean-Bedel Bokassa, and Macias Ngwema called themselves democrats.

⁶⁴⁷ Hoffman, J., *State, Power, and Democracy: Contentious Concepts in Practical Political Theory*, Sussex: Wheatsheaf Books, 1988, 31.

⁶⁴⁸ Nwabueze, B.O., *Constitutionalism*... 1.

⁶⁴⁹ Sono, T., *Comments on Democracy and Its Relevancy to Africa*, African Perspectives: Selected Works, No.3, 1992, 29.

⁶⁵⁰ Wiseman, J.A., *Democracy in Black Africa. Survival and Revival* 4.

⁶⁵¹ See Mangu, Mbata B., *Démocratie, régime pluraliste*... 11; Idem, "Development of African Jurisprudence" 28.

Idi Amin even proclaimed he could transform his tiny state into a world super-power if only the Ugandan people could learn and practice what he called “my democracy”.

In this context, democracy signified a quite different thing, the will of the dictator and not that of the people subjected to his authoritarian rule.

Some people made democracy their god. Wars were waged in its name. The mere evocation of democracy created trouble and heart attacks to others. Democracy has walked throughout centuries and ages surrounded by these paradoxes.⁶⁵²

Democracy is certainly the most popular concept and the most in fashion in both political and social scientist discourse. Its popularity results from the fact that over the years, democracy has become a very value-laden term.

There is a widespread agreement that it is “a good thing”. The term “democratic” almost inevitably connotes praise, while “undemocratic” implies censure.⁶⁵³

Like the Holy Scriptures, “democracy” remains one of the most misunderstood “books”. However, unlike the Holy Book, which is entrenched in such a way that it is almost impossible to add or subtract from it, democracy is an unfinished “Holy Book” to which every authoritarian ruler has been eager to add his own page, especially in post-colonial Africa.

According to Sono, the use and abuse of democracy resulted in such a thorough and pervasive debasement and degrading of its meaning that the term has been rendered analytically useless.⁶⁵⁴

⁶⁵² Mangu, Mbata B., *Démocratie*.....12.

⁶⁵³ Wiseman, J.A., *Democracy in Black Africa*... 4.

⁶⁵⁴ Sono, T., *op.cit.*3.

Sono went further in denying the analytical value of democracy and launched a wholesale attack on the students of democracy among whom we should be counted:

“Virtually all scribes and pundits together with an assortment of hacks and quacks glibly write and speak of ‘democracy’ and ‘democratic’ as if either term is the soul and blood of political practice today.”⁶⁵⁵

Nevertheless, democracy remains an interesting object of scientific analysis, particularly for a legal student not very much concerned with the empirical theory-inspired Sono attack.

Scholars of repute have already spilled too much ink on the definition of democracy. We do not wish to enter this debate at any length, except to highlight the main conceptions of democracy, its basic requirements, and its unfinished history.

2.3.1. Defining Democracy: Conflicting Conceptions and the Weight of Ideology

Ronen pointed out that “Defining democracy is a challenge”.⁶⁵⁶ Many writers have spent their scholarly lifetimes teasing out the subtleties and nuances associated with democracy. The result of those endeavours remains the absence of universally accepted definitions and a concept that is still highly contested in analytical and ideological discourse.⁶⁵⁷

As with Constitutionalism earlier, the following discussion of democracy only serves as a necessary foundation for later developments. It would be too much to expect the author to come up with a clear-cut and definitive definition of democracy. However, as we pursue the literature review, an understanding of the concept as used in the study will be provided after an account of different conceptions of democracy.

⁶⁵⁵Sone, T., op.cit. 29.

⁶⁵⁶Ronen, D., “The Challenges of Democracy in Africa...” 1.

⁶⁵⁷Wiseman, J. A., *The New Struggle for Democracy*.... 7-8.

Depending on the scope of democracy, two major conceptions of democracy may be identified, namely the minimalist and maximalist conceptions.

These conceptions have been informed by the two dominant ideologies in the contemporary world, liberalism / capitalism and socialism / communism respectively. Minimalist and maximalist conceptions of democracy are generally opposed in the scientific discourse.⁶⁵⁸

The latter relate to democratic values or principles while the first refer to the institutions in which those values are embodied. The clue to understanding democracy is based on this vital distinction.⁶⁵⁹

2.3.1.1. Minimalist Conceptions and Liberalism

2.3.1.1.1. *Exposé*

There is not one, but several minimalist conceptions of democracy whose common ground is that they are based on institutions of government and those other institutions directly or indirectly related thereto, particularly political parties and pressure groups, elections and rule of law.

Minimalist conceptions are basically procedural, formal, and institutional. Procedural or institutional democracy may be linked to procedural or formal constitutionalism, as seen earlier. Democracy is defined as a specific political machinery of institutions, processes and roles.⁶⁶⁰

⁶⁵⁸ On the two conceptions of democracy, see Wiseman, J.A., *The New Struggle for Democracy...* 7-14; Sklar, R.L., "African Politics: The Next Generation" 166; Nyang'oro, J.E., "Discourses on Democracy in Africa: An Introduction" X; Beckman, B., "Whose Democracy? Bourgeois versus Popular Democracy" 84-98; Shivji, I.G., "State and Constitutionalism..." 27-69.

⁶⁵⁹ Hinden, R., *op.cit.* 6-8.

⁶⁶⁰ Ronen, D., "The State and Democracy..." 200.

The notion of procedural or institutional democracy is of the sort found in Robert Dahl's concept of polyarchy.⁶⁶¹ According to Dahl, polyarchy in a political order is characterised by seven institutions, all of which must be present. These are elected officials, free and fair elections, inclusive suffrage, right to run for office, freedom of expression, alternative information and associational autonomy.⁶⁶²

Polyarchy is distinguished by two broad characteristics, which are that "citizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in government".⁶⁶³

According to Sorensen, Dahl's notion of polyarchy has three elements: competition for government power; political participation in the selection of leaders and policies; and civil and political rights.⁶⁶⁴

The Schumpeterian definition of democracy, for instance, was principally centered upon competition.⁶⁶⁵

Following in the footsteps of Joseph Schumpeter, many scholars operate with a minimalist definition of democracy, in that they stress the importance only of the institutional mechanisms for acquiring power in a democratic manner.

⁶⁶¹ See Dahl, R., *Polyarchy: Participation and Opposition*, supra; Idem, *Democracy and Its Critics...* 220-224; Sorensen, G., "Democracy and the Developmental State" 42; Wiseman, J.A., *New Struggle for Democracy...* 8.

⁶⁶² Idem.

⁶⁶³ See Dahl, R.A., *Democracy and Its Critics* 220-224; Wiseman, J.A., *The New Struggle for Democracy...* 8.

⁶⁶⁴ Sorensen, G., op.cit. 42.

⁶⁶⁵ Harbeson, J.W., "Constitutions and Constitutionalism..." 7.

Hyden criticised this approach,⁶⁶⁶ holding that it lacks recognition of such other important principles as the accountability of rulers and of other institutions that are crucial to sustaining a democratic system.⁶⁶⁷

In minimalist views, democracy is synonymous with competitive and multiparty democracy. It is representative democracy, also labelled "Western" or "liberal" democracy".

The latter was defined by Sandbrook to mean

"a political system characterized by regular and free elections in which politicians organized into political parties compete to form the government, by the right of virtually all adult citizens to vote, and by guarantees of a range of familiar political and civil rights."⁶⁶⁸

However, Wiseman contests the label of "Western democracy" given to competitive and representative democracy allegedly because liberalism emanated from the West, but so too did "Marxist" democracy.⁶⁶⁹

Support for a minimalist and procedural form of democracy came from Huntington,⁶⁷⁰ Hinden,⁶⁷¹ Clapham, and Wiseman,⁶⁷² and others.⁶⁷³

⁶⁶⁶ Hyden, G., "Governance and the Reconstitution..." 183.

⁶⁶⁷ Despite some additions in this sense by Dahl and O'Donnell to broaden the definition of liberal democracy, it continued to focus on elections and competitions.

⁶⁶⁸ Sandbrook, R., "Liberal Democracy in Africa: A Socialist-Revisionist Perspective" 137-138.

⁶⁶⁹ Wiseman, J.A., *Democracy in Black Africa*...6.

⁶⁷⁰ However, Huntington agrees that the minimalist perspective of democratic government is not necessarily "good" government:

"Governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, incapable of adopting policies demanded by the public good. These qualities may make such governments undesirable but they do not make them undemocratic". Huntington, S.P., *The Third Wave*... 10. See also Wiseman, J.A., *New Struggle for Democracy*...8.

⁶⁷¹ Hinden, R. (*Africa and Democracy*, op.cit. 9) defines democracy as a set of three essential institutions: a representative body, fundamental freedoms, and rule of law. He then insisted:

"Clothe these three institutions in what shape you like; invent whatever devices you like for safeguarding them; but they must be there. Without them there is no democracy... Without these three indispensable limitations on the powers of the government... we cross the dividing line which separates the variety of political forms which may be called 'democratic' from the territory of dictatorships, autocracies, oligarchies, and tyrannies."

⁶⁷² Clapham, C. & Wiseman, J.A., "Conclusion: Assessing the prospects for the consolidation of democracy in Africa", in Wiseman, J.A., (ed.), *Democracy and Political Change*...220.

⁶⁷³ Hinden, R., op.cit. 9.

2.3.1.1.2. Critical Appraisal

Especially Marxist and socialist scholars levelled criticism at the minimalist conceptions. Criticism against minimalist conceptions first of all concerned capitalism and liberalism. Liberalism was considered inimical to democracy.

Amin recalled the rallying cry during the French Revolution: "Liberalism is the enemy of democracy."⁶⁷⁴

Some of the best African representatives of this tendency include Samir Amin, Issa Shivji, and Claude Ake. The Marxist argument is that liberal democracy is only a mask for bourgeois democracy.⁶⁷⁵

Samir Amin holds that "Western democracy has no social dimension."⁶⁷⁶ According to him, the Western or liberal bourgeois democracy, which is confined to the political domain, ignores the masses of the people to serve the minority.

It privileges individual and political rights over collective and socio-economic rights and the rights of the minority (bourgeois) over those of the people.⁶⁷⁷

It is a "formal democracy"⁶⁷⁸ to which Shivji preferred a "substantive" or specifically a "popular democracy."⁶⁷⁹

Shivji regretted that democracy was frequently, if unconsciously, conflated with its liberal form, parliamentary or multi-party system; with constitutionalism and individual rights and freedoms, *etc*, rather than interrogated as a form of struggle and the mode of politics of the large majority of the working people.⁶⁸⁰

⁶⁷⁴ Amin, S., "The Issue of Democracy in the Contemporary Third World" 71.

⁶⁷⁵ See Sandbrook, R., *op.cit.* 145; Amin, S., "The Issue of Democracy..." 61.

⁶⁷⁶ Amin, S., "The Issue of democracy..." 70.

⁶⁷⁷ *Idem* 64.

⁶⁷⁸ Glaser, D., "Discourses of Democracy in the South African Left: A Critical Commentary" 270.

⁶⁷⁹ Shivji, I.G., "Contradictory Class Perspectives..." 254-255.

⁶⁸⁰ Shivji, I.G., *Fight My Beloved Continent ...* 2.

Ake regarded liberal democracy to be an "impoverished" democracy.⁶⁸¹ Glaser revealed that for some socialists, a defence of civil liberties and political pluralism, or at any rates their elevation to a pride of place alongside other democratic principles, is irretrievably associated with individualism, formalism and reformism.⁶⁸²

Criticism against liberal democracy also came from Western scholars. French scholar Maurice Duverger labelled it as "*démocratie sans le peuple*" (democracy without people). Far from being the government of the people, Duverger held that democracy in the West had turned out to be a partycracy and a plutocracy defined as the government of the majority party or that of the rich and some professional politicians' families. The people only intervene in times of elections.⁶⁸³

Ronen also regretted that definitions of democracy have tended to emphasize representation and the process of choice and accountability, which include political parties, elections, public opinion, and so forth.⁶⁸⁴

In the same vein, Timothy Shaw lamented:

"Much of the current discourse on democracy in Africa is still overly concerned with orthodox, formal definitions and relations rather than with novel informal organizations, with traditional human rights rather than needs."⁶⁸⁵

According to Amin,

"To stop at Western democratic forms without taking into consideration the social transformations demanded by the anti-capitalist revolt of the periphery means holding on to a caricature of bourgeois democracy and thus ensuring alienation from the people and external vulnerability. For our democracy to take root, it must, from the start, take a position that goes beyond capitalism. In this, as in so many other domains, the law of unequal development operates."⁶⁸⁶

⁶⁸¹ Ake, Cl., *Democracy and Development in Africa* ...132; see also Olukoshi, A., "State, Conflict and Democracy..." 457.

⁶⁸² Glaser, D., op.cit. 270.

⁶⁸³ Duverger, M., *La démocratie sans le peuple*, supra.

⁶⁸⁴ Ronen, D., "The State and Democracy..." 192.

⁶⁸⁵ Shaw, T., quoted by Nyang'oro, J.E., "Discourses on Democracy..." XII-XIII; see also Glaser, D., op.cit. 270.

⁶⁸⁶ Amin, S., "The Issue of Democracy..." 70.

One problem with the critics of minimalist conceptions, particularly liberal democracy, is that despite criticism, scholars do not believe it can be achieved in Africa.

Shivji, for instance, considered democracy an essentially bourgeois programme, with no bourgeoisie to support it in Africa.⁶⁸⁷

In the same breath, Ake contended that "Most of Africa is still far from liberal democracy and further still from the participative social democracy that our paradigm envisages."⁶⁸⁸

2.3.1.2. Maximalist Conceptions and Socialism, Populism or Communism

2.3.1.2.1. *Exposé*

Maximalist conceptions are built on criticisms against liberal and Western democracy. Whilst minimalist scholars define democracy as a process and a set of institutions and focus on political democracy, maximalist concepts concentrate on the substance and values of democracy, the most prominent among them being social equality, and on socio-economic rights.⁶⁸⁹

In maximalists' view, democracy is essentially socio-economic and popular or socialist democracy. Theirs is a very broad definition of democracy that would include some or all of the desirable political, social, and economic characteristics of a "good society".⁶⁹⁰ Compared with minimalist conceptions emphasising individual and political rights, maximalist views broadly define democracy as implying collective and socio-economic rights.

⁶⁸⁷ Shivji, I.G., *Fight My Beloved Continent* ... 44.

⁶⁸⁸ Ake, Cl., *Democracy and Development*... 137.

⁶⁸⁹ According to Glaser, D., (op.cit. 251) "Social equality is a crucial precondition for full democracy, and its absence limits democracy."

⁶⁹⁰ Wiseman, J.A., *The New Struggle for Democracy*... 9.

To liberal and bourgeois or elite-driven democracy, they oppose social and economic or popular democracy or what Amin once called “Jacobin democracy” or “people-driven democracy”.⁶⁹¹

Unsurprisingly, most champions of maximalist conceptions recruit among scholars from socialist or Marxist persuasion or from the so-called “Left”. They are from all walks, economists, and political scientists, historians and legal scholars who examine the issue of democracy in terms of class struggle.

Maximalist scholars, such as Ake, advocate a social democracy that places emphasis on concrete political, social, and economic rights, as opposed to a liberal democracy that emphasises abstract political rights; a democracy that puts as much emphasis on collective rights as it does on individual rights.⁶⁹²

This should be a popular, participative and social democracy.⁶⁹³ This type of democracy was also advocated in the African Charter for Popular Participation.⁶⁹⁴

The concept of “popular participation”, which is associated with civil society, became central to the discourse on democracy and development in Africa.⁶⁹⁵

2.3.1.2.2. Critical Appraisal

Maximalist definitions of democracy are in many ways very attractive and contain a far clearer notion of “good government” than the minimalist ones.⁶⁹⁶ However, minimalist scholars also levelled criticism against them.

⁶⁹¹ See Nyang’oro, J.E., “Discourses on Democracy...” X.

⁶⁹² Ake, Cl., *Democracy and Development...* 132-134.

⁶⁹³ Idem 137, 139.

⁶⁹⁴ African Charter II.17.

⁶⁹⁵ Nyang’oro, J.E., “Discourses on Democracy...” Xii – Xiii.

⁶⁹⁶ Wiseman, J.A., *The New Struggle for Democracy...* 9.

In Wiseman's words,

"To make democracy a usable concept, from an analytical point of view, in understanding events in the real world (in Africa or elsewhere) it is not useful to attach so much to it as a holdall of all desirable political, economic and social characteristics."⁶⁹⁷

Wiseman identified at least three sets of problems associated with maximalist conceptions.

First, characteristics like economic equality, high participation levels, and gender equality should be seen as possible results of democracy rather than as part of its definition.

Secondly, these conceptions are inherently imprecise on the extent to which these characteristics have to be realised. There is no agreement on how equality should be measured.

Thirdly, and probably most importantly, whilst maximalist definitions of democracy may be useful in outlining future goals, they are less useful when analysing the political systems of the real world, which inevitably fall far short of the ideal.⁶⁹⁸

Wiseman concluded:

"However sympathetic one may be towards some or all of the aspirations expressed within a maximalist conception of democracy it would be unrealistic to insist that all the maximalist characteristics have to be in place before a political system can be described as democratic."⁶⁹⁹

Ake's reply to the "impoverished liberal democracy which prevails in the industrial countries" that is popular, participative or socialist democracy was also a resolutely utopian version of democracy.⁷⁰⁰

⁶⁹⁷ Wiseman, J.A., *The New Struggle for Democracy*...9.

⁶⁹⁸ Idem.

⁶⁹⁹ Idem.

⁷⁰⁰ Ake, Cl., quoted by Young, C., "The Third Wave of Democratization in Africa: Ambiguities and Contradictions" 37.

It is worth mentioning that like critics of minimalist conceptions, who found liberal democracy impossible in Africa, minimalists also think that maximalist conceptions only advocate an ideal type of democracy.

According to Wiseman, "There is no prospect whatsoever of any African state fulfilling the total range of aspirations contained within a maximalist conception of democracy in the foreseeable future."⁷⁰¹

Sandbrook also noted:

"A direct socialist transition is not a realistic alternative. It is true that objective conditions are generally unfavourable to "bourgeois" democracy, but they are mostly more hostile to revolutionary socialism."⁷⁰²

According to Sandbrook:

"Socialism is an even more demanding system than liberal democracy because it requires the extension of the democratic principle to the economic sphere – the discovery and installation of institutional mechanisms that allow the people to "own" the state that owns the means of production."⁷⁰³

Ken Post shares Sandbrook's frustrations.⁷⁰⁴ As for Glaser, he criticised the maximalist conceptions for their emphasis on social equality, substantive democracy and collective rights to the detriment of formal, legal equality, formal democracy and individual rights.⁷⁰⁵

⁷⁰¹ Wiseman, J.A., *The New Struggle ...* 9.

⁷⁰² Sandbrook, R., "Liberal Democracy in Africa..." 138. Also quoted by Nyang'oro, J.E., "Discourses on Democracy..." XII.

⁷⁰³ Sandbrook, R., *op.cit.* 146.

⁷⁰⁴ Post, K., "The State, Civil Society, and Democracy in Africa: Some Theoretical Issues", in Nyang'oro, J.E., (ed.), *op.cit.* 163-179.

⁷⁰⁵ Glaser, D., *op.cit.* 251.

According to him, the central deficiency in the democratic discourses of the South African Left is the low status accorded to political pluralism and civil liberties,⁷⁰⁶ a lack of resolute commitment to political pluralism and civil liberties.⁷⁰⁷

Yet, civil liberties and political pluralism are indispensable to any socialist order claiming to be democratic and should not be judged or jettisoned on the basis of instrumental criteria.⁷⁰⁸

2.3.1.3. Democracy as Understood in the Study

Clapham and Wiseman suggested that a realistic notion of democracy has to be found much closer to the minimalist end of the spectrum than to the more ambitious maximalist end.⁷⁰⁹

Our position regarding democracy, like constitutionalism earlier, will distance ourselves from both radical minimalists and radical maximalists.

We oppose radical minimalism because it reduces democracy to formal democracy and concentrates on civil or first-generation rights.

We also reject radical maximalism that minimises civil and individual rights, institutions and formal democracy to over-emphasise substantive democracy and collective and socio-economic rights.

⁷⁰⁶According to Glaser, civil (individual) liberties and political pluralism are worthy even in the socialist definition of democracy and should preempt collective rights :

“Their discourses fail to recognize that a democratic definition of either majority rule or working class leadership depends on a simultaneous commitment to individual rights of free expression, association and political choice. Conversely, they fail to recognize that the empowerment of collective subjects, however crucial it may be to effective political action and to forging bonds of social solidarity, ultimately is, or ought to be about expanding the freedom of individual human beings.” (Glaser, D., op.cit. 249)

⁷⁰⁷ Glaser, D., op.cit. 248, 249.

⁷⁰⁸ Idem, 251.

⁷⁰⁹ Clapham, C. & Wiseman, J.A., “Conclusion...” 220.

In fact, maximalism understood as such is a contradiction in terms since true maximalism implies that one goes far beyond minimalism and therefore formal democracy. Civil and individual rights should also be part of the democratic agenda.

Our conception of democracy is between minimalism / proceduralism, institutionalism or legalism and maximalism / populism although much closer to the former than the latter. It is both minimalist and maximalist.

Our view of democracy is both formal and substantive, implying both formal and substantive equality and emphasising individual, civil, political and collective and socio-economic rights.

As Olukoshi insisted, democracy has an element of process to it; it is a set of institutions and procedures to enable the government of the people by the people and for the people.⁷¹⁰

Individual and civil rights are not simply "bourgeois" values and do matter in democracy, however defined.⁷¹¹ Yet, democracy should not stop there, at forms, institutions, individual and civil and political rights. Democracy is not only a set of principles or institutions, but also of values.

Accordingly, our conception of democracy as a system of government includes institutions, principles, individual, civil and political rights championed by minimalist scholars and also values, collective, and socio-economic rights defended by maximalists.

⁷¹⁰ Olukoshi, A., "State, Conflict, and Democracy..." 457.

⁷¹¹ See Glaser, D., *op.cit.* 248-251; Sandbrook, R., "Liberal Democracy in Africa..." 145.

As Bangura aptly put it;

“Although democracy is primarily concerned with the rules and institutions that allow for open competition and participation in government, it embodies also social and economic characteristics that are crucial in determining its capacity to survive.”⁷¹²

While embracing such a holistic definition, in line with the methodology adopted in the study, we are mainly concerned with institutions, since they may block or foster democratic values.

However, formal democracy must be linked with more substantive forms of popular rule.⁷¹³

There is not necessarily a conflict between formal democracy on the one hand and substantive democracy on the other. Nor do individual, political and civil rights oppose the collective and socio-economic ones.⁷¹⁴

No purpose is really served by distinguishing between “substantive” and “formal” democracy.

As Glaser put it,⁷¹⁵ it is hard to allege that social equality constitutes “substantive” democracy. Nor can it be established that individual rights generate merely “formal” democracy.

⁷¹² Bangura, Y., “Authoritarian Rule and Democracy in Africa...” 98. Bangura (p.107) also held:
 “To sustain democratic rule capitalist economies – however advanced – must devise appropriate social systems. Such systems must provide welfare / economic support, however contestable, for the deprived majority to exercise their formal democratic rights, which in turn should allow them to sustain and develop their livelihood aspirations.”

⁷¹³ Bangura, Y., “Authoritarian Rule...” 129.

⁷¹⁴ Glaser (D., op.cit. 251-252) pointed out:
 “In the first place, formal legal equality and the entrenchment of rights are crucial resources for democratic politics even prior to the achievement of social equality. Provided they are located in a political and legal culture that takes them seriously.... They can, even under capitalism, grant real protections and (potentially) confer real powers on subordinate groups. Beyond that, the full realization of the one depends on the realization of the other. Individual freedoms may be of lesser value if there is unequal access to their enjoyment; but so is social equality of lesser value if it does not confer on equals a genuine voice in decision-making and genuine choice between rival decision makers and programs wherever decisions are delegated to elected representatives.”

⁷¹⁵ *Idem* 251.

Minimalists should learn from maximalists the values of social equality, collective and socio-economic rights. On the other hand, maximalist conceptions should be enriched by principles, institutions, rules, individual and civil and political rights.

A scholar such as Glaser, who counts himself part of the Marxist tradition, tried to defend civil liberties and political pluralism. He regretted their association with individualism, formalism and reformism, thereby asserting that individual rights can and ought to be inherent in any revolutionary struggle for socialism under working class leadership.⁷¹⁶

According to Sandbrook, liberal democracy is worth struggling for, even by socialists, insofar as it stands as “double-edged sword”. Furthermore, its institutions are historically associated with capitalism and facilitate the latter’s reproduction.

On the other hand, political and civil liberties and parliamentary institutions are available to their opponents – those who aim to wring concessions from the dominant classes and supersede liberal democracy by extending democratic procedures from the political into the economic sphere.⁷¹⁷

The defence that liberal democracy provides against despotism is no small matter. On the other hand, it affords progressive forces the political space to survive and within limits organise.⁷¹⁸

All things considered, the different conceptions of democracy revolve around democracy as defined by US President Abraham Lincoln in his famous speech on 19 November 1863 referring to “the government of the people, by the people and for the people”.

⁷¹⁶ Glaser, D., op.cit. 270.

⁷¹⁷ Sandbrook, R., op.cit. 146.

⁷¹⁸ Idem.

Unlike African English-speaking countries, French-speaking ones ignore the clause on the supremacy of the Constitution but adopt a "democracy clause" borrowed from President Lincoln and also unknown by the former.⁷¹⁹

There is no evidence that French-speaking countries, which expressly adopt the "democracy clause" and ignore the "supremacy" one, are more democratic but less constitutional than other African countries. This is, however, one of the features that should attract the attention of anyone studying constitutionalism and democracy in post-colonial Africa.

2.3.2. Elements of Democracy

Determining the elements of democracy is another contentious issue. The determination of the elements or requirements for democracy depends on whether one is maximalist or minimalist, but in the end all go together and interrelate.

Some of them relate to the establishment and some others to the consolidation of democracy. On the other hand, their list is not exhaustive.

Given the relationship between constitutionalism and democracy, the elements of the former as analysed earlier may also belong to the latter.

The ultimate purpose of the principles of separation of powers and federalism is to further democracy or the government of the people.

⁷¹⁹ See, for instance, the Constitution of the Republic of Togo (adopted by referendum on 27 September 1992 and promulgated on 14 October 1992) and the Constitution of the Republic of Senegal of 1983. Article 2 para 3 of the Togolese and Article 3 of the Senegalese Constitutions provided respectively that the principle of the Republic is "the government of the people, by the people, and for the people" (Translation mine).

All the same, the Constitution, institutions, human rights and the rule of law or *Etat de Droit* are instrumental to democracy. Crucial among the democratic institutions is the judiciary, which stands as the principal guardian of constitutionalism and must protect human rights. Without promotion of, respect for and a culture of human rights, there is no possibility for democracy. According to Henkin, democracy itself is a human right.⁷²⁰

Related to human rights are sovereignty and citizenship. Sovereignty is critical to the “government of the people, for the people, and by the people”. It refers to the supreme power vested in the people. On the other hand, the people in a democratic State are primarily citizens who are entitled to rights and also subjected to duties.

Democracy is primarily a “citizens’ affair”. Therefore, there cannot be democracy without sovereignty of the people and without citizens.

An additional element of democracy is political culture needed to sustain it, which is a democratic culture.⁷²¹

According to Amor:

*“Edicter d’un trait de plume l’émergence démocratique dans les pays du Tiers-Monde n’assure pas plus de démocratie tant que celle-ci demeure au niveau des signes et des formes, en d’autres termes des institutions, et tant qu’elle n’est pas intériorisée par la société.”*⁷²²

Moreover, a peaceful environment is required for constitutionalism and democracy to work and consolidate.

There is a linkage between the different elements of democracy: separation of powers, federalism, constitution, *Etat de droit*, rule of law, (democratic) institutions, human rights, sovereignty and citizenship, popular participation, accountability, legitimacy, political culture and peace.

⁷²⁰ Henkin, L., quoted by Olivier, P.J.J., op.cit.19.

⁷²¹ See Amor, A., “L’émergence démocratique dans les pays du Tiers-Monde: le Cas des Etats africains”, in Conac, G., (ed.), op.cit. 55, 67.

⁷²² Amor, A., supra, 55: “To enact by a stroke of a pen the democratic emergence in Third World countries does not guarantee democracy if the latter remains at the level of signs and forms, in other words of institutions, and if it is not internalised by the society.” (Literal translation from French)

At this juncture, for the purpose of this study, it is worth revisiting some elements or requirements that are generally referred to in the literature on constitutionalism and democracy and in the political discourse especially developed in the West.

The focus is on economic development, elections and political pluralism or multipartyism.

2.3.2.1. Economic Development

Like democracy, development is a contentious and nebulous concept. It is defined and interpreted in different manners.

It is agreed with Sklar that "development is a value-laden idea; it signifies progress toward the realization of desired goals".⁷²³ In short, development means progress.

Ake lamented the absence of a political theory of development.⁷²⁴ However, properly understood, the political theory of democracy, which manifests political development, should be seen as part of that theory.

Democracy is part of the very meaning of development. Yet, development is generally demeaned to mean economic development.

A common assumption underlying conventional wisdom about the Third World and professional analyses of political behaviour in developing countries is that there exists a critical linkage between democracy and economic performance.⁷²⁵

⁷²³ Sklar, R.L., "Developmental Democracy" 3.

⁷²⁴ Ake, Cl., *Development and Democracy*... 127.

⁷²⁵ Baker, P., "Reflections on the Economic Correlates of African Democracy", in Ronen, D., (ed.), *op.cit.* 53. Scholars such as Johnson, Slater, and Gowan (quoted by Baker, P., *op.cit.* 53-54), for instance held that "African States whose economies have not performed well in the 1960s and 1970s are prone to coups."

There is an intense debate on the possible consequences of democratisation or democracy for economic performance.⁷²⁶ Is (economic) development a requisite for democracy or *vice versa*?

Claude Ake took the debate and its surrounding confusion further:

“Considerable confusion exists among scholars of development over the relationship between development and democracy. Some say there is no necessary relation between democracy and development. Some argue that democracy is detrimental to development; others think it is conducive to it. By all indicators this confusion arises from scholars not taking the assumptions, the conventional wisdom, seriously. Once that is done, the confusion disappears; there may be errors but not confusion.”⁷²⁷

According to Ilunga Kabongo,

“One needs some degree of development of the productive forces with its ensuing development of political consciousness in order to get some kind of democratic practice ingrained in people’s behavior and expectations on a long scale and in modern terms.”⁷²⁸

The bulk of the liberal democratic theory, including the modernisation theory, establishes a close relationship between economy and stable democratic rule, or between economic development and democracy.⁷²⁹

The “modernization” argument was that economic development leads to democracy.⁷³⁰ Accordingly, democracy was not possible without development.⁷³¹

⁷²⁶ See Sorensen, G., “Democracy and the Developmental State” 31; Marsh, R.M., “Does Democracy Hinder Economic Development in the Late-Comer Nations?” *Comparative Social Research* 2, 1979, 215-248; Weed, E., “The Impact of Democracy on Economic Growth: Some Evidence of Cross-National Analysis”, *Kyklos* 36,1, 1983, 21-40.

⁷²⁷ Ake, Cl., *Democracy and Development*... 126.

⁷²⁸ Ilunga Kabongo, “Democracy in Africa: Hopes and Prospects”, in Ronen, D., (ed.), *op.cit.* 38.

⁷²⁹ See Nyang’oro, J.E., “Introduction” X.; Bangura, Y., “Authoritarian Rule...” 101.

⁷³⁰ Brautigam, D., “The ‘Mauritius Miracle’: Democracy, Institutions, and Economic Policy”, in Joseph, R., (ed.), *op.cit.* 131.

⁷³¹ Diamond, L., “Sub-Saharan Africa”, in Wesson, R., (ed.), *Democracy: A Worldwide Survey*, New York, Westport, Connecticut, London: Praeger, 1987, 87, 107.

Scholars such as Young,⁷³² Przeworski & Limongi⁷³³, Nzongola,⁷³⁴ and Ronen⁷³⁵ rejected the dependence of democracy on economic development or the automatic link of democracy as resulting from economic development narrowed down to economic growth.

Democracy has been established and consolidated over decades in India, and some South American, African and Asian States despite the hardship of economic and social conditions.

Democracy also exists in many countries at different levels of economic development. There is no standard development level that should be achieved in a particular country to establish and consolidate a democratic government.

On the other hand, the "Asian tigers" achieved economic growth without necessarily ushering in democracy.

Baker contended that we still lack an understanding of the process by which economic success or failure translates into political action.⁷³⁶

⁷³² According to Young,

"Democratization is not contingent in some deterministic sense on the level of economic development... However, the constraints of economic poverty operate in shaping the prospects for consolidation." (Young, C., "The Third Wave of Democratization in Africa..." 34)

⁷³³ Przeworski, A. & Limongi, F., "Modernization: Theories and Facts" 177. They held:

"The emergence of democracy is not a by product of economic development. Democracy... can be initiated at any level of development. Only once it is established do economic constraints play a role; the chances for the survival of democracy are greatest when the country is richer. Yet the current wealth of a country is not decisive... If they succeed in generating development, democracies can survive even in the poorest nations." See Przeworski, A. & Limongi, F., "Modernization: Theories and Facts", *World Politics*, Vol. 49, No.2, January 1997, 177.

⁷³⁴ Nzongola admits that good economic conditions may improve and thus increase the chances for social democracy, but "The democratic transition cannot be held hostage by economic situation." (Nzongola-Ntalaja, G., "The State and Democracy..." 22)

⁷³⁵ According to Ronen,

"There is no evidence, in my view, that economic development is a road to or a requisite for democracy. What I am arguing is that democracy and economic development are and should be taken as separate challenges, and therefore should be aimed at separately. Democracy should not be put aside with the excuse that it will be the eventual by-product of economic development". (Ronen, D., "The Challenges..." 2-3. See also Olukoshi, A., op.cit.462)

⁷³⁶ Baker, P., "Reflections..." 54.

He also considered that the economic indicators used by scholars such as Johnson, Slater and Gowan⁷³⁷ to interpret and predict political instability touch on the surface of the subject on which far more data need to be gathered and far more research needs to be conducted.⁷³⁸

This is not to say that there is no relationship whatsoever between economic development and democracy.

Even scholars, who reject the direct relationship or clear dependence of democracy on economic development, recognise that poverty and underdevelopment could be an obstacle to the establishment and mostly the consolidation of democracy.

Przeworski and Linongi, for instance, hold:

“Democratic regimes that emerge in comparatively affluent countries are more likely to survive and be consolidated than those emerging in poorer ones, probably because affluence mitigates distributional struggles and eases the impact of economic crises.”⁷³⁹

According to Ronen,

“It is evident that famine-stricken people cannot easily establish and maintain democracy; for them, functioning in one is equally difficult. First, the famine-stricken people do not tend to aspire to anything more than survival. Second, famine-stricken people are by definition dependent on others for food and health care. Thus, a system of food and health care need not be democratic in the eyes of the recipients; it must only be efficient.”⁷⁴⁰

Mahatma Ghandi was once supposed to have said, “an empty stomach is not a good political adviser.”⁷⁴¹

⁷³⁷ Quoted by Baker, P., *supra*, 53-54, as pointing out that “Measures of ... positive economic performance are all highly stabilizing and, conversely... African states whose economies have not performed well in the 1960s and 1970s are prone to coups”.

⁷³⁸ Baker, P., “Reflections...” 60.

⁷³⁹ See Przeworski and Linongi, quoted by Brautigam, B., “The ‘Mauritius Miracle’...” 137 and Young, C., “The Third Wave of Democratization...” 34.

⁷⁴⁰ Ronen, D., “The Challenges of Democracy in Africa...” 2.

⁷⁴¹ Mahatma Ghandi, quoted by Amisshah, A., “Constitutionalism and Law...” 41.

Some alleged that what Africa needs are primarily economic development, food, and not freedom and democracy: "Starving people do not need democracy".⁷⁴²

Undoubtedly, the world as a whole and the development community in particular were impressed by what the newly industrialising countries (NICs) – notably Thailand, Taiwan, South Korea, and Singapore – achieved under authoritarian rule.⁷⁴³

Hence the view adopted by the Western countries and the international financial institutions (IFIs) that a benign, efficient dictatorship was required to achieve economic development.⁷⁴⁴

According to one perennial argument, rapid development in the early stages of capitalism requires, and therefore justifies authoritarian government and the suspension of many human rights.⁷⁴⁵

The argument was well captured by Donnelly:

"The exercise of civil and political rights may disrupt or threaten to destroy even the best-laid development plan and must, therefore, be temporarily suspended... However, at a later stage, when capital accumulation, political institutionalization, national unity, and trade union discipline are well advanced, the liberty-growth trade-off becomes nugatory. An industrial society, so concludes this argument, is able to support a congenial mix of political democracy, human rights, and capitalist production relation."⁷⁴⁶

⁷⁴² Taken seriously, such argument would have particularly negative consequences on constitutionalism and democracy in Africa, especially under the current circumstances where the continent is facing an unprecedented famine.

⁷⁴³ On "developmental democracy", "developmental dictatorship", "developmental or modernizing oligarchy" or "developmental state", see Nyang'oro, J.E., "Introduction" X; Sandbrook, R., "Liberal Democracy in Africa..." 140; Sklar, R.L., "Developmental Democracy" 1-2; Sorensen, G., "Democracy..." 31-60; White, G., "Developmental States..." 84.

⁷⁴⁴ Ake, Cl., *Democracy and Development*... 127, 128. According to Ake, there are many difficulties, some dilemmas, and not a little confusion in this debate. First of all, democracy is already part of (political) development and the authoritarianism of the East Asian countries is a complicated fiction since the authoritarianism of the NICs has certain "redeeming features" lacking to African States, for instance. Therefore, Ake contended, "Labelling the NICs autocratic is not accurate, but it conceals those features that signal the existence of some critical though imperfect, democratic values... The authoritarianism of the NICs of East Asia is entirely different from that of Africa, which tends to lack these rudimentary democratic values... It is important to avoid thinking of Africa by making analogies and easy comparisons with the experiences of others, especially the NICs of East Asia." (Ake, Cl., op.cit. 128)

⁷⁴⁵ Sandbrook, R., "Liberal Democracy..." 140.

⁷⁴⁶ Donnelly, J., "Human Rights and Development: Complementary or Competing Concerns?" 257. Also quoted by Sandbrook, R., op.cit. 140.

The “liberty-*versus*-growth” trade-off⁷⁴⁷ was also defended by Almond and Huntington when they affirmed the need to choose between economic growth and democratic political participation.⁷⁴⁸

However, as Olukoshi warned, there can be no question of a trade-off between food and economic development on the one hand and freedom and democracy on the other hand. Nor can it be between the state and the market.⁷⁴⁹

The argument based on the Eastern Asian countries, that soft authoritarianism could better serve the cause of development than democracy, is debatable.⁷⁵⁰

Economic development is not a prerequisite for the establishment of democracy. However, it plays a major role in its consolidation.

As Bangura argued:

“Although underdevelopment *per se* should not constitute a fundamental obstacle to democratization, the establishment of stable and sustainable democracy requires substantial changes in the forms of accumulation; the promotion of an acceptable level of welfare that will allow the majority of the people to have confidence in the capacity of democratic institutions to manage economic, social and political conflicts; and the resolution of the contradictions between authoritarian relations that are dominant at the political sphere and nascent liberal pressures that are to be found in civil society.”⁷⁵¹

⁷⁴⁷ See Sandbrook, R., *op.cit.* 140-141.

⁷⁴⁸ See Almond & Huntington cited by Sklar, R.L., “Developmental Democracy” 4. Also see Nyang’oro, J.E., “Introduction” X.

⁷⁴⁹ Olukoshi, A., “State, Conflict...” 460.

⁷⁵⁰ What are therefore the consequences of democracy or authoritarianism for economic performance? The conclusion by Sorensen’s analysis was that “democratic as well as authoritarian regimes are both better and worse for economic development than they are expected to be in the literature”, and his answer to the foregoing question was “inconclusive”. (Sorensen, G., “Democracy...” 31, 33)

As far as the author is concerned, it is important to note that economic performance is not development and authoritarianism should not be put on the same level as democracy. The most developed countries are not authoritarian states.

⁷⁵¹ Bangura, Y., “Authoritarian Rule and Democracy in Africa...” 97.

Democracy does not necessarily bring about economic development. It only creates conditions, which make this development possible. On the other hand, as the Eastern Asian case demonstrates, a fairly authoritarian state may achieve the same end.

Sorensen insisted that there could be no general theory about the relationship between development and democracy.⁷⁵²

Scholars should therefore refrain from setting a general and absolute rule or drawing fast and hard conclusions.⁷⁵³

However, Sklar is right that after the failure of the so-called dictatorships of development to bring about development in Africa, what is needed on the continent is a "developmental democracy" and, on the other hand, a developmental state has a better chance under democracy.⁷⁵⁴

2.3.2.2. Elections and Multipartyism

The most debated requirements for democracy, particularly praised by minimalist and liberal scholars, are elections and multipartyism, which are generally confused with democracy.

Elections and democracy have become virtually synonymous in Western political thought and analysis.⁷⁵⁵ Dahl held that the consolidation of democracy involves political participation and competition, which implies elections and pluralism.⁷⁵⁶

⁷⁵² Sorensen, G., quoted by Nyang'oro, J.E., "Introduction" X.

⁷⁵³ According to Sorensen,

"It has now been firmly established that any attempt to make a general claim on the basis of the East Asian experience that authoritarianism will invariably help create a developmental state, must be rejected.... From a comparative perspective...developmental states of East Asia stand out as increasingly historically unique exceptions the more one studies the experiences of other countries." (Sorensen, G., "Democracy and the Developmental State" 52)

⁷⁵⁴ Sklar, R.L., "Developmental Democracy" 1-30.

⁷⁵⁵ Richard, J., "State, Conflict, and Democracy..."9.

⁷⁵⁶ Dahl, R., quoted by Bratton, M. & Posner, D.N., "A First Look at Second Elections..."378.

According to Harbeson, “the study of democratization still suffers from disproportionate emphasis on the conduct of initial, national-level multiparty elections.”⁷⁵⁷

The overemphasis on the electoral dimension is according to him rooted both in the literature on democratic transitions and upon not necessarily accurate readings of the contemporary empirical democratic theory that undergirds the literature.⁷⁵⁸

More recently, in the hurry to globalise democracy in the aftermath of the ending Cold War, democracy was reduced to the crude simplicity of multiparty elections to the benefit of some of the world’s most notorious autocrats who were able to parade democratic credentials without reforming their repressive regimes.⁷⁵⁹

In the liberal conception, “Elections are the defining institution of democracy.”⁷⁶⁰ Huntington applied the “two-turnover test” according to which consolidation of democracy occurs whenever the winners of founding elections are defeated in a subsequent election, and the new winners themselves accept an electoral turnover.⁷⁶¹

Karl Terry rightly criticised such assessments of democratic building or consolidation only based on elections or what he labelled “the fallacy of electoralism”.⁷⁶²

The embrace of dubious electoral and political arrangements on the grounds that, at this stage of Africa’s development, it is the only outcome that can be realistically expected, is according to Olukoshi, very problematic.⁷⁶³

⁷⁵⁷ Harbeson, J.W., “Rethinking Democratic Transitions...” 39.

⁷⁵⁸ Idem.

⁷⁵⁹ Ake, Cl., *Democracy and Development...* 130.

⁷⁶⁰ Bratton, M. & Posner, D.N., “A First Look at Second Elections in Africa...” 378.

⁷⁶¹ See Huntington quoted by Bratton, M. & Posner, D.N., op.cit.378; Joseph R “State, Conflict and Democracy in Africa” 11.

⁷⁶² Karl Terry quoted by Bratton M & Posner, D.N., op.cit.378.

⁷⁶³ Olukoshi, A., “State, Conflict...” 456.

According to Bratton and Posner,

“Formal procedures for elections do not create a democracy because, as in Latin America experience has shown elections can coexist with systematic abuses of human rights and disenfranchisement of large segments of the population”.⁷⁶⁴

Nzongola argues that it would be too simplistic to identify democracy with the holding of elections. According to him, the question of democracy goes beyond elections to the realisation of democratic principles of governance and to the balance of social forces in the political community.⁷⁶⁵

Ake also referred to the same fact under the one-party system with people “voting without choosing.”⁷⁶⁶ Mkandawire well captured that idea in his “choiceless democracies”.⁷⁶⁷

As Young held, the need to satisfy foreign donors was one of the major inducements for African authoritarian regimes to open up their systems. Moreover, the most tangible demonstration that such a change had been initiated was the legalisation of political parties and the holding of competitive elections.⁷⁶⁸

In Africa, to borrow from Okoth-Ogendo’s metaphor of “Constitutions without Constitutionalism,” numerous elections albeit hardly free and fair have been held regularly since independence without countries establishing and consolidating democracy.

Elections are organised every year on the African continent. The most recent presidential elections took place in the Republic of Congo, in Zambia, Zimbabwe, Niger and Mali.

⁷⁶⁴ Bratton, M. & Posner, D.N. op cit. 378-379.

⁷⁶⁵ Nzongola Ntalaja G “The State and Democracy in Africa” 19.

⁷⁶⁶ Ake, Cl., *Democracy and Development* ... 137.

⁷⁶⁷ Mkandawire, T., “Crisis Management...” 119-135.

⁷⁶⁸ Joseph, R., “State, Conflict, and Democracy...” 9-10.

Except for Mali (May 2002) where General Ahmadou Touré democratically returned to power, it cannot be said that the elections that brought M. Levy Mwanawasa to the presidency in Zambia or maintained authoritarian leaders such as General Denis Sassou Ngouesso (Congo) and Robert Mugabe (Zimbabwe) were democratic. The phenomenon is that of elections without democracy.

Electoral democracies are but cosmetic democracies.⁷⁶⁹ If nothing else, convening scheduled multiparty elections serves the minimal function of marking democracy's survival.⁷⁷⁰ In these conditions, are elections unnecessary?

While seeking to avoid the electoral fallacy, we should not embrace its antithesis, what Seligson Mitchell and Booth⁷⁷¹ called the "anti-electoralist fallacy", by assuming that elections never matter for democratisation.⁷⁷²

In our modern era, you can have elections without democracy, but you cannot have democracy without elections.⁷⁷³

As Bratton and Posner wrote, "The regularity, openness, and acceptability of elections signal whether basic constitutional and attitudinal foundations are being laid for sustainable democracy."⁷⁷⁴

Although elections and democracy are not synonymous, elections nonetheless remain fundamental, not only for the installation of democratic government, but for broader democratic consolidation.⁷⁷⁵

⁷⁶⁹ See Ake, Cl., *Democracy and Development* 130.

⁷⁷⁰ Bratton, M. & Posner, D.N., "A First Look at Second Elections..." 379.

⁷⁷¹ Quoted by Bratton, M. & Posner, D.N., *op.cit.* 379.

⁷⁷² Bratton, M. & Posner, D.N., *supra* 379.

⁷⁷³ *Idem.*

⁷⁷⁴ *Ibidem.*

⁷⁷⁵ See Bratton, M. & Posner, D.N., *supra*; Ilunga, Kabongo, "Democracy in Africa..." 35.

As far as the relationship between democracy and pluralism is concerned, most scholars use the two concepts interchangeably.⁷⁷⁶ There is no common definition of pluralism.

According to Diagne,

“Pluralism is a term that has many different and often contradictory meanings... Like many researchers, I understand the term “plural society” to refer to heterogeneous and complex society.”⁷⁷⁷

As for Nicol, pluralism involves a wide range of categories: racial, ethnic, religious, classes, and within these, other such as kinship groups.⁷⁷⁸

Kaba takes the same line when he considers that

“Pluralism may refer to societies with cleavages between the different population groups in terms of ethnicity, religions, and values... Pluralism may also refer to a dispensation of authority among the groups bound together by common values and crosscutting loyalties to one another and to the system. This type of pluralism may foster democracy rather than coercion and conflicts.”⁷⁷⁹

We adopt a broad definition of pluralism as a system marked by pluralities. It may be ethnic, institutional, economic, religious, cultural, and political. In this sense, every society is plural or pluralistic.

The common conception of political pluralism is that of multipartyism. According to the liberal theory, there is no democracy without political pluralism, understood as multipartyism.⁷⁸⁰

Political parties have been identified as crucial to the process of democratic transition and consolidation.⁷⁸¹ However, as for elections, multipartyism is not democracy.⁷⁸²

⁷⁷⁶ See Ronen, D., “The Challenges of Democracy...” 1; Conac, G., “Etat de droit...” 483.

⁷⁷⁷ Diagne, P., “Pluralism and Plurality in Africa” 65.

⁷⁷⁸ Nicol, D., “African Pluralism and Democracy” 165.

⁷⁷⁹ Kaba, L., “Power and Democracy...” 102 (note 2).

⁷⁸⁰ Conac G “Etat de droit et Démocratie” 492.

⁷⁸¹ Bauer, G., “Challenges to Democratic Consolidation in Namibia” 439-441.

⁷⁸² See Conac, G., “Introduction” 5; Pelletier, J., “L’Afrique en Mouvement” 477.

On the other hand, political parties are recent and as demonstrated in pre-colonial Africa, it is possible to have democracy, or some measure of it, without multipartyism.

When it exists, multipartyism is not a guarantee for democracy. Authoritarianism may well tie the knot with integral multipartyism.⁷⁸³

As will be seen later, more than four hundred political parties officially existed during Mobutu-guided transition in Zaire. Instead of advancing democracy, this wild multipartyism rather contributed to the survival of the authoritarian regime of President Mobutu.

However, as Nzongola remarked, "If multipartyism is not necessarily synonymous with democracy, it is difficult, if not impossible, to show that a one-party system can be democratic".⁷⁸⁴

During the first decades of Africa's history, anti-multipartyism was taken to its extreme and resulted in the consecration of one-party rule which had the favour of almost all African rulers, except in a few states, as expression and instrument for democracy.

The outcry of the same one-party rule in the 1980s was clear indication of the failure of monopartyism to achieve democracy.

In conclusion, multipartyism is important to democracy, but it should not be confused with it.⁷⁸⁵

Ben Yahmed's metaphor⁷⁸⁶ about multipartyism is particularly interesting:

*"Il est à la démocratie ce que le sel est à la cuisine: un ingrédient nécessaire et dont il est facile d'abuser. Mais le sel ne fait pas un repas à lui seul. Ceux des peuples africains qui se contenteront du multipartisme ne tarderont pas à s'apercevoir qu'ils sont restés sur leur faim."*⁷⁸⁷

⁷⁸³This is in full contrast with Conac's statement: "no democracy without pluralism; no political pluralism without rule of law." (Conac, G., "Etat de droit..."492)

⁷⁸⁴ Nzongola Ntalaja, G., "The State and Democracy..."15.

⁷⁸⁵ Glaser, D., "Discourses of Democracy in the South African Left..."249-250.

⁷⁸⁶ Béchir Ben Yahmed, quoted by Gonidec, P.-F., "Démocratie et développement ..." 57-58.

⁷⁸⁷ "It is to democracy what salt is meal to the kitchen, a necessary ingredient very easily abused. However, salt alone does not make the meal. Those African peoples who will be content with multipartyism won't take long to realise that they have remained hungry." (Literal translation)

2.4. Dialectic of Constitutionalism and Democracy

The relationship between constitutionalism and democracy has been the subject of a hot debate in legal and political sciences.⁷⁸⁸

Sometimes, constitutionalism and democracy are considered mutually dependent and reinforcing, at other times antagonist.⁷⁸⁹

2.4.1. Marriage between Constitutionalism and Democracy

Democracy may not be the essence of constitutionalism and a system may be constitutional without being democratic, as Nwabueze⁷⁹⁰ and Friedrich⁷⁹¹ pointed out, constitutionalism is nevertheless considered a step towards democratisation and an issue that inserts itself into the large debate on democracy, as Shivji and Mamdani stressed.⁷⁹²

According to Chandler, Enslin and Renstrom, "The final phase of modern constitutionalism was its democratization."⁷⁹³

True and sustainable democracy is impossible without constitutionalism. Furthermore, without constitutional restraints, democracy becomes weaker and is doomed to collapse.⁷⁹⁴ Constitutionalism is a prerequisite for democratic survival.⁷⁹⁵

⁷⁸⁸ On the dialectic between democracy and *Etat de droit*, see Conac, G., "Etat de droit..." 485-487.

⁷⁸⁹ See Rosenfeld, M., "Modern Constitutionalism..." 27; Olukoshi, A., op.cit. 456.

⁷⁹⁰ Nwabueze, B.O., op.cit. quoted by Mojekwu, C.C., "Nigerian Constitutionalism" 164.

⁷⁹¹ Quoted by Sigmund, P., "Carl Friedrich's Contribution to the Theory of Constitutionalism – Comparative Government" 38.

⁷⁹² See Mamdani, M., "Social Movements and Constitutionalism..." 243; Shivji, I.G., "Contradictory Class Perspectives..." 255.

⁷⁹³ Chandler, R.C., Enslin, R.A. & Renstrom, P.G., op.cit. 18.

⁷⁹⁴ Elster, J., "Introduction" 9.

⁷⁹⁵ Conac, G., "Etat de droit..." 485.

As Holmes put it,

“It is meaningless to speak about popular government apart from some sort of legal framework which enables the electorate to have a coherent will... Without tying their own hands, the people will have no hands.”⁷⁹⁶

On the other hand, constitutionalism as broadly understood requires democracy.

Sejersted contended that “the common experience is likely to be stronger than democracy has after all been the best guarantee for limited government and the rule of law.”⁷⁹⁷

Constitutionalism and democracy are therefore held to be interrelated and interdependent. However, they also came to be regarded as incompatible or contradictory phenomena, as captured in the “counter-majoritarian” dilemma or difficulty.

2.4.2. The Counter-majoritarian Dilemma

2.4.2.1. *Exposé*

One of the major discussions about the relationship between constitutionalism and democracy concerns the so-called “counter-majoritarian dilemma”, which is the discord between majoritarian politics and constitutionally anchored restraints.⁷⁹⁸

The debate constitutionalism *versus* democracy is akin to the debates constitutionalists *versus* democrats, constitutional supremacy *versus* parliamentary supremacy or sovereignty, rule of law *versus* rule of man, “*politique politisante versus politique politisée* or majority politics,” “reason *versus* passion,” Madison or Locke *versus* Jefferson or Rousseau.⁷⁹⁹

⁷⁹⁶ Holmes, S., “Precommitment...”231.

⁷⁹⁷ Sejersted, F., “Democracy and the Rule of Law...”139.

⁷⁹⁸ See Holmes, S., “Precommitment and the Paradox of Democracy” 195-198; Elster, J., “Introduction”1-8.

⁷⁹⁹ Elster, J., “Introduction” 8.

Constitutionalists such as Hayek and Shapiro perceive constitutionalism as a useful limit on democracy while democrats such as Shapiro see it as an unnecessary nuisance.⁸⁰⁰

The counter-majoritarian dilemma embodies many different aspects, some of which need to be revisited briefly.

First, why should people tie their hands to a constitution that has been entrenched in order to preclude easy alteration?⁸⁰¹

Secondly, why should democratic government be limited at all and how can the constitutional precommitment be legitimate?

In other words, how can we justify a system that thwarts the will of the majority in democracy?⁸⁰²

Another related question, neglected, but particularly important for African countries, is why should the people be bound by a Constitution drafted and adopted by non-elected representatives of political groups while no referendum was called?

According to Davis, Chaskalson and De Waal, constitutional scholars, particularly in the USA, have long struggled with what has come to be known as the “counter-majoritarian difficulty” and despite many attempts at resolving it, the debate went on.⁸⁰³

⁸⁰⁰ Hayek and Shapiro, quoted by Holmes, S., “Precommitment...” 196-197.

⁸⁰¹ Laurence Tribe (quoted by Holmes, S., *supra*, 195) opens his influential treatise on *American Constitutional Law* with this concise formulation of the counter-majoritarian dilemma:

“In its most basic form, the question...is why a nation that rests legally on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement ... deliberately structured so as to be difficult to change.”

⁸⁰² Holmes, S., “Precommitment...” 197.

⁸⁰³ Davis, D., Chaskalson, M. & De Waal, J., “Democracy and Constitutionalism: The Role of Constitutional Interpretation”, in Van Wyk, D., (ed.), *Rights and Constitutionalism. The New South African Legal Order*, Juta & Co, 1994, 5-8.

Basically, the debate on the counter-majoritarian dilemma revolves around the legitimacy of judicial review: Is judicial review allowing unelected and allegedly unaccountable judges to strike down legislation enacted by elected and legitimate people's representatives in Parliament compatible with popular sovereignty and democracy? Should appointed judges have a right to nullify the decisions of democratically elected officials?

According to Holmes, the existence of an irreconcilable "tension" between constitutionalism and democracy is one of the core myths of modern political thought.⁸⁰⁴

The defenders⁸⁰⁵ of the counter-majoritarian dilemma came close to suggesting that constitutionalism and democracy could not be reconciled and "constitutional democracy" was a marriage of opposites, an oxymoron.⁸⁰⁶

For a large number of serious thinkers, constitutional democracy remains a paradox, if not a contradiction in terms.⁸⁰⁷

According to Elster, constitutionalism fights a two-front war: against the executive and against the legislative branches of government.⁸⁰⁸ Constitutionalism has been described as being in essence antidemocratic as it refers to limits on majority decisions.

The relationship between constitutionalism and democracy is said to be problematic if not downright contradictory.⁸⁰⁹

⁸⁰⁴ Holmes, S., "Precommitment..."195, 197.

⁸⁰⁵ Among them, Hume, Jefferson, and Paine (quoted by Holmes, S., *supra*, 199-205) who opposed "constitutional precommitment binding the future". Carl Schmitt (quoted by Holmes, S., *idem*, 231) also subscribed to the myth of a fundamental opposition between constitutional limits and democratic government and held that the entire effort of constitutionalism was aimed at repressing the political.

⁸⁰⁶ Holmes, S., "Precommitment..."197.

⁸⁰⁷ *Idem*, 198.

⁸⁰⁸ Elster, J., "Introduction"7.

⁸⁰⁹ Rosenfeld, M., "Modern Constitutionalism..."20, 26-27.

2.4.2.2. Critical Appraisal

Those who view constitutionalism and democracy as opposed irremediably or an oxymoron, are idealists who certainly believe in the perfection of democratic government in the world.

Yet, as pointed out earlier, democracy remains an unfinished business, which is nowhere perfect.

As Sklar also noted, "All political systems are evidently mixtures of democracy and oligarchy."⁸¹⁰ One should not concentrate on judicial review, which is only one of many oligarchic devices that are routinely incorporated into the structures of modern democratic polities in order to preserve liberty and enhance the overall quality of government.⁸¹¹ However, as Sejersted asked, is there really a contradiction between constitutionalism and democracy?⁸¹²

A number of political thinkers and scholars hold that constitutionalism and democracy are not fundamentally antagonistic, but mutually supportive or complementary.⁸¹³ In other words, they are reconcilable.

⁸¹⁰ Sklar, R.L., "African Polities..." 166.

⁸¹¹ *Idem*, 165.

⁸¹² Sejersted, F., "Democracy and the Rule of Law..." 131.

⁸¹³ Hooker and Madison, (quoted by Holmes, S., "Precommitment..." 215-221) defended constitutional precommitment. Holmes ("Precommitment..." 195, 197, 198) considers the counter-majoritarian dilemma or the alleged "irreconcilable tension between constitutionalism and democracy" a "myth" and not a reality, sharing with Ely Hart (quoted by Holmes, S., *supra*, 198) and Stuart Mill (quoted by Holmes, S., *idem*, 233) ideas that constitutions can be democracy-reinforcing (Hart) and constitutional restraints freedom-enhancing (Mill). Sejersted ("Democracy and the Rule of Law..." 131) also held :

"The rule of law and democracy correspond to the two different concepts of liberty, the negative, which makes liberty dependent on the curbing of authority, and the positive, which makes it dependent on the exercising... of power."

They were reconciled by the American Founding Fathers.⁸¹⁴ On the other hand, scholars such as Alexander Bickel and Frederick Schauer,⁸¹⁵ argued that the counter-majoritarian difficulty was, in fact, not really a “deviant institution”.

They argued that the judiciary played a unique role. Therefore, the judges should be trusted and judicial review considered a necessary part of the democratic system.

Moreover, the American people long after *Marbury v Madison*,⁸¹⁶ where John Marshall, the Chief Justice, asserted the power of judicial review, still maintain confidence in the judicial system and the power of the judiciary to be the watchdog of democracy.

Even in Britain where the system of parliamentary sovereignty still prevails, there is no contradiction between democracy and rule of law.⁸¹⁷

On the other hand, constitutionalism and democracy have rightly been reconciled in Africa, as judicial review has been entrenched in many African constitutions.

Accordingly, the debate on the counter-majoritarian dilemma may have been of importance in American constitutional law, but it has come to be moot or academic in African comparative constitutional law for both constitutional and empirical reasons.⁸¹⁸

⁸¹⁴ Tribe (quoted by Holmes, S., “Precommitment...”230) asks:

“If we believe in the sovereignty of the people, why do we accept all these (constitutional) restrictions? The answer proposed by the American Framers was quite simple: They are not restrictions; they are the people.”

⁸¹⁵ Quoted by Davis, D., Chaskalson, M. & De Waal, J., op.cit.8-10.

⁸¹⁶ 5 US 137, 2 Led 60 (1803).

⁸¹⁷ Sejersted, F., “Democracy and the Rule of Law...”135.

⁸¹⁸ Davis, Chaskalson & De Waal (supra 11), however, contend that “the counter-majoritarian difficulty does matter” and are very critical of the role played by the judges:

“Judges have not been able to maintain, let alone identify, enduring general values. A decision to ignore the problem because James Madison might not have perceived it to be a problem begs the question. Trusting judges to exercise their discretion in a ‘good’ manner has resulted in an inconsistent and often contradictory constitutional jurisprudence. Finally, dependence upon the democratic process to correct judicial excesses has historically proven itself unreliable.”

This total attack on judicial review and judges seems unwarranted. Jurisprudence, whether constitutional or other has never been consistent all the time. This is not to deny the “counter-majoritarian difficulty”, but for us studying comparative constitutional law, it really does matter less than it did in the US. African peoples fighting for constitutionalism and democracy would hardly say that it is one of the main problems they are facing.

A further comment on the counter-majoritarian debate is that the argument is faulty insofar as it is based on a narrow definition of both constitutionalism and democracy which confines the former to judicial review and the latter to the rule of the majority. Yet, as understood in this study and stated earlier, constitutionalism is more than judicial review and may even exist without it.

Democracy precludes dictatorship of the majority and the sovereign people may decide themselves to retain or abide by previous rules. On the other hand, it is not the elected people's representatives in Parliament who are sovereign, but the people who gave them the power and to whom they are accountable.

According to Holmes,

"Democracy ... is never simply the rule of the people but always the rule of the people within certain predetermined channels, according to certain prearranged procedures, following certain preset criteria of enfranchisement and on the basis ... of certain predrawn electoral districts."⁸¹⁹

Defending the argument of the "counter-majoritarian dilemma" would amount not only to reducing the people to a transient majority in Parliament, but also to transferring sovereignty from "the people" to "the majority" of the people.

The people are free to grant their elected representatives some powers and preserve some other for other officials, although not elected.

As Holmes put it

"To preserve democracy, voters must partially abdicate the power of apportionment, that is, must remove it ... from the hands of elected and accountable representatives. This is a striking example of the paradox of democracy: citizens can increase their power by tying their own hands. Limited democratization subserves continuing democratic rules."⁸²⁰

⁸¹⁹ Holmes, S., "Precommitment..."231.

⁸²⁰ Idem 232. In fact, by removing some powers from elected representatives to assign them to other officials, the people are not "tying their hands", but only that of their representatives since it is always they who decide and may bestow some powers upon unelected officials. The majority in Parliament are not the people. Nor do they always defend peoples' views and interests. That is why majorities come and go. Furthermore, the argument that only elected peoples are accountable and appointed officials, including judges, are not should be opposed. In a system of constitutional supremacy, the judiciary is also accountable to the people directly or indirectly *via* those who appointed them (The President, King or Queen, the Government and Parliament) and are peoples' representatives. Moreover, the judges are subject

Constitutionalism entails limitation on the powers not only of the executive, legislative, and judicial branches of government, and of administrative officers, but also on the powers of the majority in Parliament.

An absolute democracy would be a *façade* for tyranny of the majority.⁸²¹ It is not only the judiciary, which may endanger democracy and bring about authoritarianism or totalitarianism, but a passionate majority may also do.

As Conac pointed out:⁸²²

*“La fin du régime de Weimar a démontré tragiquement qu’une majorité aux ambitions totalitaires pouvait très légalement détruire une démocratie fragilisée par l’instabilité politique et la crise économique.”*⁸²³

As Jefferson⁸²⁴ earlier insisted in the American case, “elective despotism” cannot be the government fought for by African peoples embarked on the struggle for constitutionalism and democracy.

On the other hand, constitutionalism is better served with democracy and democracy with constitutionalism within the framework of a constitutional democracy or democratic constitutionalism.

to and fettered by the Constitution itself and the law. As Carpenter and Botha (op.cit.133) pointed out concerning constitutional interpretation,

“The recognition of the presence of subjective factors, the determination of societal values and the utilization of purposive and teleological modes of interpretation do not give any judge *carte blanche* to decide a case in accordance with whim rather than principle.”

⁸²¹ Chandler, R.C., Enslen, R.A. & Renstrom, P.G., op.cit.35.

⁸²² Conac, G., “Etat de droit et Démocratie” 486.

⁸²³ “The end of the Weimar Republic has tragically demonstrated how an ambitious totalitarian majority could very legally destroy a democracy made fragile by political instability and economic crisis.” (Literal translation mine)

⁸²⁴ Quoted by Levi, E.H., op.cit. 375.

2.4.3. Tension between Constitutionalism and Democracy: Which Should Prevail?

2.4.3.1. Problem

Accepting that constitutionalism and democracy are not fundamentally antagonistic and that they may and should coexist implies the recognition of a possible tension that cannot be ruled out altogether.

The problem that may arise, especially in constitutional democracy or democratic constitutionalism, is which should prevail in case of tension: constitutionalism or democracy?

2.4.3.2. Possible Solution

Despite criticism against it, constitutionalism, at least narrowly understood to refer to the power of the judiciary, has prevailed over majority rule without democracy losing.

Recent cases in two constitutional and democratic countries may illustrate this, one from the USA and another from South Africa.

In the USA, the general rule is that the presidential candidate who wins the popular vote gets at least 270 of the 538 electoral votes and wins the presidency. However, the results of the November 2000 US presidential election gave rise to an unusual situation the country had not known for 125 years.

In Florida, the margin between Vice President Albert Gore and Governor George W. Bush, Republican and Democratic candidates respectively, was less than one percent of the ballots cast, and required manual recounting in terms of the electoral law of the State of Florida.

The recounting of votes in constituencies where the Democratic Party had a strong following was very likely to give the lead to its candidate by helping him win the 25 electoral votes of Florida that were required to become the next US President.

Accordingly, Vice President Al Gore launched an application for manual recounting before Florida's Supreme Court.

On 8 December 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9, 000 ballots in Miami-Dade County.

The Supreme Court of Florida also ordered the inclusion in the certified vote totals of 215 votes uncertified in Palm-Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr., and Senator Joseph Lieberman, Democratic candidates for President and Vice President of the USA.⁸²⁵

The Florida Supreme Court therefore ruled that relief would require manual recounts in all Florida counties where undervotes existed.⁸²⁶

The Court directed that the standard to be employed in the manual recounts was the standard established by the Legislature in the Florida Election Code.⁸²⁷

Governor Bush opposed. The case was urgently referred to the US Supreme Court, which handed down its judgement on 12 December 2000, which was the day set as the deadline for the certification of the results in Florida. The nation was awaiting word from the "un-elected" justices of the US Supreme Court.

⁸²⁵ *Albert Gore, Jr., and Joseph I. Lieberman, Appellants, v Katherine Harris, as Secretary, etc., et al., Appellees*, 772 So. 2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. at S 1112, S 1117 (Supreme Court of Florida, decided on 8 December 2000).

⁸²⁶ *Idem*, at S 1114, 1117-8.

⁸²⁷ *Idem*, at S 1118.

In a five to four ruling, the Court reversed the judgement of the Supreme Court of Florida. It held that the Florida statutory standard for the manual examination of ballots violated equal protection rights and ultimately mandated that any manual recount be concluded by 12 December 2000.⁸²⁸ The case returned before the Florida Supreme Court on remand from the United States Supreme Court.

The Florida Supreme Court ruled that in light of the time of the release of the US Supreme Court opinion, the deadline could not possibly be met. It also declined to grant relief to the appellants, namely Democratic Candidates Albert Gore and Joseph Lieberman, and decided to leave the issue of the development of a specific, uniform standard throughout the State of Florida, to the competence of the legislature of this State.⁸²⁹

The saga following the controversial 2000 US presidential election and the electoral dispute were over and, after concession by Vice President Al Gore, Governor George W. Bush was proclaimed the 43rd US President.

As the guardian and watchdog of American constitutionalism and democracy, the US Supreme Court enjoys such a prestige that Vice President Albert Gore agreed to abide by its ruling. So did the Democratic Party and the American people. This case contributed to downplaying the traditional debate on the “counter-majoritarian dilemma” in the very country where it originated and developed so much.

⁸²⁸ See *George W. Bush and Richard Cheney, Petitioners v Albert Gore, Jr., et al.*, No. 00-949, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L.Ed.2d 388, 121 S. Ct., 525, at 7-12 (Supreme Court of the United States, Decided on 12 December 2000).

⁸²⁹ *Albert Gore, Jr., and Joseph I. Lieberman, Appellants, v Katherine Harris, as Secretary, etc., et al., Appellees*, No. SC00-2431, 773 So. 2d 524; 2000 Fla. LEXIS 2474, 26 Fla. Law W. at S 1 (Supreme Court of Florida).

In South Africa, considering the rampant crime in the country, the majority of the people arguably came to favour the reintroduction of the death penalty after it had been declared unconstitutional and outlawed by the Constitutional Court in *S v Makwanyane and Another*.⁸³⁰

The Constitutional Court put it clear that it was only bound by the Constitution whatever the opinion of the majority could be.

As President Chaskalson held,

“I am, however, prepared to assume that...the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.”⁸³¹

He went on:

“Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.”⁸³²

Accordingly, constitutionalism prevails over (majority) democracy in case of tension.

2.5. Constitutionalism and Democracy in the Changing World of Globalisation

Much has been already said and written about globalisation that has made the headlines and dominated political, economical and scientific discourses since the late 1980s. Globalisation now occupies the place once held by colonisation, independence, structural adjustment, and good governance.

Although it is not specifically a phenomenon of the twentieth century, globalisation is one of the most important events the world has been going through since the end of the second millennium. It is very likely that it will stay with us well into the 21st century, as the world does not stop globalising.

⁸³⁰ *S v Makwanyane and Another*, supra.

⁸³¹ *Idem* at para 87.

We do have a conception of globalisation much broader than that generally used and which confines it to the opening-up of the liberal market or economic globalisation. The opening-up inherent in the concept may affect several sectors and not only the market or economy.

Accordingly, globalisation may be and is also social, legal, political, industrial, technological, and so on. New information technologies, for instance, result in a "cultural globalization".⁸³³

Two important dimensions of globalisation deserve a brief comment in the context of the study.

The first dimension is the globalisation of law and politics, developed mostly through the UN and regional agencies.

The development of international law, especially international human rights law, within the UN with the General Assembly taking the form of a world parliament and the Security Council that of a world government resulted in some internationalisation of law and politics. Through the UN and regional organizations efforts were made towards the creation of an international or regional *Etat de droit* or towards the internationalisation of constitutionalism and democracy to which every state should be subjected.⁸³⁴

The second face of globalisation, the best known but not necessarily the oldest, is globalisation of the market or economic globalisation, defined by Van de Walle as "the process of integration of national economies".⁸³⁵

⁸³² *S v Makwanyane* at para 88.

⁸³³ Van de Walle, N., "Globalization and African Democracy" 97.

⁸³⁴ Conac, G., "Etat de droit..." 483, 503, 505-507.

⁸³⁵ Van de Walle, N., "Globalization..." 97.

Globalisation of law and politics and economic globalisation pose dilemmas and will definitely impact on constitutionalism and democracy, particularly in African States.⁸³⁶

2.5.1. Constitutionalism, Democracy and Globalisation of Law and Politics

2.5.1.1. Constitutionalism, Democracy and Internationalisation of the *Etat de Droit* or Rule of Law under the United Nations

Legal and political globalisation during the 20th century developed essentially through international organisations with efforts aimed at uniting nations behind some common objectives whether internationally or regionally. At the international level, the United Nations is indisputably the main result of the globalisation of law and politics.

The creation of the UN in 1945 constituted a major step towards the creation of an international *Etat de droit*⁸³⁷ or international rule of law.

The World Body positively impacted on constitutionalism and democracy in the world in general and in Africa in particular through the embodiment of human rights in the UN Charter, the adoption of the Universal Declaration of Human Rights and hundreds of human rights treaties or conventions, declarations and resolutions.⁸³⁸

The first action in this sense was the engagement of the UN in the termination of colonialism and the promotion of peoples' right to self-determination. One of the organs of the UN, which was involved in this matter at an early stage, was the Trusteeship Council.⁸³⁹ Most African States became independent after the creation of the UN and thanks to the UN.

⁸³⁶ See Hyslop, J., *African Democracy in the Era of Globalisation*, Johannesburg: Witwatersrand University Press, 1999; Kidana, M., "Dilemmas Globalisation Poses on Africa", *Paper* presented at CODESRIA 9th General Assembly on "Globalisation and Social Sciences in Africa", Dakar, 4 – 8 December 1998.

⁸³⁷ Conac, G., "Etat de droit..." 483, 505-507.

⁸³⁸ See supra, the Universal Bill of Rights.

⁸³⁹ Chapter XII of the UN Charter.

Nevertheless, ideological divisions, the Cold War, and the large dependence of the UN on the winners of the second World War who granted themselves the veto right within the Security Council prevented the UN from going far in the establishment and consolidation of constitutionalism and democracy in the World, especially in post-colonial Africa.

On the other hand, there is the principle of non-interference in the domestic affairs of other states,⁸⁴⁰ which did not allow the UN to intervene to boost constitutionalism and democracy in countries where they were threatened or rejected.

The progress of constitutionalism and democracy in the world through the UN system will largely depend on the enforcement of human rights treaties or conventions, and also the necessary transformation or democratisation of the UN, where the five permanent members in the Security Council may dictate the international community and where the African continent does not have any single permanent seat.

2.5.1.2. Constitutionalism, Democracy and Regionalisation of the *Etat de Droit* or Rule of Law

Regional organisations such as the Council of Europe (CE), European Union (EU) (Europe) and OAU / AU (Africa) also epitomise globalisation of world politics. Their impact on the development of constitutionalism and democracy at the regional level cannot be underestimated.

⁸⁴⁰ Article 2.7.

2.5.1.2.1. The Council of Europe, European Union and Constitutionalism and Democracy in European States

The CE has played a tremendous role in promoting constitutionalism and democracy in Europe.⁸⁴¹

The CE was set up on 5 May 1949. In 1999, it consisted of 41 Member States. It is different from the EU although the 15 EU Member States are all members of the CE.

Any European State can become a member of the CE provided it accepts the principle of the rule of law and guarantees human rights and fundamental freedoms to everyone under its jurisdiction.

The aims of the CE include the protection of human rights, pluralist democracy, and the rule of law and the consolidation of democratic stability in Europe by backing political, legislative and constitutional reform.

As far as the promotion of human rights is concerned, the CE is based on the Convention for the Protection of Human Rights and Fundamental Freedoms adopted at Rome on 4 November 1950.

This Convention has been amended by several Protocols. These Protocols concerned the extension of human rights protected by the Convention, the competence of the European Court of Human Rights, the abolition of the death penalty (Protocol No.6), and the participation in the proceedings of the European Court.

⁸⁴¹ See The Council of Europe, *Activities & Achievements*, Public Relations Service, 1998; UNHCHR, *Human Rights. A Compilation of International Instruments*, Volume II Regional Instruments, New York & Geneva: UN, 1997, 73-319.

Protocol No. 11 is particularly important as it established the European Court of Human Rights as the enforcement mechanism of European human rights law. The judgments of the Court are binding on all the CE Member States.

Other conventions adopted within the framework of the CE include the European Social Charter and its Protocols, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its Protocols.

These human rights conventions are among over the 170 conventions signed within the framework of the CE.

In May 1990, the European Commission for Democracy through Law, also known as the Venice Commission, was established as a Partial Agreement of the CE. This Commission studies constitutional, legislative and administrative measures that serve to establish the basic principles of the CE.

The main issues studied include constitutional justice and constitutional reform, in particularly activities aimed at developing and consolidating democratic stability in Europe.

As far as the EU is concerned, its main organs with bearing on constitutionalism and democracy are the European Parliament and the Court of Justice of European Communities.

The former represents the peoples of the EU and sees itself as the guardian of the European interests and the defender of the citizens' rights.

The latter is to ensure that the law is observed in the interpretation and application of the Treaties and, generally in all of the activities of the Community.

The CE and the EU have immensely contributed to promoting constitutionalism and democracy, which are the founding values on which Europe is based.

A European country that does not respect or promote these values would find it very difficult to become a member of the CE or the EU and to fully participate in their activities.

2.5.1.2.2. The OAU / AU and Constitutionalism and Democracy in African States

2.5.1.2.2.1. The Organisation of African Unity

The OAU was by no means created to promote constitutionalism and democracy in African states.

Established shortly after independence of many African States while some were still under colonisation, the OAU was initially concerned with independence and its consolidation.

The OAU as an international organisation was firstly an instrument in the service of African States and their governments.

However, this does not mean that the OAU Charter, resolutions and practice did nothing to promote constitutionalism and democracy.

At the time of the creation of the OAU, self-determination, decolonisation⁸⁴² and the suppression of apartheid in South Africa, were understood as prerequisites for constitutionalism and democracy that cannot be said to exist under slavery, colonisation or apartheid.

Insofar as they were entrenched among its objectives,⁸⁴³ and African States ultimately obtained their independence, it cannot be denied that the OAU thereby contributed to constitutionalism and democracy in Africa.

A second contribution was made *via* the development of a regional human rights system.

The OAU later on adopted a number of human rights treaties, the most important among them being the African Charter on Human and Peoples' Rights to be supplemented by the Protocol Establishing the African Court on Human and Peoples' Rights.

Although its enforcement mechanisms remained poor, the Charter had the merit of sending a message to all African peoples and governments that human and peoples' rights were instrumental in achieving real independence and development on the continent.

So will the Protocol which, however, is not to bring about a human rights paradise on the continent and whose institutional shortcomings as enforcement mechanism were addressed earlier.

⁸⁴² On self-determination, its evolution and relationship with democracy, see Ronen, D., "The State and Democracy..." 192-194. Ronen held that that for Woodrow Wilson after World War I, democracy was self-determination. After the Second World War, self-determination and democracy were separated. Self-determination has come to mean independent statehood, democracy, representative institutions, elected officials, political parties and elections. He also submitted that "self-determination as sovereign independence in Africa and elsewhere has not only meant democracy, but it has become the counterforce to democracy" (Ronen, D., "The State and Democracy..." 195). "Democracy, he then concluded, means self-rule and self-determination" (Ronen D., *op.cit.* 202). For us, it is a prerequisite and the cornerstone for constitutionalism and democracy.

⁸⁴³ Article III of the OAU Charter.

Apart from this small contribution, the OAU did very little to promote constitutionalism and democracy.

It generally acted as “a club or a holy alliance of African Heads of State and Government”. Most of them came to power in undemocratic manner (generally through *coup d'état*).

They were determined to keep it at all costs, and could not be interested in building constitutionalism and democracy, which implied limitations on the exercise of a power they wanted unhindered.

2.5.1.2.2.2. The African Union

The Constitutive Act of the AU goes one step further in the promotion of constitutionalism and democracy in Africa.

African Heads of State and Government committed themselves, even if this commitment is generally more verbal than real, “to promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law.”⁸⁴⁴

This is the very first time that these components of constitutionalism and democracy, namely human rights, rule of law, good governance and democratic institutions appeared *in tandem* in an African treaty.

AU objectives are *inter alia* to:

- “(b) defend the sovereignty, territorial integrity and independence of its Member States; ...
- (g) promote democratic principles and institutions, popular participation and good governance;
- (h) promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”⁸⁴⁵

⁸⁴⁴ Preamble to the Constitutive Act of the African Union, Para 10.

⁸⁴⁵ Article 3 of the Constitutive Act of the AU, *supra*.

The African Union will function in accordance with 16 principles that are particularly important for the promotion and consolidation of constitutionalism and democracy in Africa.⁸⁴⁶

These principles constitute an unprecedented move and a fantastic revolution when considering the principles once entrenched in the OAU Charter and the practice of the African Organisation.

Besides, some institutions or organs of the new African organisation are specifically designed to promote constitutionalism and democracy. That is especially the case of the Pan-African Parliament that will be established "in order to ensure the full participation of African peoples in the development and economic integration of the continent."⁸⁴⁷

Another institution to play a key role is the Court of Justice.⁸⁴⁸

⁸⁴⁶ In terms of Article 4 of its Constitutive Act,

"The Union shall function in accordance with the following principles:

- a) Sovereign equality and interdependence among Member States of the Union;
- b) Respect of borders existing on achievement of independence;
- c) Participation of the African peoples in the activities of the Union;
- d) Establishment of a common defence policy for the African continent;
- e) Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- f) Prohibition of the use of force or threat to use force among Member States of the Union;
- g) Non-interference by any Member State in the internal affairs of another;
- h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;
- i) Peaceful co-existence of Member States and their right to live in peace and security;
- j) The right of Member States to request intervention from the Union in order to restore peace and security;
- k) Promotion of self-reliance within the framework of the Union;
- l) Promotion of gender equality;
- m) Respect for democratic principles, human rights, the rule of law and good governance;
- n) Promotion of social justice to ensure balanced economic development;
- o) Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- p) Condemnation and rejection of unconstitutional changes of governments."

⁸⁴⁷ Article 17. 2 of the Constitutive Act.

⁸⁴⁸ Article 18 of the Act.

The Pan-African Parliament and the Court of Justice are particularly important, as they are intended to redress some major shortcomings of the OAU Charter that did not establish institutions to allow for the participation of African peoples and ensure that the Charter was fully complied with by all Member States.

However, the exact role to be played by the people through the Pan-African Parliament or the African judges through the Court of Justice will largely depend on the protocols provided by the AU Constitutive Act and still to be adopted.⁸⁴⁹

The African Union is still in the coming and the future will tell whether the principles entrenched therein are respected and whether the African leaders did not adopt them just for the sake of convenience or because, after all, Africa also needed a Union modeled on the European Union.

Accordingly, it is premature to predict how its lofty principles will be enforced or adhered to and what is going to be the real impact of the AU on the promotion and consolidation of constitutionalism and democracy on the continent.

Much will depend on the political will of African Heads of State and Government to abide by the principles they adopted themselves and the appropriation of the AU by African peoples as well as their active participation in its activities, whether directly or indirectly through their non-governmental organisations.

However, at least on paper, in the light of the objectives and principles provided by Articles 3 and 4 of the Constitutive Act of the AU, it may be argued that constitutionalism and democracy once neglected have now achieved the status of a right of African peoples. We should therefore expect a new era of African renaissance in this regard, which was unthinkable under the OAU.⁸⁵⁰

⁸⁴⁹ See Article 17.2 & 18.2 of the Constitutive Act of the AU.

⁸⁵⁰ However, the Constitutive Act of the African Union is not fully equipped to promote and consolidate constitutionalism and democracy on the continent. First, the membership is almost automatic; any African

All in all, this move towards the establishment of an African *Etat de Droit* through the African Union should be welcomed since, as Conac insisted, “an international and regional *Etat de droit* would sustain and boost democracy or rule of law in individual states.”⁸⁵¹

2.5.2. Constitutionalism, Democracy and Economic Globalisation

Admittedly, there are dilemmas that globalisation poses on Africa.⁸⁵²

According to Mkandawire,

“Globalisation contains within it two contradictory effects on democratization. On the one hand, the “opening up” of economies and societies, the political conditionalities transmitted through global institutions, and the solidarity from movements encapsulated in the notion of “global civil society” are generally supportive of democratization efforts in many countries. On the other hand, the demands of globalization, especially the erosion of national sovereignty and the uniformization of what are considered “fundamentals” in economic policy, limit the range of policy options for democratic regimes.”⁸⁵³

A review of the literature on the impact of economic globalisation on constitutionalism and democracy in Africa may help to divide scholars into two groups, namely the “anti” and “pro” globalisation.⁸⁵⁴

State may become member without being subject to stringent conditions of respect for constitutionalism, democracy and human rights (Article 29). Secondly, the system of sanctions leaves much to be desired. Sanctions will be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union (Article 23). Suspension is the only sanction for Governments which come to power through unconstitutional means (Article 30). “Intervention of the Union in a Member State pursuant to a decision of the Assembly in respect of graves circumstances, namely war crimes, genocide and crimes against humanity” also appears to be an additional sanction (Article 4 (h)) as it conflicts with the sacrosanct principle of “non-interference by any Member State in the international affairs of another” (Article 4 (g)). Thirdly, there is a problem concerning the enforcement of the rare sanctions provided in the Act, especially suspension and intervention by the Union in a Member State. Many African Heads of State and Government came and cling to power through the same unconstitutional and undemocratic means, keep on abusing rights of their citizens and peoples, and manifest mutual support and solidarity. In these conditions, the implementation of the sanctions will constitute an important test of the willingness of the African Heads of State and Government and their commitment to building an African Union based on respect for constitutionalism, democracy, human rights and rule of law.

⁸⁵¹ Conac, G., “Etat de droit...” 483.

⁸⁵² See Hyslop, J., *African Democracy in the Era of Globalisation*, supra; Kidana, M.; “Dilemmas Globalisation Poses on Africa”, supra.

⁸⁵³ Mkandawire, T., “Crisis Management...” 119.

⁸⁵⁴ Idem 119-120.

“Anti-globalisation” scholars consider globalisation as negatively impacting on democratisation, leading to the making of or rendering democracies “choiceless”.⁸⁵⁵

On the other hand, “pro-globalisation” pundits hold that democracy and economic liberalisation are simply two sides of the same coin.

Accordingly, the edification of a liberal order is a natural convergence of processes that mark the triumph of a liberal capitalist order and the “end of the history”.⁸⁵⁶

“Anti-globalisation” scholars contend that globalisation is “anti-democratic”; it is “anti-development” and increases the gap between the developed and underdeveloped countries.

However, “pro-globalisation” intellectuals hold the contrary and consider it a golden opportunity, not to be missed, for democracy and development in Africa. Jeffrey Sachs,⁸⁵⁷ for instance, argued that “global capitalism is surely the most promising institutional arrangement for worldwide prosperity that history has ever seen”.

2.5.2.1. Globalisation as Anti-Democratic

The argument that engagement with the world economy will have nefarious consequences for Africa and its citizens has been a recurrent theme of much scholarly literature about the continent since the appearance of the seminal work of scholars like Walter Rodney, Wallerstein Immanuel and Amin Samir.⁸⁵⁸

⁸⁵⁵ Mkandawire, T., “Crisis Management...” 119-120; 122-130, 133. Mkandawire is right to identify a fundamental contradiction between dictation and choice in African transitions (Joseph, R., “State, Conflict and Democracy...” 6-7); but his “choiceless democracies” is also a contradiction in terms since there is no democracy without choice granted or recognised to the people. A regime where there is no choice is not democratic at all, but an authoritarian one.

⁸⁵⁶ Mkandawire, T., *supra* 119-120.

⁸⁵⁷ Sachs, J., “The Limits of Convergence: Nature, Nurture, and Growth”, *Economist*, June 14, 1997, 22. See also Joseph, R., “The Reconfiguration of Power in Late Twentieth-Century Africa” 67.

⁸⁵⁸ Quoted by Van de Walle, N., “Globalization and African Democracy” 97.

The overwhelming majority of African scholars, especially Marxist and socialist, are pessimistic or negative about economic globalisation that is said to play a negative role in hindering political reform and democratisation in Africa.

Nzongola argued:

“It is obvious that the objective conditions of the current globalization process do not favour democracy...The dogmatic assertion of the virtues of the market in the face of growing inequalities and social exclusion, even in the very centers of developed capitalism, is a sign of an anti-democratic tendency to discourage an open debate on alternative economic models...In reality, the need to subjugate Africa to the logic of global capitalist expansion is contrary to the requirements for democracy. It favours instead rule by technocratic elite that can only be anti-labor, anti-people, and therefore anti-democratic.”⁸⁵⁹

According to Mkandawire,

“The nature of Africa’s integration into the world economy is such as to take away any discretionary decision-making from African governments;⁸⁶⁰ the democracy that Africans have fought for turns out to be “choiceless” – all of its policy choices having been ordained by international market forces and their privileged agents in Africa, the IMF, and the World Bank.”⁸⁶¹

Mkandawire considered the linkage of democratisation with economic liberalisation to be generally harmful in its consequences.⁸⁶²

In Nzongola’s view, the technocratic elite who should rule according to the internal logic of globalisation can be expected to be beholden to their foreign patrons and to implement externally mandated policies likely to benefit their patrons to the detriment of their people.⁸⁶³

Claude Ake argued that the current evolution of global economic forces undermines the sovereignty of African governments over economic matters so as to make democracy essentially irrelevant.⁸⁶⁴

⁸⁵⁹ Nzongola-Ntalaja, G., “The State and Democracy...” 17.

⁸⁶⁰ If globalization is to take away any discretionary decision-making from authoritarian African governments, as Mkandawire suggests, then it should be considered a good thing.

⁸⁶¹ Van de Walle, N., “Globalization...” 97.

⁸⁶² Mkandawire, T., as quoted by Joseph, R., “State, Conflict and Democracy...” 6.

⁸⁶³ Nzongola-Ntalaja, G., “The State and Democracy...” 18.

⁸⁶⁴ Ake, Cl., quoted by Van de Walle, N., “Globalisation...” 96. However, Ake was a moderate critic of globalisation. Instead of “delinking” from the international market, as suggested by Amin, he

Cheru suggested that globalisation would necessarily result in “more hardship and further marginalization for the majority of poor African peasants and the Third World as a whole.”⁸⁶⁵

As for Amin, he also held that the absence of democracy from the periphery of the world capitalist system is a constancy that is neither an accident nor a residue of earlier eras, but the inevitable consequence of the expansion of actually existing capitalism.⁸⁶⁶

Amin stressed that this is neither an accident nor a hold-over from their “traditional culture”, but democracy is incompatible with the demands of capitalist expansion.⁸⁶⁷

According to him, the solution for democracy as well as development in Africa lies with the “delinking” of the continent from the global market.⁸⁶⁸

2.5.2.2. Globalisation as Democratic

Pro-globalisation scholars⁸⁶⁹ are mainly the liberal thinkers who also supported the SAPs and hold that capitalism and liberalism, far from being anti-democratic, are probably the best tools to democracy.

recommended “selective links with the economies of the Organization for Economic Cooperation and Development.”

⁸⁶⁵ Cheru, F., “New Social Movements: Democratic Struggles and Human Rights in Africa”, In Mittelman, J.H., (ed.), *Globalization: Critical Reflections*, Boulder, Co: Lynne Rienner Publishers, 1996, 145. See also Van de Walle, N., “Globalization...” 96; Joseph, R., “State, Conflict...” 7; Mkandawire, T., “Crisis Management...” 133.

⁸⁶⁶ Amin, S., “The Issue of Democracy...” 62, 67.

⁸⁶⁷ This conclusion is too sanguine and contradictory. First, we are not given enough reasons why democracy was compatible with the demands of capitalist expansion there (in capitalist countries of the West) and not “here”. Secondly, radical anti-capitalist / liberalism/ globalisation scholars such as Amin are contradicting themselves by stating that “democracy is incompatible with capitalism or liberalism”, yet it developed in capitalist countries of the West.

⁸⁶⁸ Amin, S., *Delinking ...* supra.

⁸⁶⁹ See Joseph, R., “The Reconfiguration of Power...” 64; Bates, R.H., quoted by Joseph, R., “State, Conflict and Democracy in Africa” 6-7; Sachs, J., quoted by Joseph, R., “The Reconfiguration ...” 67; Sandbrook, R., “Liberal Democracy...” 151; Diamond, Linz and Lipset, quoted by Sandbrook, R., supra 151; Van de Walle, N., “Globalization...” 115.

Unlike Amin and other anti-globalisation scholars,⁸⁷⁰ Van de Walle contends that African countries are minimally involved in contemporary global transformations and “the recent past has witnessed a delinkage of African economies from global production processes”.⁸⁷¹

The key issue for him is Africa’s marginalisation from these dynamics, its absence rather than its dependence. Instead of decrying the subordination of Africa to the demands of globalisation, the more urgent question for Van de Walle is the identification of ways for Africa’s insertion into the world economy to enable it to benefit from major capital flows and international trade.⁸⁷² He then went on championing the linkage, alleging that

“international market forces represent less of a threat to democracy than does the present situation of progressive delinkage from the world economy, which has been driven by two decades of “non reform,” economic crisis., and state decay... Engaging the world economy would be healthier than economic stagnation riddled with neopatrimonial politics, but more or less sustained by international aid.”⁸⁷³

Does globalisation take away choices from Africa’s going democracies, as Mkandawire⁸⁷⁴ pointed out?

Van de Walle only partly agreed:

“There can be little doubt that international economic integration lessens the autonomy of all African states. But the progressive delinkage from the world economy that we are witnessing in too many of the region’s countries is far more dangerous for the future of African democracy.”⁸⁷⁵

The conclusion reached by Van de Walle and without any doubt by other pro-globalisation and liberal scholars, is that “greater integration into the world economy holds opportunities as well as dangers, for African democracies.”⁸⁷⁶ Therefore, globalisation is a “good thing”.

⁸⁷⁰ See Amin, S., *Delinking...* supra; idem, “The Issue of Democracy...” supra; Mkandawire, T., “Crisis Management...” 119-133; Nzongola-Ntalaja, G., “The State and Democracy...” 17.

⁸⁷¹ Van de Walle, N., “Globalization...” 112. Also quoted by Joseph, R., “State, Conflict ...” 7.

⁸⁷² Van de Walle, N., idem 115.

⁸⁷³ Idem, 114.

⁸⁷⁴ Mkandawire, T., “Crisis Management...” 119-130.

⁸⁷⁵ Van de Walle, N., supra 98, 114-115.

⁸⁷⁶ Idem 98.

As far as the issue of sovereignty is concerned, Van de Walle considers that “There is no reason to believe that African democracies will not retain some latitude in their policy choices.”⁸⁷⁷

2.5.3. Assessing the Debate Globalisation *versus* Constitutionalism and Democracy

As the abovementioned developments may demonstrate, much has been written and said on the “impact of globalisation”, especially economic globalisation, but very little on globalisation of law and politics on “African democracies”.

The impact of globalisation on African states cannot be denied. However, it seems exaggerated to complain about the “impact of globalisation on African democracies”⁸⁷⁸ or its erosion of the “sovereignty” of African States.

It would be misleading to pretend that “democracies” and “sovereign” States existed throughout Africa prior to globalization; that the latter should be blamed for the collapse of the former, and African States may therefore afford to reject it.

Arguably, absolute sovereignty remains a legal and political fiction and it is hard to hold that politically and economically African states have ever been sovereign since independence.

Moreover, economic globalisation, like technological globalisation through internet, is something seemingly imposed by obscure forces we cannot control, and Africa, even less than any other region of the world does not have the capacity to oppose economic globalisation. Whether one likes it or not, the issue is no longer whether Africa may refuse or avoid globalisation or what impact it may have on the African state and on democracy in Africa.

⁸⁷⁷ Van de Walle, N., *op.cit.* 112.

⁸⁷⁸ See Van de Walle, N., “Globalization...” 95-118; Hyslop, P., *supra*; Kidana, M., *supra*.

The real question that should attract more attention from African scholars and peoples is what to do and how to live with it and benefit from the “global monster”, as anti-globalisation scholars would say, which is here to stay with us.

Mkandawire suggested that we must continue to explore alternatives that can lead to “democracies without tears”, which is also a myth, and that can allow the new democracies meaningful choices.⁸⁷⁹

The search for new alternatives cannot be undertaken bearing in mind that economic globalisation may be jettisoned altogether and Africa kept away or outside the “global village”. Africa cannot stand outside the main road of globalisation. If we cannot avoid economic globalisation, we must negotiate our presence in the “global village” to ensure that it does not bring us more tears or hardship and further marginalisation as some scholars rightly feared.⁸⁸⁰ Therefore, Africa should prepare and equip itself to embark on that “negotiation” to ensure that its peoples derive the maximum “joy” from it.

The main issue for research should therefore be how Africa and African States may organise themselves to face the challenges of globalisation, avoid or rebuke its pernicious consequences and get the maximum of it. That brings us back to the main hypothesis of this study that is the rebuilding of Africa and African States on the foundations of constitutionalism and democracy in order to develop the continent and achieve African Renaissance.

⁸⁷⁹Mkandawire, T., “Crisis Management...”133. Mkandawire continues with the contradiction of “Choiceless democracies” since real democracies entail meaningful choices for the people and their government. A regime without choice is not a democracy at all, but an authoritarian one.

⁸⁸⁰ See Van de Walle, N., “Globalization...”96, 98, 115 (Cheru quoted); Joseph, R., “State, Conflict...” 7; Mkandawire, T., “Crisis Management...”133.

It is submitted that only true constitutional and democratic African States and a democratic Africa will resist the negative impact of globalisation, take the best of it, and conserve some sovereignty.⁸⁸¹

Instead of decrying or praising globalisation, the key issue remains the question of rebuilding the state,⁸⁸² establishing and consolidating constitutionalism and democracy on the continent while reconstructing Africa itself. Only a constitutional, democratic, and developing Africa will be in a strong position to negotiate change, make its voice heard, and substantially benefit rather than suffer from both the economic globalisation and the globalisation of law and politics.

2.6. Conclusion

Constitutionalism and democracy feature among the concepts that are the most discussed in social sciences, particularly in law and political science. Controversies abound. Conceptions are generally competing and contradictory.

The net result has been great imprecision and sort of “conceptual disorder”, as constitutionalism and democracy tend to mean whatever scholars and mostly politicians want them to mean. There is, however, some common conceptual ground, which this study modestly purports to build on in order to advance the development of knowledge. Modern constitutionalism is a “package deal” that consists of principles and values.

⁸⁸¹This view is also supported by scholars like Brautigam and Nzongola-Ntalaja. According to Brautigam (D., “The ‘Mauritius Miracle’...” 158), “democratic governments may in fact act more quickly than non-democratic governments to adjust adverse external conditions.” Nzongola-Ntalaja (G., “The State and Democracy... 17-18) supports a “people-driven democratization” in face of the dire effects or consequences of globalisation and a government by leaders with a political base in the country who have a constituency and to whom they are accountable.

⁸⁸² On the existence of an effective and legitimate state to mediate the relationship between domestic and external economic forces, see Joseph, R., “State, Conflict...” 7, 12; Olukoshi, A., “State, Conflict...” 460-462; Przeworski, A., (ed.), *Sustainable Democracy* 11-12; Lipset, S.M., “The Social Requisites of Democracy Revisited” 1-22; Ronen, D., “The State and Democracy...” 199, 201; Sorensen, G., “Democracy ...” 43; Sandbrook, R., “Liberal Democracy...” 141-143; Hyden, G., “Governance and the Reconstruction ...” 184-194.

The separation of powers and federal principles are considered part and parcel of constitutionalism, which is also to protect and promote human rights enshrined in the Constitution or other pieces of legislation. The Constitution or any of the principles embedded therein does not suffice alone to make a constitutional state.

An independent judiciary is essential to constitutionalism and democracy, but it is not the only one institution.

Judicial review is legitimate and, as demonstrated by recent developments in American constitutional law where it attracted the highest attention in the aftermath of *Marbury v Madison*, the “counter-majoritarian” debate has lost much of its interest.

In European law, which influenced so much the constitutional law of many African countries due to colonisation, the French concept of *Etat de droit* and the German *Rechtsstaat* are very close to the Anglo-American concept of constitutionalism. However, they are more substantial than the rule of law to which they also relate.

A constitutional state is an *Etat de droit*, which is a state based on the force of the law and subject to it, and where people are entitled to a wide range of human rights. So understood, it must also favour democracy, which stresses popular participation, sovereignty, legitimacy and accountability.

Accordingly, though they are historically and conceptually different, constitutionalism and democracy are substantively and purposively defined in this study as complementary and mutually enriching phenomena. Perhaps more than anywhere else because of the particular situation of African States, the struggle for constitutionalism and democracy, their content and evolution on the continent have been influenced by developments occurring in our ever changing world since independence.

CHAPTER 3 CONSTITUTIONALISM AND DEMOCRACY IN POST-COLONIAL AFRICA

3.1. Introduction

Constitutionalism and democracy have been the subject of a perennial debate for centuries.

The debate mostly revolved around the content of the concepts, their domestication and applicability in particular regions of the world.

As far as Africa is concerned, voices on constitutionalism and democracy are sometimes equivocal and contradictory.

Amin lamented over our era of “great confusion”.⁸⁸³ According to Nzongola, there is a “sense of incredible disorder”,⁸⁸⁴ which was besides aptly captured in Nyang’oro’s *Discourses on Democracy in Africa*⁸⁸⁵ and Shivji’s *State and Constitutionalism in Africa*.⁸⁸⁶

This chapter is to continue the literature review. Without pretending to “bring some order to the debate”,⁸⁸⁷ its aim is to revisit the various discourses we have heard on constitutionalism and democracy in Africa.

It is also to emphasise the role played by constitutionalism and democracy in the struggle against the colonial authoritarian rule and their major trends in Africa since independence.

⁸⁸³ Amin, S., “The Issue of Democracy...” in Nyang’oro, J.E., (ed.), op.cit.62.

⁸⁸⁴ Nzongola-Ntalaja, G. & Lee, M.C., “Preface and Acknowledgments” VII.

⁸⁸⁵ Nyang’oro, J.E., (ed.), supra.

⁸⁸⁶ Shivji, I.G., (ed.), supra.

⁸⁸⁷ Nzongola-Ntalaja, G. & Lee, M.C., supra.

3.2. Discourses and Debates on Constitutionalism and Democracy in Africa: Western and African Voices on Some Old and Recurrent Questions

Discourses and debates on constitutionalism and democracy in Africa revolved around a number of questions that have been very much discussed in Africa since the late 1980s.

Can one speak of “democracy in Africa and democracy for Africa,” as Wamba-dia-Wamba wrote⁸⁸⁸?

Can constitutionalism and democracy also be considered “African” or are they foreign to Africa?

Why should it matter to struggle and die for constitutionalism and democracy?

On the other hand, if African peoples have been fighting for constitutionalism and democracy, as emphasised in this study, to borrow from Nana-Sinkam,⁸⁸⁹ are constitutionalism, democracy and development “feasible”? Put otherwise, can they be successful in Africa?

What has been the major objective of the struggle for constitutionalism and democracy in Africa?

Is it substantially different from that of the struggles that took place or have been going on in other parts of the world?

There were questions about the “paternity” and “model” of constitutionalism and democracy, their “autochthony”, their “feasibility” and the underlying reason, “idealism” or “realism”, of the struggles that unfolded against the authoritarian rule in Africa. Each of them gave rise to contradictory debates that are briefly reviewed.

⁸⁸⁸ Wamba-dia-Wamba, “Democracy in Africa and Democracy for Africa”, *CODESRIA Bulletin*, No. 20, 1994, 3.

⁸⁸⁹ Nana-Sinkam, S.C., “Démocratie et Développement en Afrique: Peut-on les réussir?” *Afrique 2000*, No.14, 1993, 71-82.

3.2.1. The Question of “Paternity” and “Model” of Constitutionalism and Democracy: Liberals and Eurocentrists *versus* Marxists, Socialists, Africanists, and Afrocentrists

Are Constitutionalism and Democracy Western Inventions, Western Imports in Africa and is the West the Model thereof? Were constitutionalism and democracy experienced in pre-colonial Africa or are they foreign to African societies?

Regarding human rights and constitutionalism, Mamdani asked,

“Is human rights a Western tradition? Is the very conception of human rights and the accompanying notion of constitutionalism, a legal process that sets definite limits on the exercise of political power, specifically a Western notion?”⁸⁹⁰

Depending on their response to the question of “paternity” and “model” of constitutionalism and democracy, scholars may be divided into two main groups, namely the “Liberals and Eurocentrists” on the one hand, and the “Marxists, Socialists, Africanists and Afrocentrists” on the other.⁸⁹¹

⁸⁹⁰ Mamdani, M., “Social Movements and Constitutionalism...” 237.

⁸⁹¹ As stressed earlier, the use of labels and epithets may be problematic in social sciences. Not all scholars labelled as liberals, Eurocentrists, and Marxists, socialists or Afrocentrists would necessarily and spontaneously agree. The classification, which is mine, is nevertheless based on ideas expounded by these scholars or on the way colleagues see them. The author concedes that this is debatable. This classification is, however, used here to make sense of the debate and the parties involved as supporters and opponents of one thesis or another. Furthermore, some scholars are more radical than others are and their classification in the same group should not imply that they share exactly the same views. Finally, it is worth emphasising that all liberal scholars are not Eurocentrists or Europeans. Nor are all Marxists and socialists Afrocentrists and Africans or *vice versa*. Africa meant or means very little to some Marxist, socialist and even African scholars. Marxists and Leninists who launched the anti-liberal or anti-capitalist revolution and rebelled against the exploitation of man by man in Europe, for instance, ironically found themselves among the supporters of colonialism in Africa and participated in the exploitation of the continent in the same way as their capitalist foes. There are also African scholars who have been so “alienated”, so anchored to the West and its values that they have turned out to be Afropessimists and even anti-Africa.

3.2.1.1. Liberals and Eurocentrists

The conventional academic wisdom in the liberal tradition is that constitutionalism and democracy, confined to competitive democracy, have no future; they are unsuitable for and unattainable in Africa, especially in Black Africa.⁸⁹²

In *State in Africa*, the French scholar Jean-François Bayart recalled that political scientists for long considered that prior to colonisation African states were subjected to the arbitrariness of kings in a regime that was better characterised as “despotism”.⁸⁹³

Some scholars view constitutionalism and democracy as Western inventions and consequently alien phenomena that are being imported into an African society whose culture places more emphasis on the community than on the individual and is therefore incapable of internalising liberal democratic values.

They argue that the West is the model of constitutionalism and democracy, considered foreign to African traditions or cultures.

The West through ancient Greece, especially Athens, is presented as the “inventor” of constitutionalism and democracy. True constitutionalism and democracy are said to be Western and liberal ones.

As far as African traditions and pre-colonial Africa are concerned, it is alleged that they totally ignored constitutionalism and democracy, whose rudiments only reached Africa through colonisation. Constitutionalism and democracy, it is further said, are “at variance with African traditions” or “out of tune with the needs of African countries at this stage in their history.”⁸⁹⁴

⁸⁹² Wiseman, J.A., *Democracy in Black Africa*... IX, XI.

⁸⁹³ Bayart, J.F. quoted by Perrot, C.H., *op.cit.* 149.

⁸⁹⁴ Hinden, R., *op.cit.* 2-3.

Champions of these views are not only European and American, but also some African scholars who sold their souls to the West and ended up being even more critical of African traditions than their Western masters.⁸⁹⁵

According to Simiyu,

“In Black Africa, whether the political system was that of the highly centralized states or of the amorphous non-centralized communities, it did not belong to a democratic tradition. There were rudiments of democratic principles and practices, especially in the non-centralized communities, but it would be dangerous to equate those practices with advanced forms of democracy.”⁸⁹⁶

In similar vein, Francis Akindès considered the ancient Dahomey as typical of the authoritarianism of pre-colonial Africa and saw a continuity between this and political practice in post-colonial Africa.⁸⁹⁷

Huntington, another liberal thinker, denounced “the unreceptivity to democracy of several major cultural traditions,”⁸⁹⁸ including the African.

Kedourie also argued that “African and Asian societies are victimized by their own despotic traditions.”⁸⁹⁹

Dealing more specifically with human rights, Howard and Donnelly are among those who argued forcefully, but unconvincingly, that the concept of human rights was a Western discovery.

⁸⁹⁵ See Akindès, F., *Les mirages de la démocratie en Afrique* 162-175; and criticism by Nzongola-Ntalaja, G., “The State and Democracy ...” 10.

⁸⁹⁶ Simiyu, “The Democratic Myth in African Traditional Societies”, quoted by Sandbrook, R., “Liberal Democracy in Africa” 149; also quoted by Memel-Fote, H., “L’Héritage africain et les Processus démocratiques contemporains”, *Paper for CODESRIA 7th General Assembly on Processus de Démocratisation en Afrique: Problèmes et Perspectives*, Dakar, 10-14 février 1992.

⁸⁹⁷ Akindès, F., *Les mirages de la transition démocratique...* 178-179; also quoted by Nzongola-Ntalaja, G., “The State and Democracy...” 10-11. This attack on Dahomey is particularly serious as ancient Dahomey is commonly cited as a model of democracy in pre-colonial Africa.

⁸⁹⁸ Huntington, S.P., quoted by Sklar, R.L., “Developmental Democracy” 2; also quoted by Ibrahim, J., “Transition démocratique en Afrique: le défi d’un nouveau programme” 124.

⁸⁹⁹ Kedourie, Elie, quoted by Sklar, R.L., *op.cit.* 2.

According to Howard and Donnelly, non-Western cultural and political traditions lacked not only the practice of human rights but also the very concept, and the recognition of human rights was not the way of traditional Africa with obvious consequences for political practices.⁹⁰⁰

It was also said that the Rule of Law was merely an Anglo-American institution; that the concept of "Government under Law" and phrases such as the "Supremacy of Law" were all purely Western inventions.⁹⁰¹

Constitutionalism and democracy in Africa were therefore held to be a myth and not to belong to Africa.⁹⁰²

This is the conclusion reached not only by a number of scholars, but also by some political leaders in the West.

While touring some French-speaking West African countries and close French allies on the continent, Mr. Jacques Chirac,⁹⁰³ at the time French Prime Minister, declared on 23 February 1990, after a visit to President Houphouët Boigny, who was confronted with unprecedented demands for multi-party democracy in Ivory Coast:

*"Pour les pays en développement, le multipartisme est une erreur politique (...) un luxe que ces pays qui doivent concentrer leurs efforts sur leur expansion, n'ont pas les moyens de s'offrir. Le multipartisme n'est pas lié à la démocratie et il y a des pays parfaitement démocratiques comme la Côte d'Ivoire qui sont des pays à parti unique et où la démocratie s'exerce au sein de ces partis uniques."*⁹⁰⁴

⁹⁰⁰ Howard, R.E. & Donnelly, J., "Human Dignity, Human Rights and Political Regimes", *American Political Science Review*, 80, No.3, 1996, 891-919. Also quoted by Busia, Nana K.A., Jr., "The Status of Human Rights in Pre-colonial Africa: Implications for Contemporary Practices" 49.

⁹⁰¹ Sir Adekunbo A. Ademola, former Nigeria's Chief of Justice, quoted by Hinden, R., op.cit.4.

⁹⁰² Legum, C., "Democracy in Africa..." 177-179.

⁹⁰³ Jacques Chirac, quoted by Bourgi, A., "Jacques Chirac et le sens de l'histoire" 18; Bourgi, A. & Casteran, C., *Le printemps de l'Afrique*, Paris: Hachette, 1991, 120-124; Dumont, R., *Démocratie pour l'Afrique*, Paris: Le Seuil, 1991, 13; Banock, M., *Le Processus de Démocratisation en Afrique* 108. Mr. Chirac was elected President in May 1995. He was reelected in May 2002.

⁹⁰⁴ "For developing countries, multipartyism is a political error (...), a luxury that these countries cannot afford as they must concentrate on their expansion. Multipartyism is not related to democracy and there are single-party countries such as Ivory Coast that have achieved fully-fledged democracy and where democracy functions within these single parties." (Translation mine)

This statement rejoined the view earlier expressed by many authoritarian African leaders and their ideological pundits such as Nve Mbengono of Equatorial Guinea who held:

“Our thesis is that today in Black Africa, political pluralism is not viable. Reasons for this are not only political, but also sociological given that our social structure, which is still based on tribes, ethnic groups and clans, cannot sustain political pluralism.”⁹⁰⁵

In an interview with *Wall Street Journal* on 14 October 1985, President Mobutu held:⁹⁰⁶

“*La démocratie n'est pas pour l'Afrique; le chef africain ne partage pas son pouvoir. Ce qu'il nous faut au Zaïre, c'est l'unité.*”⁹⁰⁷

Speaking of the chief in Africa, President Léopold Sédar Senghor (Senegal) also contended earlier: “there is no place for two male crocodiles in the same pond.”⁹⁰⁸

On the other hand, the Tanzanian President Julius Kambarage Nyerere, a foremost protagonist of the one-party democracy idea in Africa, declared in 1961:

“It could hardly be expected that a united country should halt in midstream and voluntarily divide itself into opposition groups just for the sake of conforming to what I have called ‘Anglo-Saxon form of democracy’ at the moment of independence.”⁹⁰⁹

In January 1993, he persisted in thinking that the majority of Africans remained favourable to the one-party rule, and all over Africa, “it is an active minority that manages to impose multipartyism.”⁹¹⁰ Only later on, did he recognise that monopartyism was an error.

⁹⁰⁵ See Nve Mbengono, E.-E., quoted by Liniger-Goumaz, M., *La démocrature, dictature camouflée, démocratie truquée*, Paris: L'Harmattan, 1992, 194.

⁹⁰⁶ Quoted by Liniger-Goumaz, M., *supra* 81.

⁹⁰⁷ Literally: “Democracy does not belong to Africa. An African chief does not share his power. What we need in Zaire is unity (meaning not democracy)”. However, as Liniger-Goumaz (*op.cit.*81) observed, the single party has no African paternity, Ayittey (quoted by Liniger-Goumaz, *idem*) holding it for a “collapsed Western system”.

⁹⁰⁸ Senghor, L.S.S., quoted by Liniger-Goumaz, M., *La démocrature, dictature camouflée...222*.

⁹⁰⁹ Nyerere, J., quoted by Hinden, R., *op.cit.*6.

⁹¹⁰ *Idem*, quoted by Gonidec, P.F., “Démocratie et développement en Afrique: perspectives internationales ou nationales”, *Afrique 2000*, No.14, 1993, 57.

Although multipartyism cannot be equated with democracy as we stressed earlier, it is quite regrettable that for more than three decades, some leaders persisted with and kept African peoples subject to their error.

Chirac's remarks, as Bourgi wrote, were obviously designed to provide support to African friends in political turmoil, and unfortunately reflected the views of many French leaders of all political hues on the question.⁹¹¹

In the Parisian journal *Les Echos* on 21 January 1983,⁹¹² the editorialist held:

*“Quoi qu'en pensent en effet les intellectuels français, l'Afrique n'est pas la France. Morcelée en ethnies que la colonisation a regroupées artificiellement au sein des Etats fragiles, elle est travaillée par des forces politiques obscures que seul un pouvoir fort, pour ne pas dire autoritaire, peut contenir. Vouloir exporter vers des Nations jeunes les principes qui nous gouvernent – équilibre des pouvoirs, indépendance de la justice, répartition équitable des richesses, respect strict des droits de l'homme –, c'est donc courir le risque délibéré de se brouiller avec les responsables africains. Tout simplement parce que l'exercice quotidien du pouvoir s'accommode mal, dans ces contrées inhospitalières où la civilisation n'as pas encore très profondément pénétré de la moindre faiblesse.”*⁹¹³

The above comments remind us of what Elliot Abrams held to be the first fallacy that should be avoided in thinking about democracy in Africa. That is “the ‘mirror image’ fallacy to think that Africa is essentially similar to the US, except perhaps that it is poorer and blacker” and “if democracy works for Americans, why shouldn't it work for Africans?” Abrams considered this view “grossly misleading”.⁹¹⁴

⁹¹¹ Bourgi, A., “Jacques Chirac...” 18. Also quoted by Banock, M., op.cit. 108.

⁹¹² Quoted by Liniger-Goumaz, M., op.cit. 25.

⁹¹³ “No matter how French intellectuals think about it, Africa is not France. Divided up into ethnic groups that colonisation gathered artificially into fragile states, it is traversed by obscure forces that only a strong, not to say authoritarian power, can contain. Willing to export towards young nations principles that govern us, namely balance of powers, independence of the judiciary, fair sharing of wealth, and strict respect for human rights, is therefore to run the risk of falling out with African leaders. Just simply because the daily exercise of power in these *inhospitable regions not yet deeply penetrated by Civilisation* (emphasis mine) can hardly suffer the least weakness.” (Translation mine)

⁹¹⁴ Abrams, E., “Pluralism and Democracy” 61.

Another American scholar writing in the *Annals of the Political Science Academy* earlier alleged that freedom was a custom “unknown to tropical peoples,” warning that “the White man has to be modest not to export a system of government that only suits himself.”⁹¹⁵

Accordingly, M. Chirac only echoed views that were familiar not only in France, but also in America and the West in general.

Many people who thought of themselves as good democrats in their own countries, and bitter opponents of the authoritarian regimes which dominated Eastern Europe, nevertheless felt that democracy was inappropriate or a “luxury” for Africans.

Strong supporters of African authoritarian leaders, these democrats at home and *pro domo* were hesitant about voicing any criticism of aberrations of these leaders; they whitewashed deeds which they would abhor in their own countries.⁹¹⁶

They proclaimed that what was good for them was not good for others and the latter were incapable of appreciating the values allegedly of the West, driving a wedge of racial arrogance between themselves and the people of Africa.⁹¹⁷

A very disturbing phenomenon is, according to Nzongola-Ntalaja,

“the tendency of Northern countries on both sides of the Atlantic to think that Africans do not deserve the same rights as peoples elsewhere, and that strong men are what is needed to keep a restless and volatile continent at peace. Thus, what is absolutely intolerable elsewhere can be justified as understandable, ‘by African standards’.”⁹¹⁸

Yet, as early as 1961, Obafemo Awolowo advised:

“Democrats cannot and must not censure any nation on the grounds of deviationism. But they must at least have the courage and honesty to insist that a flagrant departure from the ideal of democracy is not an acceptable variant of the most beneficent and ennobling form of government which mankind ... has evolved.”⁹¹⁹

⁹¹⁵ Young, J.J., quoted by Liniger-Goumaz, M., op.cit. 148.

⁹¹⁶ Hinden, R., op.cit.3.

⁹¹⁷ Idem, 14.

⁹¹⁸ Nzongola-Ntalaja, G., *From Zaire to the Democratic Republic of the Congo*, Nordiska: Africaninstitutet, 1998, 14.

⁹¹⁹ Obafemi Awolowo, quoted by Hinden, R., op.cit. 4.

Eurocentrist views denying democracy to Africa and African peoples were rejected and rightly so by many other Africanist or African scholars.

3.2.1.2. Marxists, Socialists, Africanists, and Afrocentrists

In the face of the above argument denying constitutionalism and democracy to Africa and African peoples, there is a more convincing argument to the contrary defended not only by the overwhelming majority of African, Marxist and socialist intellectuals, but also by an important number of “Africanist”⁹²⁰ scholars.

The West is neither the inventor nor the model of constitutionalism and democracy. Constitutionalism and democracy are not un-African. Nor were they unknown in pre-colonial Africa. They also belong to Africa.

Claude Ake and Nzongola-Ntalaja deplored the attitude of the North and the Western conventional approach to the study of Africa.

According to Ake,

“Through decades of involvement in Africa, the North’s attitude has been that democracy is not for Africa. That attitude was an important component of the ideology of colonization, which held that Africans were unfit to govern themselves, that they needed the civilization of colonial tutelage as their one hope of eventually achieving self-determination and development.”⁹²¹

Africa being observed and declared unfit for democracy is that Africa which was disturbed and stunted by slave trade, colonial and neo-colonial oppression or post-colonial misrule.⁹²²

⁹²⁰ The expression “Africanists”, as different from “Africans”, is generally used to refer to Western and foreign scholars, who are interested in Africa in their works.

⁹²¹ Ake, Cl., *Democracy and Development*... 130.

⁹²² Nzongola-Ntalaja, G., “The State and Democracy...” 10.

As Nzongola-Ntalaja emphasised,

“Such an approach not only glosses over the impact of the Atlantic slave trade on political institutions and practices in West and Central Africa, but also minimises the role of colonial despotism as a school for post-colonial rulers.”⁹²³

Other African and Africanist scholars, namely Hinden, Ilunga-Kabongo, Kaba, Magang, and Ronen, join Nzongola-Ntalaja in a further submission that constitutionalism and democracy should not be reduced to a particular set of institutions. They also and even mainly comprise substantive values and principles. The values, principles and aspirations of constitutionalism and democracy are universal and not peculiarly Western, but the institutions in which they are embodied may, and do, vary widely according to place and time.⁹²⁴

Constitutionalism and democracy are not an exclusive property of Western societies.⁹²⁵ Sir Adekunbo⁹²⁶ strongly rejected the view that the Rule of Law was a Western idea and dismissed the linkage generally made between it and the economic and social system that developed in the West.

As Kaba pointed out, “The ideal of democracy is neither foreign to African history nor superfluous in... Africa.”⁹²⁷

Hinden held that “There is nothing, in the basic essentials of democracy, which need be at variance with African cultures”.⁹²⁸

⁹²³ Nzongola-Ntalaja, “The State and Democracy...” 11-12.

⁹²⁴ See Hinden, R., *Africa & Democracy*... 6-8; Kaba, L., “Power and Democracy in African Tradition...” 101; Ilunga-Kabongo, “Democracy in Africa...” 35; Magang, D.N., “Democracy in African Tradition: The Case of Botswana”, in Ronen, D., (ed.), *op.cit.* 104-105; Ronen, R., “The State and Democracy...” 199-202; Nzongola-Ntalaja, G., “The State and Democracy...” 11-14.

⁹²⁵ Nzongola-Ntalaja, G., “The State and Democracy...” 10.

⁹²⁶ Sir Adekunbo A. Adejumo, quoted by Hinden, R., *op.cit.* 4.

⁹²⁷ Kaba, L., *op.cit.* 101.

⁹²⁸ Hinden, R., *op.cit.* 9, 14.

On the other hand, as Wiseman noted, "There is nothing inherently un-African about democracy and there is certainly nothing inherently undemocratic about Africa in general."⁹²⁹

According to Ilunga-Kabongo, "democracy is not intrinsically alien to African people" or "un-African" and "In many traditional systems in Africa, it was the political principle around which life evolved."⁹³⁰

Ayittey held that political regimes established by modern African leaders were foreign to indigenous Africa:

"In their autochthonous political systems, Africans were not governed by soldiers. African chiefs were chosen. They did not impose themselves on their people. Nor did they declare themselves 'president for life' and their villages 'single-party communities'."⁹³¹

Many other Africanist and African scholars stressed that traditional or pre-colonial African societies were conversant with democracy and did not ignore the mechanisms of control of power.⁹³²

Studies by Busia, Wilks, and Rattray, for instance, concentrated on democracy in pre-colonial Africa, particularly the political system of the Ashanti of Ghana.⁹³³

⁹²⁹ Wiseman, J.A., *Democracy in Black Africa*... 6.

⁹³⁰ Ilunga-Kabongo, op.cit. 35.

⁹³¹ Ayittey, G.B.N., quoted by Liniger-Goumaz, M., op.cit. 262. (Translation mine)

⁹³² For a comprehensive account of constitutionalism and democracy in pre-colonial Africa or traditional African societies, see Busia, Nana K.A., Jr., op.cit. 43-67; Busia, K.A., *Africa in Search of Democracy*, 22-32; Idem, *The Position of the Chief in Modern Political System of Ashanti*, Oxford: Oxford University Press, 1951; Rattray, R.S., *Ashanti Law and Constitution*, Oxford: Clarendon Press, 1969; Hinden, R., supra; Perrot, C.H., "Le contrôle du pouvoir royal dans les Etats Akan aux XVIIIe et XIXe siècles", in Conac, G., (ed.), op.cit. 149-153; Idem, *Les Anyi-Ndenge et le pouvoir politique aux XVIIIe et XIXe siècles*, Abidjan, CEDA & Paris: Publications de la Sorbonne, 1982; Magang, D.N., op.cit. 103-108; Ilunga-Kabongo, op.cit. 35-39; Loucou, J.N., "Le multipartisme en Côte d'Ivoire", *Afrika Zamani*, No.2, 1996, 109-126; Chafe, K.S., "The Problematic of African Democracy..." 127-143; Fyle, C.M., "Indigenous Political Culture and Democratisation in Upper Guinea" 99-108; Diabaté, H., *Le Sannevin, un royaume Akan de la Côte d'Ivoire (1701-1901): Sources Orales et Histoire*, Thèse d'Etat, Paris: University of Paris I, 1984; Wilks, I., *Asante in the Nineteenth Century, The Structure and Evolution of Political Order*, Cambridge: Cambridge University Press, 1975; Nzongola-Ntalaja, G., "The State and Democracy..." 13-14; Conac, G., "Etat de Droit et Démocratie" 507.

It is reported that once nominated, elected and inaugurated, the Ashanti king had to take an oath of office before the federal assembly. The oath included a pledge not to be autocratic and despotic. The king did not rule for life and remained in office only as long as he enjoyed the support of his people; he was always subject to deposition.

Busia held that if any of the king's subjects wished, he had the constitutional right to set in motion a process of his deposition if he could show that the king had breached an oath of office or any other constitutional obligation.⁹³⁴

In his study of pre-colonial West Africa, Loucou also insisted that various ethnic societies, namely the Abbey, Abidij, Abouré, Adjoukrou, Ahizi, Alladian, Akyé, Avikam, Ebrié, Ega, Ehotilé, Essouma, Krobou, and Mbatto, practised a "democracy of age classes".

The Akan, Mandé, and Baoulé societies were democratic monarchies with even slaves exercising senior administrative and political responsibilities, especially in the Mandé kingdom.⁹³⁵

In sub-Saharan African kingdoms, unwritten laws existed that limited the power of the monarch. This was illustrated by some examples from the Anyi kingdoms in Ivory Coast and in Ghana.

The king could be impeached and removed from office. A college of electors, political and military chiefs of villages, called *Asafohene*, chose him among several candidates or postulants.

It was not the candidate in the first genealogical position who was appointed, but individual qualities were taken into account.

⁹³³ See Busia, K.A., *Africa in Search...*, 22-26; Idem, *The Position of the Chief...* Chapter 3; Busia, Nana K.A., Jr., op.cit. 46-47, 54-56; Wilks, I., supra; Rattray, R.S., supra.

⁹³⁴ Busia, Nana K.A., Jr., op.cit. 54-56.

⁹³⁵ Loucou, J.N., op.cit. 111-126.

The Anyi king did not enjoy absolute power. Moreover, people could “vote with their feet” whenever their rights were not guaranteed by emigrating to another king’s authority.⁹³⁶

This way of voting was a particularly serious sanction since the power and legitimacy of a king largely depended on the number of his people. A kingdom losing its subjects was doomed to collapse.

Claude H el ene Perrot further revealed that a contested king accused of witchcraft could be judged, as the case was with Boa Koassi I, the king of the Ndenge, *circa* 1870.⁹³⁷

According to Nzongola-Ntalaja,

“In the pre-colonial Bantu kingdoms of Central, East, and Southern Africa, where the rulers were supposed to have command over everything, including natural elements like rain, wind, storms, lightning, etc., the test of accountability was so severe that they often paid with their life for failing it. Kings could be held responsible for prolonged droughts, calamitous storms, and the infertility of both soils and women.”⁹³⁸

In segmented societies, such as the Baluba in Zaire, the rulers had to be approved by a set of clans. The specific role of these clans was to formally hand power to the ruler chosen from within the ruling lineage, and to make sure that his rule was in accordance with both the tradition and the expectations of his people.⁹³⁹

The political system of the Fang societies in Central Africa (Gabon, and Guinea) is also interesting in this regard.

According to Liniger-Goumaz, the chiefs of Fang tribes were not dictators. There were checks and balances, such as the councils of the elders and popular assemblies of clans, which were discussion forums open to everybody, including women, and the system of palaver functioned.

⁹³⁶ Perrot, C.H., “Le contr ole du pouvoir royal...” 152.

⁹³⁷ Idem.

⁹³⁸ Nzongola-Ntalaja, G., “The State and Democracy...” 13-14.

⁹³⁹ Ilunga-Kabongo, “Democracy in Africa...” 35.

Pluralism was respected. The decision by elders was only taken after wide consultation and everybody interested having expressed their views on the question at hand.⁹⁴⁰

Chafe pointed out that "there was more democracy in the pre-colonial period than at any given period after independence" and rulers were more accountable to their people in the Sokoto Caliphate than in the present "modern" Nigeria."⁹⁴¹

Rhoads held that the Igbos (Nigeria) achieved the foundations of a democratic system.⁹⁴²

In Southern Africa, it has been demonstrated that the Tswana (Botswana) had a very strong democratic tradition revolving around the assembly known as "*lekgotla*" where matters of public interest were freely and democratically discussed.

These traditional assemblies resembling the Greek and Roman Agora have been preserved to this day. All inhabitants had access to *lekgotla*.

The chief did not work alone, but with his counsellors who were men of experience. He symbolised the body politic. He owned everything and, at the same time, owned nothing in the land. His powers came from the people. This is expressed in Setswana as, "*Kogyo ke kgosi ka batho*", meaning the chief is chief by the will of the people.⁹⁴³

"Mukalenge wa Bantu Bantu wa Mukalenge" conveys the same wisdom among the Luba in the DRC.⁹⁴⁴

According to Hinden,

"In tribal society, the chief was rarely an arbitrary despot. He had his council of elders who could depose him if he flouted them; there were customary laws and conventions, which had to be respected."⁹⁴⁵

⁹⁴⁰ Liniger-Goumaz, M., op.cit. 75-83.

⁹⁴¹ Chafe, K.S., op.cit. 139-140.

⁹⁴² Quoted by Odhiambo - Atieno, E.S., "Democracy and the Emergent Present in Africa: Interrogating the Historical Assumptions", *Afrika Zamani*, No.2, 1996, 35.

⁹⁴³ On democracy in African tradition of Botswana, see Magang, D.N., "Democracy in African Tradition..." 104-105.

⁹⁴⁴ Literally meaning "The Chief (does exist) for the People and the People for the Chief." Put otherwise, there is no chief without people or the chief must serve his people and *vice versa*.

⁹⁴⁵ Hinden, R., op.cit.9.

Hinden also found out two basic misunderstandings that had clouded argument that denies democracy to Africa:

“First, that African tradition demands harsh, tyrannical government; and, second, that democracy is not democracy unless it is clouded in the particular institutions that have evolved in the West. With these two misunderstandings out of the way democracy is seen surely to be as suitable for Africans as for any other people.”⁹⁴⁶

Nzongola-Ntalaja studied the most frequently mentioned principles of democratic governance: the idea that legitimate power emanates from people, the concept of the rule of law, the principle that rulers are chosen and accountable to the people, the right of citizens to participate in the management of public affairs, and the right of people to change a government that no longer serves their interests, or the right to revolution.

He then concluded that democracy as political practice or a form of rule was known in pre-colonial or traditional Africa.⁹⁴⁷ On the other hand, the best way of establishing or tracing the Western “paternity” of constitutionalism and democracy is to scrutinise political practice of the Athenians, Americans, and British.

Parkinson, Busia, Mamdani, Nzongola-Ntalaja, and Hountondji mounted a great deal of criticism against the so-called and self-proclaimed “founding fathers” or “inventors” of constitutionalism, democracy and human rights.

On the Greeks and Athenians, generally referred to as “fathers of the fathers” of democracy, Parkinson noted:

“In commenting upon the course of history, St. Augustine is shrewd to suggest (as did Sallust before him) that the Athenians exceeded other people more in their publicity than in their deeds. Most subsequent scholars have been more credulous, one result being a surprisingly widespread belief that the Athenians were the inventors of democracy... What we owe to the Athenians (and Westerners or Euro-Americans) is not the thing itself (democracy) or even its name but the earliest account of how a democracy came into being, flourished and collapsed. Of the Indian democracies, which were probably older, we have all too little precise information.”⁹⁴⁸

⁹⁴⁶ Hinden, R., op.cit. 9.

⁹⁴⁷ Nzongola-Ntalaja, G., “The State and Democracy...” 13-14.

⁹⁴⁸ Parkinson, C.N., quoted with approval by Nzongola-Ntalaja, G., “The State and Democracy...” 10.

The Greek society, with its slaves, not to mention the subordination of women, was not a liberal democracy, as conventionally understood.⁹⁴⁹

Busia pointed out that in spite of declarations on human rights made by regimes that have styled themselves liberal since the 18th and 19th centuries, the American Constitution, for example, while pronouncing the equality of human beings, still confirmed blacks as slaves.⁹⁵⁰

As far as human rights are concerned, we remain very much concerned about abuses of women's rights, particularly in the Muslim and African countries.

However, we should not be quick to forget the 1876 judgment where the US Supreme Court denied Myria Bradwell the right to be admitted to the bar of the State of Illinois on the ground that

“Man is or should be a woman's protector and defender.
The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of civil life.”⁹⁵¹

In the United Kingdom, membership of Parliament and the right to vote was a privilege of the rich until 1885 and it was not extended to women until the passage of the Representation of Peoples Act of 1918.

The above account cannot serve as a justification of human rights abuses since the situation changed. It is just evidence that no country has the monopoly of human rights respect or abuses. Nor can it claim to be a paradise for human rights.

Athens and Rome that “invented” democracy ended up with authoritarianism and dictatorship. Greece, “the mother of Western democracy”, was still a dictatorship in the 1970s.

⁹⁴⁹ See Zeleza, P.T., “Reflections on the Traditions of Authoritarianism and Democracy in African History”, *Afrika Zamani*, supra 227.

⁹⁵⁰ Busia, Nana K.A., Jr., op.cit.49.

⁹⁵¹ See *Bradwell v Illinois*, 83 US (16 Wall) 130 1876, 141-142; Busia, Nana K.A., op.cit. 50 (Footnote 25).

Unfortunately, it is too easy for Western scholars and leaders to forget this Janus-face⁹⁵² of their history in order to give lessons and present themselves as the “model” of constitutionalism, democracy and human rights. In his answer to the question whether human rights was a Western tradition or notion, Mamdani ruled out the Western “paternity” of the concept:

“It is difficult to accept, even in the case of Europe, that human right was a conception created by 17th century Enlightenment philosophy. True, one can quote Aristotle and his ideological justification of slavery as evidence that the idea of human rights was indeed foreign to the conscience of the ruling classes in ancient Greece...What was unique about Enlightenment philosophy, and about the writings of the French and American Revolutions, was not a conception of human rights, but a discussion of these in the context of a formally articulated philosophical system.”⁹⁵³

Hountondji⁹⁵⁴ expressed the same view as Parkinson earlier on the contribution of the West to the “invention” of human rights and democracy:

“It thus produced, not the thing, but discourse about the thing, not the idea of natural law or human dignity but the work of expression concerning the idea, the project of its formulation, explanation analysis of its pre-suppositions and consequences, in short the draft of a philosophy of human rights.”⁹⁵⁵

There is no compelling evidence that non-Western and African traditions ignored the concept of human rights.

As Busia insisted,

“it should be recognised that even though a particular concept may be articulated or developed in a specific cultural system, it does not imply that the phenomenon does not or did not exist in other cultures.”⁹⁵⁶

By way of analogy, Busia cited terms and concepts like “bastard”, “half-sibling,” and “homosexuality” that do not exist in the African cultural vocabulary and yet portray situations that are natural practices and phenomena which to a lesser or higher degree did and do exist universally.⁹⁵⁷

⁹⁵² See Duverger, M., *Janus, les deux faces de l'Occident*, Paris: Fayard, 1972.

⁹⁵³ Mamdani, M., “Social Movements...” 236-237.

⁹⁵⁴ Idem 237.

⁹⁵⁵ Hountondji, P., quoted by Mamdani, M., “Social Movements and Constitutionalism...” 237.

⁹⁵⁶ Busia, Nana K.A., Jr., *op.cit.* 46.

⁹⁵⁷ Idem.

Non-Westerners and Africans might or may not know the concept, but they knew the thing itself, that is constitutionalism, democracy and human rights. Therefore, it serves very little purpose to question their origin.

According to Busia, such “an inquiry into the origin of human rights is not only a false search but a precarious adventure which can only resurrect the cultural relativist’s argument which is now running out of stream.”⁹⁵⁸

Finally, scholars who indulge in easy and lazy conclusions of the sort “the concept is of Western invention”, “unknown in non-Western vocabulary” or “inexistent in any African culture of vocabulary,” are unable to say precisely to which particular Western society they refer.

On the other hand, one should be conversant with all non-Western or African traditions, speak all non-Western or African languages and read all that is written therein in order to convince that a particular concept is unknown in non-West and African societies.

Failing to keep quiet on the “unknown”, one might end up giving credit to Mobutu’s statement that “corruption” was a Western concept unknown in any African language. Moreover, even in case a concept could be “foreign” to people of a particular cultural milieu, there is no reason why those people should be prevented from learning and “domesticating” it.

Furthermore, there is no evidence that a concept will be respected at all times in the culture that allegedly invented it.

⁹⁵⁸ Busia, Nana K.A., Jr., *op.cit.* 65.

If the concept of human rights was a Western discovery as Howard, Donnelly and a host of other Western and Eurocentrist scholars forcefully pretended, the same should be said of concepts such as genocide, slavery, absolute monarchy, inquisition, authoritarianism, and so on.

Regarding constitutionalism in African traditions or pre-colonial Africa, Cowen clearly warned:

“It would be egregiously naïve to assume that African legal development began in the colonial era. Long before European colonization, Africans had made their own contribution to law and its administration.”⁹⁵⁹

3.2.1.3. Assessing the Debate

Constitutionalism and democracy are not the exclusive property of Western societies; they are part of the cultural legacy of humanity and no people can claim their monopoly or paternity.⁹⁶⁰

It is an affront to the African people to suggest that they are incapable of applying the principles of democracy.⁹⁶¹

Democracy can be confidently upheld as the suitable way of life for Africa, just as it is for Western Europe or America, indeed for all men everywhere.⁹⁶²

Men and human societies invented them. Constitutionalism and democracy have neither individual “father” nor “inventor”, but is there any “model” to which all other systems should conform and that should be implemented everywhere? The answer is no.

⁹⁵⁹ Cowen, D.V., “African Legal Studies ...” 546.

⁹⁶⁰ See Ghali, B.B., “Les Nations Unies et l’Afrique”, *Afrique 2000*, No.14, 1993, 15; Banock, M., op.cit.8; Bathily, A., “Pouvoirs et dynamiques de changement politique en Afrique: de l’ère pré-coloniale aux indépendances” 7-8; Bourgi, A., op.cit. 18; Bourgi, A. & Casteran, C., op.cit. 120-124; Dumont, R., *Démocratie* ... 13; Gonidec P.F., “Démocratie et développement en Afrique...” 56-57; Liniger-Goumaz, M., *La Démocrature* ... 236-237; Nzongola-Ntalaja, G., “The State and Democracy...” 10.

⁹⁶¹ Awolowo quoted by Hinden, R., op.cit. 4.

⁹⁶² See Ronen, D., “The State and Democracy...” 202; Hinden, R., op.cit.14.

As Badinter blatantly put it,

*“il n’y a pas, dans l’Etat de droit démocratique, de modèle; il y a des principes, ce qui n’est pas la même chose. Il n’y a pas, pour parvenir à l’Etat de droit démocratique, de recettes; il y a des expériences, avec des conséquences que l’histoire a permis de dégager.”*⁹⁶³

Okoth-Ogendo insisted that no single model, if any, is good for all societies at all time.⁹⁶⁴

Whilst dismissing the idea of Western paternity or model of constitutionalism and democracy or of Western traditions being altogether, and always democratic, we should also reject the thesis that African traditions were consistently so.⁹⁶⁵

To talk of a “Western democratic tradition” is, according to Mamdani,

*“to indulge in a degree of ideological mystification. For the “Western tradition” was neither homogeneous nor consistent. It varied not only from one geographical location to another, but also from one social class / group to another.”*⁹⁶⁶

All the same, Legum considered a “myth” the argument that traditional African societies were democratic, communalistic, and operated on a basis of consensus.⁹⁶⁷

Legum’s view, a distorting generalisation according to Wiseman,⁹⁶⁸ is opposed by Depelchin who held that it was rather the inexistence of democratic practices in African societies that was one of the real “myths” unfortunately hard to die.⁹⁶⁹

⁹⁶³ Badinter, R., “Quelques réflexions sur l’Etat de droit démocratique”, in Conac, G., (ed.), op.cit. 9: “There is no model of the democratic legal state; there are principles, which is not the same thing. To achieve a democratic legal state, there is no recipe; there are experiences, with consequences that history has produced” (Literal translation from French).

⁹⁶⁴ Okoth-Ogendo, H.W.O., “Constitutions without Constitutionalism...” in Shivji, I.G., (ed.), op.cit.20.

⁹⁶⁵ It is common view, for instance, that the Zulu and Baganda kingdoms in Southern and Central Africa respectively were not models of constitutionalism and democracy.

⁹⁶⁶ Mamdani, M., “Social Movements and Constitutionalism...”238.

⁹⁶⁷ Legum, C., “Democracy in Africa...”179, 186.

⁹⁶⁸ Wiseman, J.A., *The New Struggle for Democracy in Africa...* 15.

⁹⁶⁹ Depelchin, J., “De quelle manière les masses du peuple pourront-elles contrôler le pouvoir qui prétendrait les servir?” in Mouvement Progressiste du Congo (Zaire), *Démocratie néo-coloniale ou deuxième indépendance ?* Paris : L’Harmattan, 1992, 132.

As Magang quite rightly stressed:

“When I speak of democracy in African tradition...it should not be assumed that this was a tradition uniformly observed and practised in the whole continent of Africa. We must accept that the traditional systems existed in different varieties to suit people’s history, culture, economy... and social conditions. ... There cannot be total uniformity in the application of African tradition because there will always be critical factors such as cultural, economic, and social pressures, which affect different societies in different ways, depending upon their historical and cultural traditions.”⁹⁷⁰

Zwede, for instance, outlined:

“If there are countries that had values and systems, that could assist the democratisation process, Ethiopia is not one of them. The Ethiopian past is replete with authoritarianism and dogmatism and woefully short of democracy and tolerance... There is in short no golden age to revive as far as democratisation is concerned.”⁹⁷¹

On the other hand, though some historians argued that the *coup d'état* was a practice unknown in pre-colonial Africa, Abdoulaye Bathily⁹⁷² held the contrary:

*“Dans les grands empires soudanais de l'ère précoloniale, le coup d'état militaire fut de façon fréquente la forme par laquelle s'exprimait le besoin de changement de l'ordre social et politique. L'empire du Mali (14e et 15e siècles) et surtout l'empire Songhay (16e siècle) furent souvent agités par l'intervention de l'armée dans le processus politique. Cette intervention se faisait tantôt pour dénouer les querelles de succession au sein du clan aristocratique dominant tantôt pour dénouer une crise nationale. L'armée jouera ainsi le double rôle d'instrument des révolutions de palais et de bouleversement de l'ordre dynastique.”*⁹⁷³

The sociological reality of ancient Africa is too complex to be simplified through the lenses of Afrocentric romantics as a golden age of freedom, or those of Eurocentric Afropessimists as an epoch of despotism.⁹⁷⁴

⁹⁷⁰ Magang, D.N., “Democracy in African Tradition...”103.

⁹⁷¹ Bahru, Zwede, “Historical Legacy and the Democratisation Process in Ethiopia”, in Hutchful, E. & Bathily, A., (eds.), op.cit. 156.

⁹⁷² Bathily, A., “Pouvoirs et dynamiques de changement politique en Afrique...” 10.

⁹⁷³“In the big Sudanese empires of the pre-colonial era, the military *coup d'état* was the frequent way of social and political change. The Mali Empire (14th and 15th century) and mostly the Songhay Empire (16th century) were regularly shaken down by military intervention in the political process. That intervention was designed either to settle succession problems within the ruling aristocratic clan or to bring to an end a national crisis. Therefore, the army played a double role as an instrument for both palace revolutions and change of the dynastic order.” (Translation mine)

⁹⁷⁴ Nzongola-Ntalaja, G., “The State and Democracy...”10.

Western and African traditions are both contradictory. There are examples of both authoritarian and democratic systems.

As elsewhere, there was democracy in Africa, in addition to tyranny and other forms of rule.⁹⁷⁵

3.2.2. The Question of "Autochthony" and The Problem of "African" Constitutionalism and Democracy: Relativists *versus* Universalists

Related to the issue of "paternity" and "model", one of the main questions that have besieged experts and students of constitutionalism and democracy in Africa is that of autochthony.

Should constitutionalism and democracy as known in the West apply or be imported as they are in African societies or, to take root, should they be clothed with local, indigenous, autochthonous or domestic forms? Furthermore, is it possible to speak of "African" constitutionalism and democracy different from constitutionalism and democracy outside the continent, especially in Europe?

The debate is akin to that of universalism *versus* relativism regarding the issue of human rights briefly discussed earlier and may help divide proponents between universalists and relativists, depending on whether they favour constitutionalism and democracy as universal values or not.

3.2.2.1. Relativists

There are indeed scholars who argue for "African" constitutionalism and democracy and insist that they should be Africanised to take root on the continent.

⁹⁷⁵ See Mamdani, M., "Social Movements and Constitutionalism..."238, 249; Magang, D.N., op.cit.103, 104; Wiseman, J.A., *The New Struggle for Democracy* ...15; Nzongola-Ntalaja, G., "The State and Democracy..."10; Fyle, C.M., "Indigenous Political Culture and Democratisation ..."100-101; Loucou,

They tend to favour domestication, a sort of "tropicalisation" of constitutionalism and democracy in societies that allegedly ignore them and to which they are supposedly foreign ideals. Autochthony is, therefore, considered an "indispensable part of constitutional development."⁹⁷⁶

Okoth-Ogendo, however, does not overemphasise the importance of autochthony. What appears to have gone drastically wrong in Africa, he contended, is "not the search for autochthony but rather the extreme disregard of constitutionalism which this process has assumed."⁹⁷⁷

African traditions were dramatically distorted by some authoritarian leaders who justified the one-party rule with its intolerance, rejection of any form of opposition and accountability, as in line with African traditions or "authenticity".⁹⁷⁸

J.N., "Le multipartisme en Côte d'Ivoire" 111; Zeleza, P.T., "Reflections on the Traditions of Authoritarianism and Democracy ..." 223-240; Bathily, A., "Pouvoirs et dynamiques..." 7.

⁹⁷⁶ Okoth-Ogendo, H.W.O., "Constitutions without Constitutionalism..." in Shivji, I.G., (ed.), op.cit. 20.

⁹⁷⁷ Idem.

⁹⁷⁸ In the 1970s, roughly 30 years before the launching of "African Renaissance" by South African President, then Deputy President, Thabo Mbeki, President Mobutu of Zaire became famous for his philosophy of African "authenticity". He developed his ideas during his historical address to the UN General Assembly on 24 October 1970. In fact, M. Mobutu was inspired by the doctrine of "*Négritude*" expounded in the early 1930s by L. Senghor, A. Césaire and L.G. Damas at the time young black students in Paris, and by Cheikh Anta Diop's thesis on *The African Origin of Civilization* (Diop, C.A., supra). *Négritude* was a philosophical defence of Black Man, values and civilisations and an intellectual challenge against colonialism in Africa. *Négritude* opposed the "negation" of values and "alienation" of Black people throughout the world. Based on the famous "Black and Beautiful," it was designed to counter colonial racism according to which Black people were inferior, ugly, and barbarous, without God, souls, values or "civilisation". Senghor, Césaire and Damas, *Négritude*'s "fathers", were poets and novelists. In the 1950s, 1960s, and 1970s, Cheikh Anta Diop gave a historical and scientific basis to *Négritude* in a monumental work which authoritatively asserted the "precedence of Black civilisations" *vis-à-vis* others, especially Romano-Greek civilisations. Cheikh Anta Diop is the "founder" of a new scientific and historical discipline, now known as "Egyptology", for its concentration on ancient Egypt. "Pharaoh of Knowledge," as the then Senegalese President Abdou Diouf named him during an international conference celebrating the 10th anniversary of his death (Dakar, Senegal, 28 February-2 March 1996), Cheikh Anta Diop demonstrated that Africa was the cradle of mankind and the origin of civilisation. The first human being was Black and lived in Africa. Moreover, through ancient Egypt, Africa assumed the leadership of humanity during the three first historical millennia prior to declining and falling under colonisation of its erstwhile colonised. Mobutu's "recourse to authenticity" advocated that Black people should culturally remain themselves, stop copying from White and other peoples and resort to their traditional positive values in order to establish themselves as fully-fledged citizens of the universe. Mobutu was therefore a precursor of the African Renaissance. Unfortunately, "Authenticity" was used to justify and consolidate his authoritarian rule. Its main achievement consisted in dancing and singing for the dictator. Women were not allowed to wear trousers. Mobutu put himself in the skin of an African traditional leader wearing a stick of

The intolerant one-party rule became for decades the "autochthonous" form of constitutionalism and democracy in Africa, as it was considered a manifestation of "African constitutionalism".⁹⁷⁹

Awolowo regretted that spokesmen of the Western democracies ably endorsed outrageous declarations by African leaders that a one-party was in accord with the democratic way of life in Africa and with autochthony.⁹⁸⁰

This relativism, parochialism or autochthonisation of constitutionalism and democracy resulted in their demise in post-colonial Africa.

3.2.2.2. Universalists

Universalists or those who view constitutionalism and democracy as universal principles or values downplay or altogether dismiss the debate on autochthony.

Accordingly, they oppose constitutionalism and democracy by "African standards" if that was the price to be paid for autochthony.⁹⁸¹

Chafe,⁹⁸² one of the "universalist scholars", prefers dealing with "the problematic of democracy in Africa" rather than that of "African" constitutionalism and democracy.⁹⁸³

command and a leopard-skin cap. The Western-styled dress was abandoned for a Mao's style suit called "abacost" (literally "down with (the Western) costume (suit)"). Finally, an Act of Parliament criminalised the use of Christian names while every Zairian citizen was required to replace his / her past Christian name with an "authentic" African name drawn from his / her culture. That resulted in Joseph-Désiré Mobutu becoming Mobutu Sese Seko Kuku Ngbendu Wa Za Banga, meaning "Mobutu Indefatigable and Indomitable Warrior Always Victorious", as the president once explained himself.

⁹⁷⁹ See Amissah, A., "Constitutionalism and Law in Africa..." 50.

⁹⁸⁰ Obafemi Awolowo, Opposition leader in 1960 Nigeria, quoted by Hinden, R., *op.cit.* 4.

⁹⁸¹ See Nzongola-Ntalaja, G., "Introduction", in Nzongola-Ntalaja, G. & Lee, M., (eds.), *op.cit.* 1; Olukoshi, A., "State, Conflict..." 457.

⁹⁸² Chafe, K.S., *op.cit.* 140.

⁹⁸³ The position is almost the same in philosophy where the old Eurocentric and ethno-philosophical debate on "African Philosophy" following the publication of Father Tempels's "Bantu Philosophy" in the 1940s. "Bantu Philosophy" was replaced by "Philosophy in Africa". Despite emphasis on some issues due to contextualisation, there is no evidence that the Bantu or any other African people do have a philosophy of their own that is drastically different from the rest of humanity.

According to Nzongola-Ntalaja, democratic norms and principles are of universal value.

Therefore,

“There is no question of Africanizing democracy. The key demand of the moment is rather to democratize Africa. This is to say that we cannot import or Africanize democracy because the latter is something that is universal.”⁹⁸⁴

3.2.2.3 Assessing the Debate

There are a number of theoretical problems associated with the debate on “autochthony” or “African” constitutionalism and democracy.

If “African” constitutionalism and democracy only refer to the “indigenous,” “autochthonous” pre-colonial or traditional political systems or to “one party- rule”, as it was generally understood, it is of less interest to a constitutional scholar than to historians, ethnologists, sociologists or political scientists.

The first problem is that most of the scholars who argue for or insist on “autochthony” or “African” constitutionalism and democracy, willingly or unwittingly think of them as “Western” inventions or notions foreign to Africa that should be domesticated or tropicalised in order to develop or consolidate.

Dwelling upon autochthony or an African version of constitutionalism and democracy would be contradictory to the view that the latter also belong to Africa and African peoples were familiar with them.⁹⁸⁵

It is worth noting that students of constitutionalism and democracy in the West hardly refer to their “autochthony” in North America, West Europe, East Europe, South America, and even Asia, as if they were more natural phenomena there than in Africa and therefore did not need to be domesticated.

⁹⁸⁴ Nzongola-Ntalaja, G., “The State and Democracy...” 10.

⁹⁸⁵ *Idem.*

Secondly, the issue of "African" constitutionalism and democracy is highly problematic since it is hard to define "African" and what is or may be actually an African version of constitutionalism and democracy applicable or known on the entire continent.

Champions of "autochthony" argue that Africa must develop political institutions that grow out of her own culture and her political system must be fundamentally African.

Yet, we still have to be convinced about what is specifically African, American, Asian, European or Western for, since times immemorial the world has known monarchies, autocracies, and oligarchies, as well as attempts at democracy.⁹⁸⁶

Thirdly, constitutionalism and democracy in the West are dealt with within the context of national states or entities.

Despite some common features, they do not function in the same way nor do they adopt the same institutions in Britain, France, and Switzerland, Germany, Belgium or the USA, to name but a few Western states.

Emphasis on constitutionalism and democracy that would be the same regardless of time and space throughout the African continent is scientifically questionable, as it would also be an overgeneralisation.

Fourthly, the debate is based on a regrettable misconception of constitutionalism and democracy that are reduced to their formal and institutional terms.

Yet, as stressed earlier, constitutionalism and democracy are mainly concerned with values, principles or norms and institutions.

⁹⁸⁶ Hinden, R., op.cit. 2,3.

Lastly, "African" constitutionalism and democracy should not be understood to foster a notion of *démocratie tropicalisée*.

Baker lamented:

"In Africa, a political system (democracy) is measured not by the extent to which it measures up to abstract principles of democracy but rather by the way in which it operates in practice, in particular it is the extent to which it represents the interests of key groups, balances competing claims on limited resources, improves the quality of life of the masses, and offers hope of widening opportunity. It is a matter of differentiating the form from the substance."⁹⁸⁷

According to Olukoshi,

"This attempt to foster a notion of *démocratie tropicalisée*, a tropicalized version of democracy built on lower standards of assessment – and analysis – has been vigorously rejected, and rightly so, by a host of scholars who not only insist that Africa must be judged by the highest standards possible, but also that, for better or for worse, Africa is condemned to democracy as the only viable framework within which it must seek to promote political reforms and economic development."⁹⁸⁸

There is no reason why Africa should be contented with constitutionalism and democracy by "affirmative action".

Constitutionalism and democracy in Africa should be judged by the highest standards possible or at least by the same standards as those applied outside Africa, including America and Europe.

However, Olukoshi warned:

"To insist on the highest possible standards is not to call for the development of definitions of democracy and parameters for determining the existence or absence of democratic politics that correspond to no actual or known historical examples known anywhere in the world. The use of ideal types that belong only to the world of those interested in mystification and fetishism is one of the biggest problems with which practitioners of African studies have long had to deal."⁹⁸⁹

Although democratic values are universal, there cannot be question of their relativisation or autochthony. Institutions, which inform democracy and the concrete forms of its political practice, vary in time and space.

⁹⁸⁷ Baker, P.H., "Reflections on the Economic Correlates of African Democracy" 59-60.

⁹⁸⁸ Olukoshi, A., "State, Conflict..." 457.

⁹⁸⁹ Idem.

There is obviously nothing sacrosanct about the forms evolved in the West. They differ from one Western country to another in any event and it is only right that every nation should express itself in these matters according to its own wishes and traditions.⁹⁹⁰

It is to this issue of forms and institutions that the question of autochthony actually refers.

In the case of post-apartheid South Africa, Heyns claimed, “we want more of the African spirit in our constitution”.⁹⁹¹

Referring to the Bill of Rights, he also asked, almost innocently, “Where is the Voice of Africa in our Constitution?”⁹⁹²

“Are we going to be satisfied with putting foreign wine into our own bottles, or, to put it differently, to drive an imported car, merely with our own choice of the standard optional features?”⁹⁹³

Such questioning unfortunately betrays some intellectual complex of inferiority based on a perception of constitutionalism and democracy as a Western invention, and human rights as “theirs” and not “ours” or “foreign to us”. The question would not be raised were human rights also considered our own “thing”.

No one would convincingly argue that democratic values such as equality, human dignity, freedom and security of the person, non-racialism, and rights embodied in the 1993 and later on in the 1996 Constitution are foreign to South Africans or other African peoples on the continent.

Most Africans, even those who uphold the universality of principles of constitutionalism and democracy, make the reservation already referred to that the particular forms and institutions, in which those principles are embodied, should not imitate those of the West but be specifically African.

⁹⁹⁰ Hinden, R., op.cit.5.

⁹⁹¹ Heyns, C., *Where is the Voice of Africa in our Constitution?* Pretoria: University of Pretoria, The Centre for Human Rights, 1996, 11.

⁹⁹² *Idem* 1-12.

⁹⁹³ *Ibidem* 12.

Constitutionalism and democracy must be sensitive to local conditions; the simple adoption of an institutional framework designed elsewhere is unlikely to be successful.⁹⁹⁴

Although African countries slavishly imitated former colonial masters' institutions, there is no evidence that, even copied from such dubious models, institutions would have functioned in the same way in a culturally, historically and socially different context. In fact, they did not.

On the other hand, European countries have borrowed from one another without this being an obstacle to democracy in the borrowing country. It is still to be established why such an imitation should be prejudicial to the establishment and consolidation of constitutionalism and democracy in Africa.

No political system is original. Throughout history, each country and society learnt from others' experience and drew from others' institutional designs.

Political institutions such as Parliament, government, judiciary, political parties, and elections should not be reinvented in the name of autochthony or authenticity.

The debate on autochthony and African constitutionalism and democracy should therefore be relativised since no country or society has ever imitated or borrowed from others to the extent of totally alienating itself. Human cultures are mutually enriching. Values are to be shared and there is no shame in drawing inspiration from others.

There are nevertheless some forms or institutions that may be designed or retrenched depending on the needs of the society. The ceremonial is less important.

There is no reason why, for instance, in this heat, the Speaker of the House in an African country should be dressed in the same way as the British.

⁹⁹⁴ See Wiseman, J.A., *Democracy in Black Africa*... 9; Hinden, R., *op.cit.* 5.

Nor should African officials be subjected to oaths of office and solemn affirmations that do not enjoy the same value as in the West.

Ours are countries where ancestors and spirits are honoured and traditions still rife. Conventional Western formulas such as "I pledge to tell the truth, all the truth and nothing but truth" do not necessarily carry with them any sanction, even a moral one, for those likely to lie in court.

In some African societies, individuals would have less fear for the Constitution or an Act of Parliament foreign to them than for the tradition or ancestors.

A leopard tooth or skin is sometimes a much greater deterrent from lying or committing a crime than any piece of legislation. People tend to weigh the "ancestors' law" or the "spirits' law" more than the Constitution or an Act of Parliament.

One could expect senior officials such as Heads of State and Government, ministers, parliamentarians, and judges to wear traditional symbols of authority during solemn inauguration and subject to oaths and affirmations to obey God, ancestors, and the dead.

Fyle reveals that in African traditional or indigenous society, rulers were not above the law and were rather subject to sanctions, including supernatural ones.

He gives the example of the Temne, the largest ethnic group in Sierra Leone today, where people had to swear by the ancestors, spirits, and the dead to carry out any duty or commitment. The colonial rulers used these oaths in their court system, for they knew the people would have greater respect for them than for the Bible or any written law.

The people believed that they could be damned for breach of a solemn oath. Everyone feared this sanction that remained an effective social control and could be placed on rulers as well.⁹⁹⁵

⁹⁹⁵ Fyle, C.M., op.cit. 104.

Traditional leaders should be recognised in some national constitutions,⁹⁹⁶ and it is submitted that in some circumstances ethnic groupings should be granted some representation in public institutions, at least at the level of local government, to foster national unity and reconciliation.⁹⁹⁷

That may be African, but it would be too much to rely thereupon to insist on autochthony of institutions or to argue that purely “African” constitutionalism and democracy have emerged.

Finally, adherence to universalism does not imply that African peoples have no contribution to make to the development of constitutionalism and democracy in the world.

There is certainly a clear-cut answer to the question “What is the Voice of Africa in our Constitution?” All that is human in the Constitution, values and principles is also South African and African.

However, one should not turn a blind eye to institutions such as the government of national unity and the Truth and Reconciliation Commission that are an important contribution of African peoples to the development of modern constitutionalism and democracy.

⁹⁹⁶ Chapter 12 of the 1996 Constitution of the Republic of South Africa.

⁹⁹⁷ Ake, Cl., *Democracy and Development...* 131.

3.2.3. The Question of “Feasibility” of Constitutionalism and Democracy in Africa: Pessimists *versus* Optimists

Attempting to predict the likelihood of democratic consolidation in African States is, according to Clapham and Wiseman, a “journey without maps”.⁹⁹⁸

Controversies abound among both African and non-African scholars concerning the feasibility of constitutionalism and democracy in contemporary Africa.

The prospects for constitutionalism and democracy in post-colonial Africa divide scholars into two main groups, the pessimists and optimists, some being more radical than others.⁹⁹⁹

As Wiseman wrote:

“Over recent years it has become something of an academic convention to characterize scholars writing on the topic as either “demo-optimists” or “demo-pessimists” depending on how highly they rate the chances of recent moves towards democracy producing a more sustained form of democratic rule in at least a significant number of States”.¹⁰⁰⁰

Among Africanist scholars, the two schools may be identified as Wiseman *versus* Clapham.

Wiseman never made mystery of his optimism as opposed to Clapham’s pessimism:

“I had clearly been identified by others as belonging to the ‘demo-optimist’ school of thought and Christopher Clapham identified with ‘demo-pessimism’”.¹⁰⁰¹

African scholars are generally optimists. There are also pessimists who rule out constitutionalism and democracy in Africa.

⁹⁹⁸ Clapham, C. & Wiseman, J.A., “Conclusion” 229.

⁹⁹⁹ See Wiseman, J.A., *The New Struggle for Democracy...* 156-157; Woodward, P., “Democracy and Economy in Africa: The Optimists and the Pessimists”, *Democratization*, Vol.1, No.1, 1994, 116-132.

¹⁰⁰⁰ Wiseman, J.A., (ed.), *Democracy and Political Change...* 10; Idem, *The New Struggle for Democracy...* 157.

¹⁰⁰¹ Wiseman, J.A., *The New Struggle for Democracy...* 157.

3.2.3.1. Pessimists

Pessimist scholars claim that non-Western, especially African societies, are incapable of implementing constitutionalism and democracy, whether in their liberal, Marxist or socialist forms. Democracy, we are told, is the most difficult form of government to operate, the most sophisticated yet devised. It requires “special conditions” and “long experience”, an educated population, capacity for the art of compromise, respect for those with whom one disagrees, an impartial civil service and army, reasonably incorrupt politicians and judges, and so on through a formidable gamut.

Such conditions, although disputable, are said not to exist in Africa. Pessimists advocate cultural as well as economic and social obstacles to constitutionalism and democracy, which are considered not feasible in Africa.¹⁰⁰²

Associated with “realism”, pessimism is hard currency in the political scientist milieu. For the political analyst who wishes to retain some academic credibility pessimism is a much safer bet than optimism. Francis Fukujama, whose optimism about *The End of History and The Last Man* was tempered dramatically also became, ironically, one of the best advocates of pessimism, holding that

“A naïve optimist whose expectations are belied appears foolish, while a pessimist proven wrong maintains an aura of profundity and seriousness.”¹⁰⁰³

¹⁰⁰² For a comprehensive account of this argument for pessimism or against constitutionalism and democracy, their applicability or feasibility in Africa, see Nzongola-Ntalaja, G., “The State and Democracy...” 10-15 and Hinden, R., op.cit. 2-3. However, Nzongola and Hinden cannot be labelled as “pessimists” themselves. The list of pessimists is long and would include scholars such as Huntington, Kedourie, E. (quoted by Sklar, R.L., “Developmental Democracy...”); Schatzberg (M.G., “Hijacking Change: Zaire’s ‘Transition’ in Comparative Perspective”, in Ottaway, M., (ed.) *Democracy in Africa...* 114); Gordon, (D.F., “On Promoting Democracy in Africa: The International Dimension”, in Ottaway, M., (ed.), op.cit. 153); Simiyu (V.G., “The Democratic Myth in African Traditional Societies”, quoted by Sandbrook, R., “Liberal Democracy...” 46); Akindès (F., op.cit.178-179); Amin (S., “L’Etat et la Question du Développement ...”, in Anyang’ Nyong’o, (ed.), op.cit., I-XIX; Diamond, L., “Sub-Saharan Africa” 104, 106); Huntington (S.P., *Political Order in Changing Societies*, New Haven: Yale University Press, 1968), and Nelson (Huntington, S.P. & Nelson, J., *No Easy Choice: Political Participation in Developing Societies*, Cambridge: Harvard University Press, 1976).

¹⁰⁰³ Fukujama, F., quoted by Wiseman, J.A., *The New Struggle for Democracy...* 156-157.

According to Mazrui,¹⁰⁰⁴ another Afro-pessimist,

“The US must recognize the paradox of a strong African desire for democracy combined with a fragile African capability for it.”

In Gordon's view, expectations about the prospects for rapid democratisation in Africa should not be unrealistic but kept modest and downsized.¹⁰⁰⁵

Schatzberg also considered that “discussions of democratisation in various African States are premature.”¹⁰⁰⁶

Writing on Sub-Saharan Africa, Diamond came to the conclusion that “Where human survival itself is threatened, the prospect for democracy and liberty is grim.”¹⁰⁰⁷

Despairing of democracy as a form of government in the developing countries, many political scientists endorsed the idea of a developmental or modernising dictatorship or “soft authoritarianism”.¹⁰⁰⁸

Pessimists about constitutionalism and democracy in Africa include “liberal” and also “radical” or Marxist and socialist pundits such as Samir Amin¹⁰⁰⁹ and Issa Shivji,¹⁰¹⁰ who held that liberal democracy, however miserable and “impoverished”, could not develop or take root in countries without a strong middle class, independent bourgeoisie and capitalism.

¹⁰⁰⁴ Mazrui, A., “Africa: The Democratic Balance Sheet,” Testimony to the House Subcommittee on Africa, 27 September 1994, as quoted by Gordon, D.F., “On Promoting Democracy...” 153.

¹⁰⁰⁵ Gordon, D.F., “On Promoting Democracy...” 154.

¹⁰⁰⁶ Schatzberg, M.G., “Hijacking Change...” 114.

¹⁰⁰⁷ Diamond, L., “Sub-Saharan Africa” 105.

¹⁰⁰⁸ See Sandbrook, R., “Liberal Democracy...” 139-140; Sklar, S., “Democracy in Africa” 1-2; Jackson, R. & Rosberg, C.G., *Personal Rule in Black Africa*, Berkeley: University of California Press, 1982; Sklar, S., “Developmental Democracy...” 1-2; Idem, “Democracy in Africa...” 1-5; Huntington, S. & Nelson, J., op.cit.; Donnelly, J., “Human Rights and Development: Complementary or Competing Concerns?” *World Politics*, 1984, 35, 257.

¹⁰⁰⁹ Amin, S., “L'Etat et la Question du Développement...” in Anyang' Nyong'o, P., (ed.), *Afrique: la longue marche vers la démocratie...* XVII-XVIII.

¹⁰¹⁰ Shivji, I.G., *Fight My Beloved Continent...* 44-45

Therefore, as Sandbrook confirmed,

“This is not only a theory of doctrinaire liberals, but also conventional social scientists and economist Marxists”.¹⁰¹¹

More than optimism, pessimism knows no ideological boundaries. As compared to optimists who are idealists, pessimists pretend to be realistic.

There is nothing to blame in such realism that breeds the conventional discourse in political science, except that it results in conclusions drawn from the short-term politics and which ignore the “*longue durée*” or long term.

Dealing with the prospects for democratic consolidation in 48 sub-Saharan African states, Wiseman and Clapham¹⁰¹² allocated each state to one of the four categories according to whether they saw their prospects as good,¹⁰¹³ fair,¹⁰¹⁴ slight,¹⁰¹⁵ or more or less non-existent.¹⁰¹⁶

The two authors were right to be cautious in their prediction that there would be more surprises, both positive and negative, down the road.¹⁰¹⁷ Zimbabwe and Guinea-Bissau are certainly among the negative while Ethiopia and Mozambique stand among the positive surprises.

¹⁰¹¹ See Sandbrook, R., “Liberal Democracy in Africa...” 150-151; Amin, S., “L’Etat et la Question du Développement...” 5; Shivji, I.G., *Fight My Beloved Continent...* 44-45; Barrington, M., *Social Origins of Dictatorship and Democracy*, Boston: Beacon Press, 1966, 418. Amin, for instance, considered “true bourgeois democratization practically unrealizable at the periphery,” while Barrington authoritatively concluded, “No bourgeois, no democracy.”

¹⁰¹² Clapham, C. & Wiseman, J.A., “Conclusion...” 231.

¹⁰¹³ In Botswana, Cape Verde, Mauritius, Namibia, Sao Tome & Principe, Senegal, Seychelles, South Africa and Zimbabwe.

¹⁰¹⁴ In Benin, Ivory Coast, The Gambia, Ghana, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Niger, Nigeria, Swaziland, Tanzania, and Zambia.

¹⁰¹⁵ In this category; Angola, Burkina Faso, Burundi, Cameroon, Central African Republic, Comoros, Congo, Djibouti, Eritrea, Ethiopia, Gabon, Guinea, Mauritania, Mozambique, Sierra Leone, Togo and Uganda.

¹⁰¹⁶ Chad, Equatorial Guinea, Liberia, Rwanda, Somalia, Sudan and Zaire.

¹⁰¹⁷ Clapham, C. & Wiseman, J.A., “Conclusion...” 229.

However, it is hard to share their strong pessimism about the emergence of consolidated democracies in the foreseeable future in countries with “non-existent” prospects for democratic consolidation such as Chad and Zaire.¹⁰¹⁸

On the other hand, that is considered a “negative surprise” may well turn out to be a positive one in the near future.

3.2.3.2. Optimists

Without denying obstacles and challenges, there are Africanist and many African scholars who never lost faith in the future of constitutionalism and democracy and hold that they are feasible in Africa as elsewhere in the world.¹⁰¹⁹

In the light of the obstacles and challenges ahead and the time it may take to develop and consolidate constitutionalism and democracy in post-colonial Africa, optimists seem to be idealists.

Optimists mainly come from the ranks of those who argue that constitutionalism and democracy were not unknown in pre-colonial or traditional Africa.

Ake, for instance, was positive about the feasibility of democracy in Africa¹⁰²⁰ held that the prospects for democratisation were favourable.¹⁰²¹

¹⁰¹⁸ Clapham, C. & Wiseman, J.A., op.cit. 232.

¹⁰¹⁹ On optimistic views about the feasibility of constitutionalism and democracy in Africa, see Hinden, R., op.cit. 3-5, 14; Ronen, R., “The Challenges of Democracy...” 3; Idem, “The State and Democracy...” 199-202; Ake, Cl., *Democracy and Development...* 129-159; Ghali, B.B., “Les Nations Unies et l’Afrique” 15; Wiseman, J.A., *Democracy in Black Africa...* 10, 186; Idem, *Democracy and Political Change...* 10; Idem, *The New Struggle for Democracy...* 157, 160-162; 168; Ilunga Kabongo, “Democracy in Africa...” 35-39; Kaba, L., “Power and Democracy...” 101.; Nzongola-Ntalaja, G., “The State and Democracy...” 19-22; Abrams, E., “Pluralism and Democracy” 62, 63, 64; Amisshah, A., “Constitutionalism and Law ...” 51; Magang, D.N., “Democracy in African Tradition...” 103, 104.

¹⁰²⁰ Ake, Cl., *Democracy and Development...* 129-159.

¹⁰²¹ Idem, 133.

As for Nzungola-Ntalaja, he also held that in spite of obstacles and challenges, “the democratic transition in Africa is irreversible.”¹⁰²²

Ronen confirmed that “democracy is attainable in Africa.”¹⁰²³ According to Amissah, “there is hope for constitutionalism in Africa.”¹⁰²⁴

On the question of democracy in Africa, Abrams contended, “it is possible to be a realistic optimist.”¹⁰²⁵ Such optimism runs throughout Wiseman’s studies.¹⁰²⁶

3.2.3.3. Assessing the Debate: Optimist or Pessimist?

As far as the feasibility of constitutionalism and democracy in post-colonial Africa is concerned, looking at the heavy authoritarian colonial legacy and the tremendous obstacles at independence as well as progress achieved, conclusions should be more positive than are usually the case.¹⁰²⁷

Africanist scholars generally advocate a realistic or limited optimism.¹⁰²⁸ Considering the widespread and admittedly irreversible aspiration to constitutionalism and democracy on the African continent, the present author is quite optimistic.

¹⁰²² Nzungola-Ntalaja, G., “The State and Democracy...” 20.

¹⁰²³ Ronen, D., “The State and Democracy...” 202.

¹⁰²⁴ Amissah, A., “Constitutionalism and Law...” 51.

¹⁰²⁵ Abrams, E., “Pluralism and Democracy...” 62.

¹⁰²⁶ See Wiseman, J.A., *Democracy in Black Africa*... 10, 186; Idem, *Democracy and Political Change*... 10; Idem, *New Struggle for Democracy*... 157, 160-162.

¹⁰²⁷ Wiseman, J.A., *Democracy in Black Africa*... 191.

¹⁰²⁸ See Abrams, E., “Pluralism and Democracy” 62; Wiseman, J.A., *The New Struggle for Democracy*... 157, 168.

3.2.4. The Question of “Idealism” and “Realism”: Idealists *versus* Realists, Empiricists, Instrumentalists or Utilitarians

A further crucial question that has been much discussed in the literature concerned the purpose of constitutionalism and democracy in Africa.

Is the struggle for constitutionalism and democracy based on the same grounds as those, which justified constitutional and democratic revolutions in the West, for instance, or are there specific grounds that would allow other standards for constitutionalism and democracy in Africa? Why is the *raison d'être* of the struggle?

Two main approaches were developed in this regard and resulted in a debate between the proponents of idealism and the champions of realism, empiricism, instrumentalism or utilitarianism.

Within the framework of the debate, scholars also questioned the linkage between democracy and development on the one hand and democracy and peace on the other since democracy is with development and peace the three major challenges facing post-colonial Africa.

3.2.4.1. Idealists

According to idealist scholars, constitutionalism and democracy in Africa are being fought for as an ideal, an end or a goal in its own right. Peoples, so the argument goes, embark on the struggle for constitutionalism and democracy simply because of the values embodied therein.

Ronen provided a strong argument in favour of constitutionalism and democracy in idealistic terms.

As he pointed out, "democracy must be a goal in its own right."¹⁰²⁹ In Ronen's opinion, economic development cannot anywhere guarantee the implementation of democracy, and therefore both democracy and economic development must be concurrent goals and be taken as separate challenges.¹⁰³⁰

Whilst recognising the possibility for democracy to bring about peace, development, and better material conditions, idealistic scholars consider that focussing on these would be insulting for African people and branding their struggles as inferior to those fought by American and European peoples earlier.

In a specific African context, the debate between idealism and realism, empiricism, instrumentalism, or utilitarianism took the form of the debate between Mkandawire and Anyang' N'yong'o in the late 1980s. The former defended the thesis that democracy was an absolute value that is a value *per se* while accusing the latter of John Dewey-inspired instrumentalism, as he pointed out that democracy was a prerequisite for development.¹⁰³¹

The question remains whether the masses of the people who took to the streets in the 1960s for independence or in the 1980s to vindicate constitutionalism and democracy did so idealistically.

¹⁰²⁹ Ronen, D., "The Challenges of Democracy: Some Introductory Observations", in Ronen, D., (ed.), *op.cit.* 2-3; Idem, "The State and Democracy..." 192. See also Olukoshi, A., "State, Conflict..." 462.

¹⁰³⁰ Idem.

¹⁰³¹ For an account of this debate, see Bangura, Y., "Authoritarian Rule and Democracy..." 129; Mkandawire, T., "Comments on Democracy and Political Instability" 3; Anyang' Nyong'o, P., "Democracy and Political Instability: A Rejoinder to the Comments by Thandeka Mkandawire" 3; Gutto, S.B., "Social Revolutions – the Preconditions for Sustainable Development and People's Power in Africa. A Contribution to the Anyang' Nyong'o / Mkandawire Debate" 4; Mafeje, A., "Théorie de la démocratie et discours africain..." 19-22.

3.2.4.2. Realists, Empiricists, Instrumentalists or Utilitarians

According to those who may be labelled as realists, empiricists, instrumentalists or utilitarians, democracy is not an ideal or an end *per se*, but an instrument or means to attain some vital objectives or fulfil some crucial needs of the people and their society.

The worth of constitutionalism and democracy is made directly proportional to their utility.

Constitutionalism and democracy are judged on the basis of whether, as means, they are useful or helpful in the achievement of some particular ends.

Sklar thought of democracy as “an idea about means, not ends”¹⁰³² and authoritatively rejected the idealist thesis that democracy, as popular power, could be an end in itself.

He himself favoured instrumentalism:

“Some theorists hold that power is a good thing to have, a desirable end in itself... To my mind, power is ... a means for the attainment of diverse ends, such as personal freedom, security, happiness, fame, or wealth. Since I do not value popular power as an end in itself, I do attach no more than instrumental value to the elementary idea of democracy.”¹⁰³³

The main point made by instrumentalist and utilitarian scholars is therefore that democracy is worth struggling or fighting for because it is very likely to bring about or secure some vital goods.

Rather than being considered a good in itself, democracy is treated in an instrumentalist manner and its promotion becomes dependent on shifting perceptions as whether or not it is good for development.¹⁰³⁴

¹⁰³² See Sklar, R.L., “African Polities...” 165; Ronen, R., “The Challenges of Democracy...” 3.

¹⁰³³ Sklar, R.L., “African ...” 165.

¹⁰³⁴ Joseph, R., “State, Conflict, and Democracy...” 6.

Although instrumentalist and utilitarian political scientists all agree that constitutionalism or democracy is not a goal or an end in itself, but a means for the attainment of some useful goods, they nevertheless disagree on the nature of these goods.

There are scholars who adopt a very narrow conception of the “fruit” or ends of democracy and confine them to material and elementary goods such as food, shelter, and medicine.

On the other hand, there are those of the view that interests or goods served by constitutionalism and democracy should be conceived of broadly to encompass social, spiritual and more abstract and sophisticated interests or goods such as development, peace, freedom, equality, contentment, and survival. The former may be referred to as materialist and the latter as spiritualist instrumentalists.

Chafe, for instance, is among those who considered material goods the end of the struggle for constitutionalism and democracy in Africa as he contended:

“Politics is turned into business enterprises, pure and simple. I am sure, as a... research would definitely show, less than 5 per cent of Nigerian voters exercise their civic rights (duties?) on ‘principles’... In the light of the socio-economic predicament of the peasants, the unemployed and the entirely pauperised working class, it would be unwise on the part of any politician to campaign on the basis of principles (empty promises, they would say). The African underprivileged - who are the tremendous majority - would always maintain that they need food, shelter, medicine and economic opportunities and not the ‘white man’s’ political ‘palaver’ that had promised heaven, gave nothing but took away so much.”¹⁰³⁵

¹⁰³⁵ Chafe, K.S., op.cit.142. As stated earlier, this kind of argument is dangerous and unacceptable. It provides support to authoritarian leaders and their mentors in and outside the continent. For decades following independence, the champions of authoritarianism in Africa entertained the neo-colonial and even racist argument that democracy was a “luxury” in Africa. They pretended that democracy was too “sophisticated” to be understood and practised by African peoples more interested in the fulfilment of elementary material goods such as food, shelter and medicine than in democratic principles. It was said that the uneducated, poor, sick and homeless who still are the overwhelming majority of African peoples were prepared to be subjected to the most authoritarian rule and to give up democratic demands provided they be given elementary education, food, shelter, and medicine. On the other hand, Chafe’s conviction that less than five per cent of Nigerian voters exercised their civic rights on “principles” is not well documented and remains debatable. With due respect, I tend to disagree that 95 per cent of Nigerian voters would prefer to trade off and waive their rights to freedom, life, security and human dignity, for instance, just to enjoy the primary rights to food, shelter and medicine under a dictatorial regime such as the Abacha’s.

As Bangura noted, interests or goods pursued in the struggle for democracy do not have to be narrowly defined as economic, as the case was with many scholars who espoused the instrumentalist or utilitarian approach. They can also be social and political.¹⁰³⁶ They are even more social and political than economic.

According to Ake, African people have been fighting for democracy as a matter of life or death. Africans are seeking democracy as a matter of survival; they believe that there are no alternatives to this question; that they have nothing to lose and a great deal to gain.¹⁰³⁷

On a continent where authoritarian rule leads to genocide, other mass killings, gross human rights violations, endless wars and conflicts, Ghali regarded democracy as synonymous with or conditional to peace, sustainable peace, and development.¹⁰³⁸

In much of the literature, however, democracy is considered a means for economic development.

The economic basis of democracy was the main focus of many studies by instrumentalist or utilitarian scholars.

The compelling goal of constitutionalism and democracy in Africa would appear to be economic development. A democratic revolution is reportedly needed to beat the crisis of underdevelopment in Africa.¹⁰³⁹

¹⁰³⁶ Bangura, Y., "Authoritarian Rule and Democracy..." 129. See also Sklar, R.L., "African Politics..." 165.

¹⁰³⁷ Ake, Cl., "L'Afrique vers la Démocratie" 14; Idem, *Democracy and Development...* 138,139.

¹⁰³⁸ Ghali, B.B., "Les Nations Unies ..." 13.

¹⁰³⁹ Ake, Cl., *Democracy and Development ...* 138,139,158. See also the Preamble to the *African Charter for Popular Participation*, in Nyang'oro, J.E., (ed.), op.cit. 299-311.

According to Ake:

“The democracy movement in Africa opposes authoritarian elitism and the construction of development as a strategy of power and exploitation. It is bent on eliminating a leadership whose apparent incompetence and exploitive practices have become life threatening... Finally, the democracy movement in Africa is trying to initiate the kind of politics that will make development possible... The Movement does not yet have an articulated political theory. From what can be pieced together, the movement views the economic regression of Africa as the other side of political repression. It insists that the cause of development is better served by a more democratic approach that engages the energy and the commitment of the people who alone can make development sustainable.”¹⁰⁴⁰

In Bangura and Mamdani’s views, social movements in Africa have themselves linked the struggles for democracy with questions of alternative development strategies.¹⁰⁴¹

According to Bangura,

“It is primarily the debate on how to overcome the economic and political problems of the crisis and economic reforms that has brought to the fore the questions of political rights and accountable government.”¹⁰⁴²

Shivji went further contending that “the severe economic crisis has made it possible to talk of democracy”¹⁰⁴³ and resulted in “the insurrection” or “reawakening” of mass politics.¹⁰⁴⁴

¹⁰⁴⁰ Ake, Cl., *Democracy and Development*... 138.

¹⁰⁴¹ See Bangura, Y., “Authoritarian Rule and Democracy...” 129; Mamdani, M., *et al.*, (eds.), *Social Movements, Social Transformation and the Struggle for Democracy in Africa*, supra.

¹⁰⁴² Bangura, Y., “Authoritarian Rule and Democracy...” 129.

¹⁰⁴³ Shivji, I.G., *Fight My Beloved Continent* ... 44. Such a contention is right only in the sense that more has been said and written on democracy since the 1980s than before. However, the “talk” and the “show” did not start in the 1980s. As submitted in the study, the struggle for democracy and “second independence” started shortly after (the first) independence. The struggle against colonialism was part and parcel of the struggle for constitutionalism and democracy. Other African and Africanist scholars “talked” or wrote about constitutionalism and democracy long before the Iron Curtain collapsed in the late 1980s. The “talk” and “show” have always been there although not with the spectacular dimension they took with the Wind of East. Shivji makes the same mistake as radical “liberal” scholars for whom they did not exist before.

¹⁰⁴⁴ *Idem* 1, 44-46.

Nzongola-Ntalaja is right to put the genesis of the “talk” and the “insurrection” far beyond the structural adjustment programmes and the severe economic crisis of the late 1970s and early 1980s:

“The democratization process currently under way is a logical consequence of the non-fulfillment of ... expectations of independence. It is a reaction to the failure of the post-colonial state to realize the national project, namely, genuine independence, national integration, economic development, and social justice.”¹⁰⁴⁵

3.2.4.3. Assessing the Debate

In Africa, as elsewhere, people have been fighting for constitutionalism and democracy as an end or an ideal. They praise them because of the values and principles they represent. However, constitutionalism and democracy have never been fought for *in abstracto* or in idealistic terms.

According to Yusuf Bangura, pressures for democratisation do not present themselves in such idealistic and abstract terms. While it is an ideal to be cherished, democracy must make sense to the interests of the contending social groups.¹⁰⁴⁶

Few men and women would fight and die just for values and principles. People usually expect more; that constitutionalism and democracy will secure them, guarantee the enjoyment of all freedoms and human rights and result in the betterment of their lives.

Beyond democratic values and principles fought for, expectations are therefore that constitutionalism and democracy will bring with them or secure some substantial goods, either material (economic development, improvement of standards of life) or moral (enjoyment of human rights and freedoms, happiness or contentment) or both.

¹⁰⁴⁵ Nzongola-Ntalaja, G., “The State and Democracy...” 13.

¹⁰⁴⁶ Bangura, Y., “Authoritarian Rule and Democracy...” 129.

Idealism and utilitarianism are dialectically and inextricably related. Depending on circumstances the one tends to take precedence over the other.

There is an idealistic and utilitarian aspect in any human undertaking or enterprise. People do fight for constitutionalism or democracy not only because of what it is, but also because of what it can provide in terms of gain and benefit.

That is true in Africa. That was and still is true of the struggle for constitutionalism and democracy in the West, which was premised on the quest for "liberty, equality and fraternity".¹⁰⁴⁷

While fighting for these values, the American and French revolutionaries, the "founding fathers" of the American and French democracies, for instance, envisaged that once achieved, they would ultimately bring about better human conditions of life for all.

Accordingly, the argument that African people might have been fighting for the same under the umbrella of constitutionalism and democracy should not be seen as insulting for African people and branding their struggles as inferior to those fought by American and European peoples earlier.

As Nzongola-Ntalaja aptly put it in the case of Zaire:

"The democracy movement in Zaire is a struggle for political freedom and economic prosperity... These go hand in hand..."

The independence struggle of the 1960s, the popular insurrections for a 'second independence' in the 1960s and the current struggle for multi-party democracy have, as a common denominator, the demand for expanded rights politically and for a better life socially and economically."¹⁰⁴⁸

¹⁰⁴⁷ That was the slogan or war cry of the people during the French Revolution in 1789. It encapsulates the main values fought for by the people when they revolted against absolute monarchies in Britain, their North American colonies and the rest of the West or when earlier they demanded democracy in Greece and Rome.

¹⁰⁴⁸ Nzongola-Ntalaja, G., *The Democratic Movement in Zaire* 1.

To sum up, constitutionalism and democracy in Africa are both an ideal and a means. The empiricist, realist, instrumentalist or utilitarian view reducing them to a means to achieve economic development is totally misleading and results from a narrow conception of constitutionalism, democracy and development that unfortunately dominates the literature. Men in Africa, as elsewhere, do not live on bread without ideals as Bayart insinuated when he reduced politics in Africa to the "Politics of the belly".¹⁰⁴⁹

As emphasised earlier, constitutionalism and democracy first imply positive values, norms, principles or ideals, not material things.

The debate idealism *versus* realism, instrumentalism or utilitarianism harks back to the much-heated debate concerning the relationship between democracy and development. The impetus may be greater in a situation of hardship but misery, development or not, people would fight for democracy and constitutionalism that cannot be therefore sacrificed on the altar of economic development.

Constitutionalism and democracy with their underlying values are an end, an ideal to which every people aspires. However, there is no pure ideal without interest.

It is generally said that "People do not eat democracy", and that democracy is a "means for the attainment of something far more abstract which one might call human freedom, contentment, happiness, or a life free from fear."¹⁰⁵⁰

The best African answer to the question whether constitutionalism and democracy in Africa are pursued as an ideal, an end or as a means was arguably encapsulated in the African Charter for Popular Participation in Development and Transformation.¹⁰⁵¹

¹⁰⁴⁹ Bayart, J.F., *supra*.

¹⁰⁵⁰ Ronen, D., "The Challenges of Democracy..."3. See also Sklar, R., L., "African Politics..."165.

¹⁰⁵¹ See Appendix, in Nyang'oro, J.E., (ed.), *op.cit.* 299-311. The Charter was adopted during a conference organised by the Economic Commission for Africa, in collaboration with the rest of the UN System in Arusha, Tanzania, 12-16 February 1990. Over 500 persons, mostly African scholars and representatives of the civil society movement or non-governmental organisations attended.

According to the Charter, popular participation, say democracy, is a means, an instrument of development and an end in itself.¹⁰⁵²

As such, it is the fundamental right of the people to participate fully and effectively in the determination of the decisions that affect their lives at all levels and at all times.¹⁰⁵³

Scholars might still discuss whether the end preempts the means. However, there is an inescapable connection between the end and the means, as there is one between politics and economics.

Democracy and development are different, but not concurrent and unrelated challenges, as Ronen contended.¹⁰⁵⁴

The close association between democracy and development in Africa is well illustrated by some titles of research works by African scholars that put democracy first without it being clear whether it is by conviction or by alphabetical precedence.¹⁰⁵⁵ Our own priority goes for the one without dissociating it from the other.

Contrary to instrumentalist or utilitarian scholars such as Sklar,¹⁰⁵⁶ the present author attaches more than an instrumental value to constitutionalism and democracy.

Constitutional and democratic values are worth fighting for and in the process, they are useful means for peace, economic development and survival.

¹⁰⁵² *African Charter for Popular Participation in Development and Transformation*, Point I, 10, Appendix in Nyang'oro, J.E., (ed.), op.cit. 302.

¹⁰⁵³ *Idem.*

¹⁰⁵⁴ Ronen, D., "The Challenges of Democracy..." 2-3.

¹⁰⁵⁵ See Ake, Cl., *Democracy and Development...* supra; Nana-Sinkam, S.C., "Democracy and Development in Africa..." 71-82.

¹⁰⁵⁶ Sklar, R.L., "African Politics..." 165.

According to Ake,

“African peoples are in search for democracy partly because it is a condition to survive, aware as they are that they should either fight themselves or perish.”¹⁰⁵⁷

All the same, Fares held that “democracy is a chance for peoples’ survival.”¹⁰⁵⁸ Ghali insisted that a “Sustainable development is unimaginable without democracy”¹⁰⁵⁹ and “there cannot be sustainable development without promotion of democracy, and therefore respect for human rights”¹⁰⁶⁰ while the *African Charter* affirmed that “the absence of democracy is the main cause for the chronic crisis in Africa.”¹⁰⁶¹

There is a great deal of confusion in the above statements since they do not say exactly or refer to the same thing. It is obvious that for Diamond, “development” and “human survival” are means and “democracy” the end while for Ake, Fares, Ghali, and the African Charter, it is quite the opposite, democracy being a means for “peoples’ survival”, “sustainable development,” and “ending the chronic crisis in Africa” that are therefore considered an end.

Where established scholars crippled their teeth, I do not think I am suitably qualified to bring the confusion to an end.

However, it must be emphasised that democracy, development and human survival are closely intertwined and what may happen to be a means may be an end to something else and *vice versa*.

The debate idealists *versus* instrumentalists or utilitarians is sometimes overemphasised and ideologically tainted.

¹⁰⁵⁷ Ake, Cl., “L’Afrique vers la Démocratie” 14.

¹⁰⁵⁸ Fares, Z., *Afrique et Démocratie. Espoir et Illusions*, Paris: L’Harmattan, 1993, 29.

¹⁰⁵⁹ Ghali, B.B., “Les Nations Unies et l’Afrique” 15

¹⁰⁶⁰ Idem 16.

¹⁰⁶¹ See African Charter for Popular Participation, Preamble to the Charter and Point I.7; also quoted by Ake, Cl., *Democracy and Development...* 134, 301.

Idealists do not necessarily deny the instrumentalist or utilitarian dimension of constitutionalism and democracy. Nor do instrumentalists or utilitarians dismiss constitutional and democratic values and the ideal they represent altogether.

The difference is mostly one of emphasis, the first focussing or giving preeminence to values and the latter to the needs to be satisfied.

Idealism and utilitarianism are the two sides of the same coin and do not need be diametrically opposed.

3.3. Constitutionalism, Democracy and Colonial Rule in Africa

It is difficult, almost impossible, to recall the exact moment when the first colonial invasion occurred or when the first attacks were launched against the authoritarian colonial rule on the African continent.

From November 1884 to February 1885, the German Chancellor von Bismarck convened an international conference on Africa in Berlin. Leaders of many interested European countries attended the Conference.

Like vultures they agreed to divide and share up the African continent for the purposes of colonisation.

Historically and officially, the Berlin Conference is considered the starting point of colonisation in Africa and the 1960s its ending.

In fact, however, colonisation began centuries earlier and even survived long after the 1960s, especially for countries such as Angola and Mozambique that embarked on a long and bloody liberation struggle against the most stubborn of colonial masters, the Portuguese, and were only granted independence in the 1970s.

Admittedly, the colonial era came to an actual end in the early 1990s when Namibia gained its independence from South Africa, which spoiled a UN trusteeship by converting it into a fully-fledged colonisation of South West Africa.

On the other hand, apartheid in South Africa was not synonymous with colonisation. However, they were so closely related that the demise of apartheid in 1994 was hailed as the end of the final act of colonisation on African soil.

The Western Sahara case remains nevertheless an interesting case study of statehood in international law.¹⁰⁶²

¹⁰⁶² The Saharawi Democratic Republic was recognised by all African States except Morocco, as a Member State of the OAU. However, it is not recognised as such by the UN that still has to organise a referendum on self-determination. The referendum should allow the Saharawi people to choose between self-determination or independence and integration with the Kingdom of Morocco that administers the Saharawi territory. The Saharawi Democratic Republic is therefore a Janus-faced entity in international law. On the one hand, it is an independent African State with a government recognised by the OAU, but on the other hand an embryonic State under the UN that only granted its government the status of a liberation movement. As a result, there is a conflict of international law principles under the UN and the OAU. Hence the interesting research questions about the law that should prevail and whether the Saharawi Republic is a fully-fledged State or not. If an entity is recognised as a State by a regional organisation or arrangement (OAU) and denied recognition by the UN, is it a State? Is the recognition by the UN instrumental and final in achieving statehood? Is the UN bound by the recognition made by a regional agency or should the latter lose to the world body? How can the UN and OAU recognition laws and politics be reconciled? These are critical research questions that hark back to the debate on the role of recognition in statehood that once opposed the champions of the declarative and constitutive theories addressed earlier (see Dugard, J., *op.cit* 75-82).

In attempting to answer these questions on the status of the Saharawi Republic in international law, it is also worth considering the *animus* of both the Saharawi people and government, whether they consider themselves an independent people or behave as a government of an independent State. Furthermore, since the OAU is recognised by the UN and *vice versa*, and OAU Member States that recognised the Saharawi Republic also hold the membership of the UN, it is important to analyse their attitude towards the Saharawi Republic as UN Member States.

The recognition of States and governments in international law is basically a political decision, which should not, however, ignore the requirements for statehood as stated in the 1933 Montevideo Convention referred to earlier. It seems to me that the recognition of the Saharawi Republic as an independent State and its admission as a full-blown OAU Member State was premature. On the other hand, one cannot allege independence and consent to a referendum on self-determination. The fact that after its admission within the OAU, both the Saharawi government and the OAU itself pledged to abide by the outcome of the referendum to be organised by the UN amounted to admission that Western Sahara was still an independent State to be. Arguably, pending the outcome of the referendum, the International Court of Justice would rule that the Saharawi Democratic Republic does not qualify as a State with legal personality in international law.

The main questions commonly asked about the colonial rule and its relationship with constitutionalism and democracy in Africa are as follows:

1. What was the nature of the colonial rule? Did it foster the development of a democratic culture or not? Was colonialism a school for constitutionalism and democracy in Africa?
2. What was the role played by constitutionalism and democracy in the struggle against colonialism?

An attempt is made hereafter to address these important questions.

3.3.1. The Two Faces of Colonialism: Civilisation and Barbarity

Colonialism had a schizophrenic nature as civilisation and barbarity.¹⁰⁶³

3.3.1.1. Civilisation and Human Rights

Colonisation was presented as a mission of civilisation of barbarian people.¹⁰⁶⁴

Officially, European colonisation intended to bring the “primitive” African peoples to the “light of Civilisation and Gospel”, to stop the slave trade and to Christianise those who were said to be Godless in the colonial and racist discourse.

Accordingly, an important role had to be played by missionaries in paving the way for colonisation and helping it achieve its objectives, as they were its moral agents.

Abusing the Holy Scriptures, they were to preach submission, disinterest *vis-à-vis* the material world and wealth, and “poverty in spirit” reportedly required to gain Heaven.

¹⁰⁶³ See Diop, C.A., *Civilisation ou Barbarie*, Paris: Présence Africaine, 1981.

¹⁰⁶⁴ Civilisation was and still is unfortunately defined in Western milieu to entail Western values, traditions and principles. Non-Western, or more precisely non-European societies, were considered barbarian. Yet, like constitutionalism and democracy, civilisation is not a Western monopoly. There are no people without civilisation or culture.

Missionaries and former colonial masters would disapprove of the above statements and find them exaggerated.

It cannot be denied, indeed, that colonisation was capable of both “good” and “bad” things.

On the positive side, schools were built, providing Africans with an opportunity for learning to read and write. On the other hand, the contact with peoples from other parts of the world was enriching.

Large and small countries were united and peoples from different ethnic groups could communicate with one another. The foundations were laid for African modern nations to emerge. States, as we know them today, are a colonial creation. The colonial masters built up hospitals, roads, bridges, ports, airports, and railways even though the manpower was African. Thanks to colonial masters, the slave trade ultimately came to an end. Some African traditions underwent tremendous positive change.

On the negative side, those who claimed to be the messengers of God and Civilisation unfortunately indulged themselves in barbarity by establishing regimes that were hardly human and civilised. Barbarian authoritarianism was therefore the hidden face of colonialism.

3.3.1.2. Barbarity and Authoritarianism

It is almost a truism, and the overwhelming majority of scholars agree, that the colonial rule in Africa was authoritarian and largely resorted to barbarous practices.

The colonial political tradition was principally one of autocracy, centralisation, paternalism, and human rights abuses.

In some cases, as in the Congo under King Leopold II, the regime was based on greed and terror, and resulted in the "Holocaust" of African peoples on which very little has been said or written.¹⁰⁶⁵

Ayoade argued that "Colonialism retarded the growth of traditional political institutions in order to prevent them from competing with the colonial institutions for the allegiance of the people."¹⁰⁶⁶

Only in rare cases¹⁰⁶⁷ native elite did gain experience in formal democratic structures. Although some tend to be more lenient than others and condone the colonial rule, scholars such as Ake,¹⁰⁶⁸ Amissah,¹⁰⁶⁹ Ayoade,¹⁰⁷⁰ Bangura,¹⁰⁷¹ Busia,¹⁰⁷² Diamond,¹⁰⁷³

¹⁰⁶⁵ Hochschild, A., *King Leopold's Ghost. A Story of Greed, Terror and Heroism in Colonial Africa*, New York: Houghton Mifflin Company, 1998; idem, *Les Fantômes du Roi Léopold II. Un holocauste oublié*, Traduit de l'américain par Elsen, M. -Cl. & Straschitz, F., Paris: Belfond, 1998.

¹⁰⁶⁶ Ayoade, J.A.A., "The African Search for Democracy: Hopes and Reality" 25.

¹⁰⁶⁷ France was the only colonial power that went far in associating African peoples to the government either in France or in the colonies. Some categories of peoples in the French colonies were granted French citizenship. At the beginning of the 20th century, Mr. Blaise Diagne, a Senegalese native, became the first African member of the French National Assembly although Senegal was still a French colony. Other African personalities who held key positions in the French government during colonisation include Léopold Sédar Senghor and Houphouët Boigny, independence's "fathers" and first presidents of Senegal and Ivory Coast respectively.

¹⁰⁶⁸ In Ake's words,

"The power of the colonial state was not only absolute but arbitrary... Since the colonial state was for its subjects, at any rate, an arbitrary power, it could not engender any legitimacy even though it made rules and laws profusely and propagated values." (Ake, Cl., *Democracy and Development... 2-3*)

¹⁰⁶⁹ Amissah contended that "Except towards the end, and for only a short period of time, an autocratic form of government had prevailed under the colonial administrations." (Amissah, A., op.cit. 45)

¹⁰⁷⁰ Ayoade noted that "the colonial rulers had never tried to exemplify the practice of democracy; they were perfectly content with ruling in a strictly authoritarian manner." (Ayoade, J.A.A., "The African Search..." 25)

¹⁰⁷¹ Bangura denounced the "absolutism of colonial rule". (Bangura, Y., "Authoritarian Rule and Democracy..." 112)

¹⁰⁷² According to Busia,

"It cannot be said of colonial régimes that they were shining examples of democracy; nor can it be justly claimed that the newly independent states inherited from them democratic institutions suited to their condition." (Busia, K.A., *Africa in Search of Democracy... 52*)

¹⁰⁷³ As for Diamond, "colonial rule, which was more or less authoritarian, ... permitted little in the way of democratic participation. Only in the final stage of colonial rule, with the process of decolonisation, were democratic institutions constructed." (Diamond, L., "Sub-Saharan Africa" 76)

Magang,¹⁰⁷⁴ Sandbrook,¹⁰⁷⁵ and Wiseman,¹⁰⁷⁶ emphasise its authoritarian and terrorist feature.

Colonial rule was inherently and obviously undemocratic. It was logically incompatible with democracy.¹⁰⁷⁷

According to Ihonvbere,

“Under colonialism, the state combined the powers of the three arms of government. It was insensitive to local values and needs and it imposed taxes, levies, fees and laws at will and without consultation. Its primary concern was with maximizing profits and the general extraction of surplus to satisfy the interests of the metropolitan state and dominant classes.”¹⁰⁷⁸

There was no secret even for the colonialists themselves that their rule was undemocratic or authoritarian.¹⁰⁷⁹ Odhiambo went as far as considering colonial rule a racial one.¹⁰⁸⁰

The question, which may be raised, is whether it could be said to have been constitutional.

¹⁰⁷⁴ Writing on former British colonies, Magang pointed out that “throughout the colonial period, the final decisions were taken undemocratically”, by the resident commissioner or governor who carried out the instructions of the colonial secretary in London. (Magang, D.N., “Democracy in African Tradition...” 105)

¹⁰⁷⁵ Sandbrook held that “The colonial political tradition was principally one of autocracy, centralization and paternalism. However, in rare cases the indigenous elite did gain experience in proto-democratic structures.” (Sandbrook, R., “Liberal Democracy in Africa...” 150)

¹⁰⁷⁶ As Wiseman held,

“European colonial rule in Africa was not entirely devoid of African participation, but it was not until very late in the day that significant numbers of African had any involvement in their own government, and even then such involvement was largely absent in the Belgian and Portuguese colonies.” (Wiseman, J.A., *Democracy in Black Africa...* 18)

However, Wiseman maintained, “colonial rule is inherently undemocratic.” (Wiseman, J.A., *supra*.)

¹⁰⁷⁷ See Odhiambo-Mbai, C., “The Future Prospects of Multi-Party Democracy...” 13; Wiseman, J.A., *Democracy in Black Africa...* 18; Busia, K.A., *Africa in Search of Democracy...* 52; Ihonvbere, J.O., *Towards a New Constitutionalism...* 16-17.

¹⁰⁷⁸ Ihonvbere, J.O., *supra* 17.

¹⁰⁷⁹ Acknowledgment that during the 80 years of colonisation, Belgium had never thought of “organising” a democracy in the Congo can be found in the governmental Declaration made by the (Belgian) Minister of Colonies following the royal speech on 13 January 1959. In this Declaration that was issued only a few months ahead of independence, the Minister held that “Belgium intends to organise in the Congo a democracy capable of exercising the prerogatives of sovereignty and to decide about its independence.” (Translation from Young, C., *Introduction à la politique congolaise* 30).

¹⁰⁸⁰ Odiambo-Mbai, C., “The Future Prospects...” 13.

Odhiambo maintained that it was fairly liberal.¹⁰⁸¹ The colonial rule was legal and constitutional in so far as it was based on the colonial rule of law, but in no way was it consistent with constitutionalism as understood in the present study.

If colonial regimes were not shining examples of democracy, as Busia rightly put it,¹⁰⁸² can it be said that they left nothing to the independent African states?

They not only left institutional frameworks of centralised administration with a tendency towards authoritarianism, but also laid a foundation of democratic ideas and techniques that can help a country whose leaders wish to establish a democratic form of government.¹⁰⁸³

Arguably, African peoples also benefited from colonial rule. However, this rule could be tolerated for ever. It was authoritarian and called for reaction.

3.3.2. Constitutionalism and Democracy in the Struggle Against Colonialism

Constitutionalism and democracy played a crucial role in the struggle against colonialism that was their supreme negation. Whenever there is authoritarianism, there always emerges a struggle for human dignity and other human rights and freedoms.

Therefore, the ongoing struggle for constitutionalism and democracy in Africa started during colonisation and against the colonial rule and its agents.

¹⁰⁸¹ Odiambo-Mbai, C., "The Future Prospects..." 13.

¹⁰⁸² Busia, K.A., *Africa in Search...* 52.

¹⁰⁸³ Idem.

The division of the democratisation process into several “waves”,¹⁰⁸⁴ with the first wave, which can be traced back to the colonial era, corroborates what was stated earlier that the struggle for constitutionalism and democracy started long before independence.

The decolonisation wave was itself a democratisation wave given the authoritarian nature of the colonial rule as outlined earlier.

The constitutional and democratic challenge to the authoritarian colonial rule took almost the same road as the one later on against neo-colonial authoritarian rule.

Scholars such as Romdhane, Anyang’ Nyong’o, and Young stressed the place and role of constitutionalism and democracy in the struggle against the colonial rule in Africa.

According to Romdhane, constitutionalism was “the means of combating occupation,” “the leaven in the fight against colonisation,” and “the vehicle of the national movement.”¹⁰⁸⁵

Anyang’ Nyong’o pointed out that “democracy was one of the determinant ideals of the movement for independence”.¹⁰⁸⁶

¹⁰⁸⁴ See Huntington, S. P., *The Third Wave...* supra; Young, C., “The Third Wave of Democratization in Africa: Ambiguities and Contradictions”, in Joseph, R., (ed.), op.cit. 15-18. Samuel Huntington conceives of democratisation in three waves separated by interwave reversals. The first wave occurred between 1943 and 1962, the second lasted from 1974 – 1989, and the third started in 1989. The question whether or not the process only consists of three waves is disputable since democratisation has been a continuing struggle since immemorial times in the world in general and in Africa in particular. All the same, it is hard to single out a particular year as the start or the ending of a particular wave. Huntington’s imagery of waves of democratisation is nevertheless important to oppose arguments by some intellectuals that the struggle only started after independence and against the post-colonial authoritarian rule.

¹⁰⁸⁵ Romdhane, M.B., “Constitutionalism and Social Movements...” 220, 235.

¹⁰⁸⁶ My translation of “La démocratie était l’un des idéaux déterminant du mouvement pour l’indépendance”. See Anyang’ Nyong’o, P., “Discours sur la démocratie en Afrique”, in Chole, E. & Ibrahim, J., (eds.), *Processus de démocratisation en Afrique: Problèmes et Perspectives*, CODESRIA: Karthala, 1995, 28.

On the other hand, Young held:

“Internally, democracy was above all a weapon in the independence struggle. International hostility to colonial rule and anti-colonial nationalism swiftly intensified after World War II, putting the colonial powers on the defensive.”¹⁰⁸⁷

Champions of human dignity, social justice, equality and freedom for all in their metropolitan countries, colonial masters yet enforced inequality, exploitation, and oppression and denied rights to the colonised peoples. These internal contradictions of colonialism and Christianity were exploited fully by Africans who managed to turn their own arms against the colonial masters and fought successfully for independence.

On the other hand, no people who have tasted the fruit of liberty and freedom have ever turned their back against it.¹⁰⁸⁸

Therefore, independence was not the end of the struggle for constitutionalism and democracy in Africa. The struggle continued even after accession to sovereignty against the authoritarian neo-colonial and post-colonial rule.

3.4. Major Trends of Constitutionalism and Democracy in Independent Africa: Hard Road and Uneven Paths

Some scholars attempted to map out the road to constitutionalism and democracy in post-colonial Africa and considered several trends.¹⁰⁸⁹

¹⁰⁸⁷ Young, C., “The Third Wave of Democratization...” 18.

¹⁰⁸⁸ See Elster, J., “Consequences of constitutional choice: Reflections on Tocqueville”, in Elster, J. & Slagstad, R., (eds.), *op.cit.* 99: “Once mankind has eaten the fruits of equality, there is no way back.”

¹⁰⁸⁹ Sangmpam, for instance, identified “three stages in the contemporary struggles for democracy: the decolonisation period of guided democratisation; the post-colonial period of state capitalist expansion; and the period of economic crisis which is currently generating pressures for redemocratisation.” (Sangmpam, S.N., *op.cit.* 111) Sangmpam’s periodisation is unfortunately based on the economic variable and on a narrow and Marxist conception that fails to distinguish democratic from economic struggles and only sees the former as emanating from the latter.

On the other hand, Legum considered six stages as major trends in the political process in Africa since independence. His first stage is “A multiparty political system with formal trappings of democratic institutions”. At this stage, the ruling party accepted a formal opposition and the army, still nonpolitical,

Arguably, four main trends are characteristic of the struggle for constitutionalism and democracy in independent Africa.

3.4.1. Rise of Formal Constitutionalism and Democracy

The first stage was the rise of formal constitutionalism and democracy. It corresponds to the adoption, on or after independence, of a constitution providing for a regime generally modelled on the former colonial power and a multiparty system with formal trappings of democratic institutions.

The political regimes in independent states could therefore be formally constitutional, but it cannot be said that they were democratic since they were largely inherited from colonisation and generally owed more legitimacy to the former colonial masters than African peoples.

In many African countries, the first stage, which started with independence in the 1960s, was already over five years later.

was subject to civilian rule. The second stage was generally characterised by splits in the ruling party. The third stage was the period of growing political instability, outbreaks of violence (often tribal or regional), weakening of political authority, growing coercion, and decline of the ruling party. The fourth stage consisted of three different trends: emergence of single-party states, survival of some multiparty states, and emergence of military regimes. The fifth stage was marked by either the consolidation of single-party states or by military regime takeovers. The sixth stage was dominated by three trends. Many ruling parties lost claim to popular support and either became more coercive or engaged in the process of liberalisation. Some military regimes handed back power to civilians, but mostly for brief periods. Older established regimes became dominated by a single charismatic army officer or a small clique of officers while government was increasingly civilianised. (Legum, C., "Democracy in Africa..." 179 (Table 18.1). As compared to Sangmpam's, Legum's periodisation focussed on political parties and the military. It was much closer to the developments that unfolded on the African continent, but failed to consider other elements, such as the

3.4.2. Decline and Fall of Formal Constitutionalism and Democracy

The second stage was that of decline and fall of formal constitutionalism and democracy, even though it survived in a few African States.¹⁰⁹⁰ The causes of this decline were both internal and external.

The fall of independence's formal constitutionalism and democracy manifested in different ways, such as decline of parliamentarianism, secessions, violent ethnic conflicts, rebellions, and mostly in no-partyism,¹⁰⁹¹ monopartyism and militarism which rapidly gained ground in almost every African state. This stage dominated the history of constitutionalism and democracy in post-colonial Africa, taking generally between 20 and 30 of the nearly 40 years of Africa's independence.

3.4.3. Renaissance and Transition to Constitutionalism and Democracy

Renaissance and transition¹⁰⁹² to constitutionalism and democracy mark the third stage that began in the 1980s and early 1990s.

human rights situation, the development of other political institutions and, like Sangmpam, Legum could not clearly explain the move from one stage or period to another.

¹⁰⁹⁰ Formal democracy survived in countries such as Botswana and Mauritius that never experienced monopartyism or military rule. *Gambia* also remained a multi-party democracy from independence up to the *coup d'état* against President Jawara in the early 1990s.

¹⁰⁹¹ No-partyism characterises a situation where neither multipartyism nor monopartyism is allowed in the country. Officially, there is no political party at all. This generally related to a transitional period when after a *coup d'état*, the "strong man", very often the military officer who took power with the support of the army, was still busy laying the foundations for a personal or single-party regime after the ban on multipartyism. No-party regimes were very often military regimes.

¹⁰⁹² In Sklar's opinion, "the commonplace notion of 'transition to democracy' is plainly unscientific." The grounds for such a statement are that "No one has proposed a socially comprehensive scheme of analysis to monitor the course of democratic transitions. Nor have analysts who adopt this approach undertaken to assess the degree of systemic reliance on oligarchic, rather than democratic, practices in particular cases." (Sklar, R.L., "African Politics..." 167). Bratton and Van der Walle ("Popular Protest..." 218) were also skeptical about transition to democracy in Africa and argued that, "for most African countries the partial liberalization of authoritarian regimes does not amount to a transition to democracy." Despite criticism, I do use the concept of "transition to democracy" in this study and with due respect disagree with Sklar that it is "plainly unscientific". Africa is under transition although regimes are still torn between authoritarian tendencies and democratic practices. That is in my view inevitable. Transition refers to a bridge from one era to another and is necessarily a painful period. Africa is in transition, but transition to what? It cannot be

This is the stage of national conferences, constitutional reforms, and first multi-party elections following the demise of the one-party or military rule.

The transition process got underway from civilian one-party or military rule to multiparty and civilian rule. In other instances, States without Constitutions and Bills of Rights formally adopted them.

Some African countries, especially in French-speaking Africa (Benin, Congo, Chad, Gabon, and Zaire), went through the process of national conferences during which new constitutional texts were adopted and governments of national unity set up. Multiparty elections were held and new leaders came to power in those countries where elections happened to be free and fair (Presidents Soglo and Lissouba were elected in Benin and Congo, respectively), but the incumbent authoritarian rulers generally managed to retain power (Chad, Gabon, Togo).

In a country like Zaire, elections did not take place and President Mobutu succeeded in remaining in power for almost six years after the national conference (1991-1997).

Some countries did not organise national conferences, but undertook important constitutional reforms, held multiparty elections and obtained almost the same results as those where national conferences were held.

Opposition leaders were elected presidents in Burundi (President Ndadaye) and Zambia (President Chiluba) while the leaders of the erstwhile single party remained in power in Angola (President Dos Santos), Cameroon (President Biya), Ivory Coast (President Boigny), and Kenya (President Arap Moi).

In Tanzania, time came for the "heir" (M. Nkapa) to succeed to the "throne" while in Tunisia, another "heir" (M. Ben Ali) committed a political "parricide" by deposing the "Founding Father" (President Bourguiba) before consolidating his own power through elections.

a transition to the authoritarian past it comes from, but transition to something so far unachieved and African peoples have been longing for decades, that is constitutionalism and democracy.

The transition from apartheid to constitutional and democratic rule in South Africa may be assimilated to the one from monopartyism to multipartyism in French-speaking countries such as Benin where the national conference had been the most successful.

Mozambique is close to the South African model and stands as another case of successful transition from one (Marxist) single party to multiparty and constitutional rule following negotiations between *Frente de Libertação de Mocambique* (FRELIMO) and *Resistencia Nacional Mocambicana* (RENAMO).

As a rule of thumb, the success of constitutional and democratic transition requires some kind of national dialogue while the prospects for consolidation of constitutionalism and democracy in countries where such dialogue took place are greater than in those countries that decided to bypass it.

In the 1980s and early 1990s, the movement for democratic change in Africa raised a passionate debate on the nature and causes of change.

3.4.3.1. Liberalisation or Democratisation?

Scholars referred to political reforms in Africa in the late 1980s as liberalisation or democratisation, two related, complementary but ultimately autonomous and different concepts or processes.¹⁰⁹³

¹⁰⁹³For an account of the debate over democratisation and political liberalisation, see Qadir, S., Clapham, C. & Gills, B., "Democratisation in the Third World: an Introduction", *Third World Quarterly*, Vol. 14, No.3, 1993, 416-416; Rijniere, E., "Democratisation in Sub-Saharan Africa? Literature Overview", *Third World Quarterly*, Vol.14, No.3, 1993, 652-653; Mangu, Mbata B., *Démocratie, Régime pluraliste et Tribalisme ...* 6-7; Sindjoun, L., "La Cour Suprême, la compétition électorale, et la continuité politique au Cameroun: la construction de la démocratisation passive", *Afrique et Développement*, Vol. XIX, No.2, 1994, 22, 23; Sindjoun, L., (ed.) *La révolution passive au Cameroun: Etat, Société et Changement*, Dakar : CODESRIA, 1999; Fatton, R., Jr., *The Making of a Liberal Democracy: Senegal's Passive Revolution, 1975-1985*, Boulder & London : Lynne Rienner Publishers, 1985; Bratton, M. & Van der Walle, N., "Popular Protest..." 199-200; O'Donnell, G. & Schmitter, P., *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies*, Baltimore & London: Johns Hopkins University Press, 1986.

Democratisation would design a radical bottom-up process of change, initiated and controlled by the masses of the people. It requires a deliberate construction of democratic political institutions.

On the other hand, political liberalisation is considered a more cosmetic process, imposed from above or a top-down process.

It is initiated and controlled by elite interested in retaining power while impressing the people with formal institutions such as freedom of the media, pluralism, and universal suffrage, allegedly free, fair and competitive elections, without bringing about substantial change of the political regime.

Sindjoun called it “conservative liberalisation”, or “passive democratisation,”¹⁰⁹⁴ borrowing from Gramsci’s concept of “passive revolution”, suggesting the dominant role of elite in the process.

Lemarchand argued that political liberalisation could or could not result in democratisation.¹⁰⁹⁵

Liberalisation can occur without democratisation and in some parts of Africa the disintegration of the authoritarian rule may be and was followed by anarchy, intensified corruption, or military intervention rather than by stable and accountable governance.¹⁰⁹⁶

Qadir, Clapham and Gills contended that liberalisation could also transform into democratisation

“if the impetus of change escapes from élite control to encompass broader social forces and its purpose is transformed from the preservation of interests to genuine reform.”¹⁰⁹⁷

A democratisation process may also in the long run transform into political liberalisation.

¹⁰⁹⁴ See Sindjoun, L., (ed.), *La révolution passive...* supra; Idem, “La Cour Suprême...” 22, 23. However, Sindjoun and Gramsci’s imagery is problematic. Liberalisation is *per se* a conservative process initiated by those who fear radical change or revolutions prejudicial to their power. On the other hand, “passive democratisation” or “passive revolution” stands as a contradiction in terms since no real democratisation or revolution is a passive enterprise.

¹⁰⁹⁵ Lemarchand, quoted by Rijnierse, E., “Democratisation in Sub-Saharan Africa...” 653.

¹⁰⁹⁶ Bratton, M. & Van der Walle, N., “Popular Protest...” 199-200.

¹⁰⁹⁷ Qadir, S., Clapham, C. & Gills, B., op.cit. 416.

That is likely to happen when the masses, civil society and political opposition get out of breath, unable to sustain the laborious and exhausting struggle for constitutionalism and democracy.

It is also possible that the authoritarian leaders converted into democrats after a brief eclipse manage to recover the helm that they lost at some stage to democratic forces.¹⁰⁹⁸

Scholars such as Ake and Schatzberg considered that Africa was still far from democratisation and discussions of democratisation in various African states were premature.¹⁰⁹⁹

I do not fully share Ake and Schatzberg's sweeping dismissal of this process in Africa since in countries such as Benin, Mali, Malawi, and Mauritius, the process was largely that of democratisation and succeeded.

The process of political change in the late 1980s and early 1990s was more one of liberalisation than democratisation.¹¹⁰⁰ The overwhelming majority of African States are still at this stage although routes may be uneven.

In some countries, the transition has been going on for years without any end or consolidation in view. Some other transitional regimes failed and returned to the authoritarian *statu quo ante* at a time one could get the impression that constitutionalism and democracy were about to be consolidated.

In other countries, there has been a cyclic move from authoritarianism to transition and *vice versa* and States, which were already far ahead, had to restart afresh in negotiating a new turn to constitutionalism and democracy.

¹⁰⁹⁸ Mangu, Mbata B., *Démocratie, régime pluraliste...* 6-7.

¹⁰⁹⁹ See Ake, Cl., "L'Afrique vers la Démocratie..." 15; Schatzberg, M.G., "Hijacking Change..." 114.

¹¹⁰⁰ See Mangu, Mbata B., *Démocratie, Régime pluraliste...* 7; Ake, Cl., "L'Afrique vers la Démocratie..." 15; Bratton, M. & Van der Walle, N., "Popular Protest..." 200, 218.

This contradictory phenomenon¹¹⁰¹ was aptly captured by expressions such as “*démocrature*,”¹¹⁰² “virtual democracy,”¹¹⁰³ “States in pendulum motion,”¹¹⁰⁴ or “hybrid regimes”.¹¹⁰⁵

3.4.3.2. Causes of Change: “Wind of the East,” “Wind of the West,” and Primacy of Domestic Factors or the “Wind of Africa”

Scholars attributed political change in Africa to outside or inside factors but disagreed whether it originated from the West, the East or Africa itself.

¹¹⁰¹ Wiseman held that “it has been very much a mixture of two steps forward one step back / one step forwards two steps back.” (Wiseman, J.A., *The New Struggle... 7*) Pye also predicted the emergence of “a wide variety of systems that will become part authoritarian and part free.” (Pye, quoted by Joseph, R., “The Reconfiguration of Power...” 60.

¹¹⁰² According to Liniger-Goumaz,

“The concept ‘*démocrature*’ is used to refer to the unstable mixture of democracy and dictatorship, constitutionalism and authoritarianism... In a more or less universal way, the concept of *démocrature* adds the component violation of democratic rules to better illustrate the nerve of African heads of state to mix formal democracy and actual dictatorship. If neo-patrimonialism characterises the confusion of interests of the Prince with those of the Nation, the notion of *démocrature* takes into consideration the confusion between monocephalism and apparent forms of democracy. *Démocrature* ignores the fundamental notion of human dignity. It represents the autochthonous replica of the colonial dictatorship.” (Liniger-Goumaz, M., op.cit. 59-60. Translation mine)

¹¹⁰³ Joseph, R., “The Reconfiguration of Power...” 60-61. Joseph’s concept of “virtual democracy” includes the following features:

- A formal basis in citizen rule, but with key decision-making (especially economic) insulated from popular involvement;
- Manipulation of democratic transitions by political incumbents including the use of violence and electoral fraud, to re-legitimise their power;
- Wider popular participation, but narrow policy choices and outcomes; and
- External encouragement of multiparty elections on the premise that they will not threaten vested domestic and foreign interests if incumbents act adroitly.

¹¹⁰⁴ The notion of “State in pendulum movement”, swinging or torn between democracy and authoritarianism, was used by Heady (quoted by Riggs, F.W., “Fragilité des régimes du tiers-monde” 267. Translation mine).

¹¹⁰⁵ See Terry Lynn Karl (quoted by Van der Walle, N., “Economic Reform and the Consolidation of Democracy in Africa,” in Ottaway, M., (ed.), op.cit. 19; Joseph, R., “The Reconfiguration of Power...” 60. Karl called hybrid regimes “states in which formal democratic practices coexist with the persistence of authoritarian practices, a clientelist political culture, and other legacies of the pretransition regime.” (Karl, T.L., “The Hybrid Regimes of Latin America” 72-86).

Considering that the process of change in Africa unfolded after the wind of change that swept the totalitarian rule in the former Soviets Union and satellite-countries of Eastern Europe following Gorbachev's *Perestroika* and *Glasnost*, some scholars attributed the political change to the "Wind of the East".¹¹⁰⁶

However, liberal thinkers wanted the credit to be given to the West and held that the process of change was due to the "Wind of the West."

According to Banock, ascribing political change in Africa to the Wind of the East would be "an illusion consisting in forgetting the precedence of the same movement in the called Western countries."¹¹⁰⁷

Fontaine held that "If Marx had to come back on earth, he would not say that the Wind of the East prevailed over the Wind of the West."¹¹⁰⁸

He agreed with Banock that the Wind of the East should be replaced by the Wind of the West to understand the process of political change in Africa since the late 1980s.¹¹⁰⁹

Support for this argument was found in the modernising impact of global economy,¹¹¹⁰ and pressure from the Western rich countries, especially through the policy of "conditionalities" set up by the IMF and the World Bank that conditioned their aids and loans to "good governance".¹¹¹¹

¹¹⁰⁶ Mangu, Mbata B., *Démocratie, régime pluraliste... 7.*

¹¹⁰⁷ Banock, M., op.cit. 5 : "une illusion consistant à oublier l'antériorité de ce même mouvement dans les pays dits occidentaux." (Translation mine)

¹¹⁰⁸ Fontaine, A., "Vent de l'Ouest", *Le Monde*, No. 14472, 2 August 1991, 1: "Si Marx revenait sur terre, il ne dirait pas que le vent d'est l'a emporté sur le vent de l'ouest." (Translation mine)

¹¹⁰⁹ See Fontaine, A., op.cit. 1; Banock, M., supra; Mangu, Mbata B., *Démocratie, régime pluraliste... 8.*

¹¹¹⁰ See Pye, L.W., "Political Science and the Crisis of Authoritarianism", *American Political Science Review*, Vol.84, No. 1, 1990, 3-19; Huntington, S. P., "Democracy's Third Wave", *Journal of Democracy*, 2, 1991, 12-43; Bratton, M. & Van der Walle, N., "Popular Protest and Political Reform in Africa", in Nyang'oro, J.E., (ed.), op.cit. 198.

¹¹¹¹ See Bratton, M. & Van der Walle, N., "Popular Protest and Political Reform in Africa" 198.

The historic speech by the French President François Mitterrand in *La Baulle*, France, in 1981, where he urged African Heads of State and Government during the African-French Summit to embark on democratisation and respect for human rights, added to the argument that the wind of change came from the West.

On the other hand, the competitive nature of the Cold War had been antipathetic to the prospects for democracy in Africa because the competing super-powers were willing to offer support to highly authoritarian regimes as a means of gaining strategic influence.¹¹¹²

Whilst he was aware of their insignificance, President Kennedy, for instance, was full of admiration for African dictators provided that they were under his or Western command and not that of Moscow.¹¹¹³

In their quest for allies in the Cold War, the great powers ignored considerations of human rights in Africa and sought clients wherever they could. All this crystallised opinion against democracy in Africa.

From time to time human rights became an issue and democracy was discussed, not to champion it and support the democratic movement, but mainly to raise doubts about its feasibility in Africa. Hence Ake's conclusion, still valid today, that the North is more interested in economic policy than democracy in Africa.¹¹¹⁴

¹¹¹² See Wiseman, J.A., *The New Struggle for Democracy...* 4; Odhiambo-Mbai, C., "The Future Prospects of Multi-Party Democracy..." 3.

According to Odhiambo,

"Although the West was aware of the rampant nature of bad governance and authoritarianism in Africa, it failed to condemn the practices forcefully.... In some cases the West participated in propping-up and supporting some of the worst dictators in the region. This was partly due to the ideological rivalry between the West and the former 'communist block' – rivalry whose main purpose was to secure military strategic positions and markets in the region."

¹¹¹³ Gonidec, P.F., "Démocratie et Développement en Afrique..." 50-51.

¹¹¹⁴ Ake, Cl., *Democracy and Development...* 131.

Accordingly, the end of the Cold War was a major event also invoked in the argument that the process of change in Africa was externally generated.

Supporters of the “Wind of the East” and “Wind of the West” all agreed that external factors or pressures were crucial in understanding the political developments in Africa in the 1980s, and justified them.

Other scholars, mostly African, opposed the argument that the wind of change sweeping on the African continent came from outside Africa, whether from the East or the West. The late Claude Ake, one of the best representatives of the group, dismissed both the “Wind of the East” and the “Wind of the West”.

According to him, the impetus came neither from the East nor from the West, but was rather a “Wind of the South, of Africa itself” that the international community had for a long time preferred to ignore:

“Les origines et les aspirations du mouvement pour la démocratie en Afrique ainsi que sa forme et son contenu sont sans rapport avec les événements en Europe orientale. Loin d’imiter ces événements, le mouvement pour la démocratie en Afrique les a précédés. Ce mouvement ne doit rien à l’Ouest qui a longtemps été le tourment de la démocratie en Afrique. Le vent est venu du sud, de l’Afrique elle-même. Depuis près d’un siècle, les Africains luttent inlassablement pour la démocratie à un coût très lourd. Malheureusement, leurs luttes n’ont pas reçu de la communauté internationale le cachet de légitimité qu’elles méritaient... En effet, elles étaient en partie dirigées contre l’Ouest.”¹¹¹⁵

¹¹¹⁵ Ake, Cl., “L’Afrique vers la Démocratie” 13:

“The origins and aspirations of the democratic movement in Africa as well as its form and content are not related to events in Eastern Europe. Far from imitating these events, the democratic movement in Africa preceded them. This movement owes nothing to the West that has been for long inimical to democracy in Africa. The wind has come from the South, from Africa itself. For almost a century, African peoples have been untiringly fighting for democracy at a very high cost. Unfortunately, their struggles did not receive from the international community the cachet of legitimacy that they deserved.... Indeed, they were partly directed against the West.” (Translation mine)

Robert Dossou held the same view as Ake:

“L’antériorité chronique des événements de Pologne sur ceux de l’Algérie, du Bénin ou d’ailleurs, ne saurait justifier l’affirmation suivant laquelle le vent d’Est aurait entraîné celui du Sud, surtout si l’on se souvient que les luttes pour les libertés démocratiques ont embrasé la jeunesse africaine dès le lendemain des indépendances”.¹¹¹⁶

According to Ndiaye, the wind came from Africa itself, since “the worm was in the fruit.”¹¹¹⁷

Radical views championing one “wind” to the total exclusion of the other should be rejected.

The wind of change came both from outside and inside Africa. Wiseman noted that among observers of African politics there was a general agreement that pressures for change were a combination of those originating from internal domestic sources and those from external foreign sources.¹¹¹⁸

This recognition is extremely important in understanding the process, but it leaves open the vital question of the relative importance of domestic and foreign pressures.¹¹¹⁹

Hence the fundamental debate that remained about the wind or factors which played the most crucial role in the making of political change in Africa, whether they were internal or external.

¹¹¹⁶Dossou, R., “Le Bénin: du monolithisme à la démocratie pluraliste, un témoignage”, in Conac, G., (ed.), op.cit.188:

“The chronic precedence of events in Poland over those of Algeria, Benin or elsewhere should not justify the assertion according to which the Wind of the East might have led to that of the South, mostly if one has to remember that the struggles for democratic freedoms flared up the African youth starting the very first day after independence.” (Translation mine)

¹¹¹⁷ Ndiaye, T.M., “Des Transitions Démocratiques en Afrique” 13.

¹¹¹⁸ See Wiseman, J.A., (ed.), *Democracy and Political Change*...4; Idem, *The New Struggle for Democracy*...35.

¹¹¹⁹ Idem, *The New Struggle for Democracy*... 35.

In an exhaustive search through the recent literature, the only Africanist scholars Wiseman came across to stress the primacy of external pressure were Tom Young¹¹²⁰ and Barry Munslow.¹¹²¹ Most of the scholars agree that domestic or internal wind or factors pressure played the most important role.

Conac warned that one would be mistaken on the significance of the current change, should one consider it entirely induced from outside Africa.¹¹²²

Bayart also made the point that the “the external dynamics played an essentially secondary role in the collapse of authoritarian regimes, however much a tenacious myth suggests otherwise.”¹¹²³

According to Chazan,

“Although African reform has taken place under a particular (and admittedly rare) constellation of external and internal factors, domestic explanations lie at the root of the new political climate on the continent.”¹¹²⁴

In Clapham’s view, “the most important elements in this process are ...domestic rather than international.”¹¹²⁵

Welch also contended that “the fall of single party systems is more accurately a result of internal pressures.”¹¹²⁶

¹¹²⁰ According to Young (T., “Elections and Electoral Politics in Africa” 299), also quoted by Wiseman, J.A., *The New Struggle for Democracy...* 36), “the recent wave of democratization is largely externally engineered.”

¹¹²¹ In Munslow’s view (Munslow, B., “Democratisation in Africa” 483, quoted by Wiseman, J.A., *The New Struggle for Democracy...* 36), “the move for democratisation is being driven primarily from outside the African continent.”

¹¹²² See Conac, G., “Introduction” 6; Idem, “Les processus de démocratisation en Afrique...” 11.

¹¹²³ Bayart, J.F., *The State in Africa...* X.

¹¹²⁴ Chazan, N., “Africa’s Democratic Change” 281; Idem, in Nyang’oro, J.E., (ed.), *op.cit.* 225. Also quoted by Wiseman, J.A., *The New Struggle for Democracy...* 35.

¹¹²⁵ Clapham, C., “Democratisation in Africa: Obstacles and Prospects” 430.

¹¹²⁶ Welch, Cl., “The Single Party Phenomenon in Africa”, *Transafrica Forum*, Fall 1991, 85, quoted by Wiseman, J.A., *The New Struggle for Democracy...* 35.

As for Bratton and Van der Walle, political reform was “primarily in response to indigenous political demands.”¹¹²⁷

External conditionality was invoked to explain the process of change in Africa. Yet, as Wiseman remarked, “in no single case in Africa ... was external conditionality imposed without there already being strong domestic pressure for democracy from within the African state itself.”¹¹²⁸

Although the changed external environment was more conducive to political reform, the major pressures for democratisation were those being exerted in Africa by Africans.¹¹²⁹

Nzongola-Ntalaja also regarded “the internal environment as the primary arena and determinant of the democratization process.”¹¹³⁰

These conclusions regarding the primacy of domestic factor replicate the main conclusions arrived at by scholars such as Lowenthal,¹¹³¹ Bratton and Van de Walle,¹¹³² who studied democratisation in Latin America and Southern Europe.

Bratton and Van der Walle agreed that “although international factors may condition the course of transition, the major participants and the dominant influences in every case have been national.”¹¹³³

Accordingly, “external factors serve as precipitating conditions, rather than causal ones.”¹¹³⁴

¹¹²⁷ Bratton, M. & Van der Walle, N., quoted by Wiseman, J.A., *The New Struggle for Democracy*...35.

¹¹²⁸ Wiseman, J.A., (ed.) *Democracy and Political Change*...4.

¹¹²⁹ Idem.

¹¹³⁰ Nzongola-Ntalaja, G., “Introduction” 1.

¹¹³¹ See Lowenthal, A.F., *Exporting Democracy: The United States and Latin America*, Pittsburgh: University of Pittsburgh Press, 1991.

¹¹³² Bratton, M. & Van der Walle, N., “Popular Protest...” 198.

¹¹³³ Idem.

¹¹³⁴ Ibidem.

On the other hand, Chazan observed:

“While events in Africa must be weighed in the context of global shifts, it is important to stress that the process of reform in Africa for the most part predated these changes. In the majority of cases, external events and factors reinforced existing trends, and, as time progressed, offered increasingly weighty rationales for reluctant leaders to adopt some measure of liberalization.”¹¹³⁵

The present author shares with Wiseman¹¹³⁶ and other scholars the view that there has been a conjunction or combination of pressures and winds, both internal and external, but internal pressures, and the Wind of Africa, have been the most important in explaining the unfolding of events in Africa since 1989.

However, that should not be seen, as denying the importance of the role of external factors since without them very little would have been achieved.

The impact of the end of the Cold War, for instance, cannot be ignored in the dismantling of the authoritarian rule although the American-led “War against Terror” is likely to consolidate and help some authoritarian leaders who all of a sudden are courted by Western democracies.¹¹³⁷

¹¹³⁵ Chazan, N., “Africa’s Democratic Challenge,” in Nyang’oro, J.E., (ed.), op.cit. 225.

¹¹³⁶ Wiseman, J.A., *The New Struggle for Democracy...* 36-37, 158.

¹¹³⁷ On 11 September 2001, terrorists hijacked four American planes and crashed two of them into the World Trade Centre in New York and the Pentagon in Washington. Thousands of peoples were killed during this unprecedented terrorist attack against and in the USA. To strike back, the American government embarked on a “War against Terror” campaign, which mainly meant war against Afghanistan, as the terrorists were linked to the *Al Qaeda* organisation of the Saudi-born Osama Bin Laden hosted by the Taliban government in Afghanistan. The US government needed to set up and lead a world coalition against Afghanistan in order to destroy *Al Qaeda* training camps, and arrest or kill Mr. Osama Bin Laden and his *Al Qaeda* militants. In the process, strong collaboration with the leaders of some Asian authoritarian regimes, especially those of the Arab countries of the Persian Gulf, was required. The military government of Pakistan that came to power after a *coup d’état* against a civilian democratically elected government and was under American sanctions was approached. Sanctions against Pakistan were lifted and interestingly, the authoritarian military ruler who was a pariah in the West received all honours as one of the best “friends” of American and British democrats. Any leader or government, whether authoritarian or not, could get “canonised” and become American or British “friend” provided he / it was against anti-American terrorism. “War against Terror” also offered some authoritarian leaders already engaged in the democratisation process a precious opportunity to back out of their commitments and take strict measures against their opponents on the ground that they were terrorists or supported terrorism. Democracy and

As Wiseman observed, the emphasis on internal forces represents an important corrective to perspectives, which present an overly passive view of African peoples. Such perspectives suggest a virtual incapacity for independent action by Africans who can, at most, respond to external stimuli, or, more often, simply are acted upon.

It is offensively patronising to suggest that anything that happens in Africa is primarily the result of actions undertaken by non-African outsiders.¹¹³⁸

Emphasis on domestic factors is also important to oppose argument branded by African authoritarian leaders to dismiss democratic change as imposed from outside and foreign interference in domestic affairs.

Moreover, insisting on internal factors would help African peoples understand that the establishment and consolidation of constitutionalism and democracy in their countries is their primary responsibility.

Finally, the wind of change that resulted in political reform in Africa in the late 1980s and early 1990s was not only the Wind of the East, the Wind of the West, or the Wind of Africa taken separately. It was a combination of winds, the "Wind of History," in which the Wind of Africa or of the South was instrumental.¹¹³⁹

The consolidation of constitutionalism and democracy in Africa will depend on the constant impetus of all these winds, especially the Wind of Africa.

human rights in the world, starting with the US itself became the first victims of the American-led "War against Terror."

¹¹³⁸ Wiseman, J.A., *The New Struggle for Democracy*... 37.

¹¹³⁹ Mangu, Mbata B., *Démocratie, régime pluraliste*... 10.

3.4.4. Consolidation¹¹⁴⁰ of Constitutionalism and Democracy

Very few constitutional and democratic African States have reached the stage of consolidation.

States such as Benin, Botswana, Cape Verde, Ghana, Mali, Mauritius, Sao Tome and Principe, Senegal, and South Africa may be considered cases of consolidated democracies in Africa. The criterion for consolidation is not Huntington's turn-over test, but circumstances that make irreversible the process of democratisation, and some stability in the political process.

From the SADC sub-region, a question may be asked about countries like Namibia and Zimbabwe. The latter made great impression in comparative constitutional law when they acceded to independence vested with Constitutions that were considered among the most liberal in the world and models of constitutionalism and democracy on the African continent.

Accordingly, it was expected that constitutionalism and democracy would not take long to be consolidated.

Recent developments in Namibia and Zimbabwe have proven that expectations were exaggerated.

¹¹⁴⁰As stressed earlier, Huntington has argued that an important criterion for measuring the consolidation of democracy is the "two turn-over test": "a democracy may be viewed as consolidated if the party or group that takes power in the initial election at the time of transition (from authoritarian or military rule to democracy) loses a subsequent election and turns over power to those elections winners, and if the latter then peacefully turn over power to winners at a later election." (Huntington, S. P., *The Third Wave...* 226-227). Huntington's criterion for democratic consolidation is debatable since it confines democracy to competitive elections. A democratic regime may still collapse after passing the "two turn-over test". Nevertheless, although it is not absolute, the test gives indication that a democracy is likely to be consolidated.

The fate of constitutionalism and democracy will not necessarily be the same as in many other African countries where they declined after independence before one could speak of liberalisation or democratisation in the 1980s and 1990s.

However, Namibia and Zimbabwe are facing almost the same challenges that confronted many other African countries when they adopted a multiparty system with formal trappings of democratic institutions after independence in the 1960s.

The problems encountered by constitutionalism and democracy in these countries are therefore partly linked to their infancy and it was premature to expect their consolidation as in South Africa.¹¹⁴¹

3.5. Conclusion

Discourses and debates on constitutionalism and democracy in Africa remain contradictory and passionate.

Constitutionalism and democracy were not foreign to African traditions and despite obstacles, they remain feasible in post-colonial Africa.

The long struggle of African peoples for constitutionalism and democracy was recently given momentum by a combination of factors, both external and internal.

¹¹⁴¹ Why is South Africa succeeding though apartheid only collapsed in the 1990s? That is an important research question. Admittedly, constitutionalism and democracy have their own problems in South Africa, as the case is even in old constitutional democracies. However, South Africa is not Namibia or Zimbabwe. Countries differ in terms of their particular historical, social, political, and cultural backgrounds as well as the quality of their leadership, the strength of their civil society organisations and the determination of their peoples in their struggle for constitutionalism and democracy.

As a result thereof, almost all African States embarked on liberalisation or democratisation during the last quarter of the 20th century.

For the very few countries where the transition may be said to be successful and where it led to consolidation, the struggle was characterised by four stages: rise, decline and fall, renaissance and transition, and consolidation. Not all African States went through all the four stages.

The different stages on the road to constitutionalism and democracy in post-colonial Africa are examined through the struggle for constitutionalism and democracy in the RDC.

Most of African peoples and States would recognise themselves through the long struggle of the Congolese people and the road taken by the DRC to constitutionalism and democracy since independence.

CHAPTER 4 CONSTITUTIONALISM AND DEMOCRACY IN THE DEMOCRATIC REPUBLIC OF CONGO

4.1. Introduction

With a total area of 2,344,885 square kilometers and a population of 55,225,478 (2002 estimate), the DRC is the third largest country and one of the most densely populated in Africa.

To better understand the developments that have occurred in the country since independence and even before it, it is worth considering the strategic importance of the DRC, which is located right in the middle of the continent, and its immense natural resources. Anyone, who exerts influence on politics in the DRC, either directly or indirectly, is likely to control a great part of Africa and even the entire continent.

The DRC is bordered by nine other African countries, namely the Central African Republic and Sudan, on the North; Uganda, Burundi, Rwanda, and Tanzania on the East; Zambia, on the South; Angola, on the South-West; and the Republic of Congo, on the North-West.

In terms of its natural resources, the DRC ranks among the richest countries in the world. Yet due to a continuous culture of bad governance since independence, the Congolese people are currently among the poorest people in the world, which is a terrible paradox. Around 450 ethnic groups inhabit the DRC. The Bantu peoples are the overwhelming majority of the population. They speak hundred African languages. The most important are Lingala, Chiluba, Kikongo and Swahili.

The country is divided into 11 administrative regions consisting of 10 provinces, namely Bandundu, Lower-Congo (formerly Bas-Zaïre), Equator, Eastern Kasai, Western Kasai, Katanga, North Kivu, South Kivu, Maniema, Eastern Province (formerly Eastern Zaïre), and Kinshasa, which is the capital of the Republic.

Conflicting claims advanced by various nations, notably Portugal and France, to territorial rights in the Congo region led to the convening of the Berlin Conference in 1884.

During the 1885-1886 Berlin Conference on the sharing of the African continent for the purposes of colonisation and “civilisation” by the European powers, the territory that is known today as the DRC was allotted to the King of the Belgians, Leopold II. The Congo therefore entered contemporary history in 1886 not as a Belgian colony, but as a personal possession of the King of Belgium.

Despite the name of the “Congo Free State” it was then given, the Congo was neither a Free State, nor a State at all, but a personal domain of the King who owned everything, the land, subsoil, and even the people.

According to the Belgian historian Jean Stengers,¹¹⁴² “to the King, the Congo Free State was just a going concern as Standard Oil was to John Rockefeller.”

In 1908, the King transferred his Congolese domain to his country, giving to the Belgian Kingdom the best and greatest present ever. Congo Free State became a Belgian colony.

On 30 June 1960, the Belgian Congo gained its independence from Belgium under the name of Democratic Republic of Congo, with Mr. Joseph Kasa-Vubu and Mr. Patrice-Emery Lumumba as its first President and Prime Minister respectively.

¹¹⁴² Quoted by Nzongola Ntalaja, G., *From Congo ... 6-7*.

For about five years, the new independent State, which the Belgians did not prepare for independence and never before thought of as an independent State, went through chaos and a long crisis of constitutionalism and democracy.

On 24 November 1965, following a military *coup d'état*, General Mobutu overthrew the civilian government of President Joseph Kasa-Vubu. He was the Congo's new "King" and, as a successor to King Leopold II, the rightful owner of the country and its abundant resources.

The sense of ownership was so strong that Mr. Mobutu found it fit to change the country's name unilaterally from DRC to Zaire. With the support of the Western and former colonial powers, Mr. Mobutu ruled the country for 32 years until he became so ineffective and sick that the West realised the need to find a successor.

Laurent-Désiré Kabila, a former Lumumba's disciple, who entered the rebellion in the early 1960s after Lumumba's assassination, was thereupon found in Eastern Zaire. On 17 May 1997, after seven months of a virtually unchallenged long march throughout the then Zaire, Kinshasa fell to the rebel forces of the AFDL led by Laurent-Désiré Kabila. The sense of kingdom and ownership inherited from President Mobutu was preserved. Mr. Kabila proclaimed himself president. The country was renamed the "DRC". Mr. Kabila's AFDL was the new State-Party.

The logic of kingdom was even reinforced when Joseph Kabila succeeded his father Laurent-Désiré Kabila who was assassinated on Tuesday 16 January 2001 and the international community moved quickly to recognise the new "king" and his government. The accession to power of General Kabila did not unfortunately result in the full implementation of the Lusaka Agreement signed by the DRC government under his father's presidency and the RCD and MLC.

The main aims of this Agreement, which provided for an Inter-Congolese Dialogue, were to end with the rebellion that broke out against Laurent-Kabila's government on 2 August 1998, to reunite the Congo under a single and consensual administration, and to reconcile the people of the DRC with themselves.

Despite Kabila Jr's willingness to forward the implementation of the Lusaka Agreement, the first "African War"¹¹⁴³ went on and the crisis of constitutionalism and democracy persists in the DRC.

4.2. Constitutional and Democratic Challenge to the Belgian Colonial Rule¹¹⁴⁴

Colonisation was a negation of constitutionalism and democracy. Therefore, as emphasised earlier, for countries under colonisation, independence was firstly synonymous with constitutionalism and democracy. "

¹¹⁴³ As the Congolese conflict came to be known following the involvement of national armies of several other African countries that stepped in to back either the Kabila's government (Angola, Namibia, Zimbabwe and at some stage Chad) or the RCD and MLC rebellions (Rwanda, Uganda and reportedly Burundi).

¹¹⁴⁴ For an account of the literature on the constitutional and political history of the DRC / Zaire, see, *inter alia*, Biaya, T.K., "L'ethnicité au coeur de l'idéologie nationaliste", in Kankwenda, Mbaya, (ed.), *Zaire vers quelles destinées...* 2-17; Biaya, T.K. & Omasombo, Tshonda, "Les Classes sociales dans les Réalités zairoises", in Kankwenda, Mbaya, (ed.), op.cit. 103-134; Brinton, J.Y., *The Constitution of the Congo, 1964*, Research Paper for the American Society of International Law, Washington, 1965; Kalele-ka-Bila, "Les idéologies régionalistes", in Kankwenda, Mbaya (ed.), op.cit. 18-45; Gerard-Libois, J. & Verhaegen, B., *Congo 1960*, 2 Tomes, Bruxelles: CRISP; idem, *Congo 1962*, Bruxelles-Léopoldville: CRISP-INEP; Lemarchand, R., *Political Awakening in the Belgian Congo*, Berkeley: University of California Press, 1964; Longandjo, Okitakekumba, "Le Pouvoir d'Etat du MPR, un Essai d'Interprétation", in Kankwenda, Mbaya, (ed.), op.cit. 89-102; Mangu, Mbata B., Les régimes pluralistes... supra; idem, Démocratie, régime pluraliste..., supra; Mulambu, Mvuluya, "L'Etat et sa Structure: Quête permanente de la Stabilité", in Kankwenda, Mbaya, (ed.), op.cit. 47-87; Idem, "Les masses populaires et les préalables d'une transition démocratique au Zaïre", in Nzongola-Ntalaja, G. & Lee, M.C., (eds.), *The State and Democracy ...* 53-63; Nzongola-Ntalaja, G., *The Democratic Movement in Zaire 1956-1994*, Harare: AAPS Books, 1994; Idem, "Le mouvement pour la seconde indépendance au Congo/Kinshasa (Zaire)", in Anyang' Nyong'o, P., (ed.), op.cit. 208-251; Idem, *From Zaire to the Democratic Republic of Congo*, supra; Schatzberg, M.G., "Hijacking Change: Zaire's Transition..." 113-134; Verhaegen, B., *Congo 1961*, Bruxelles: CRISP; Young, C., *Post-Independence Politics of the Congo*, Johannesburg: University of Witwatersrand, 1965; idem, *Politics in the Congo: Decolonization and Independence*, Princeton, NJ: Princeton University Press, 1965; Idem, *Introduction à la politique ...* 1968; Idem, *Introduction à la politique...* 1979; Idem, *The Congo: Background to Independence*, Johannesburg: University of Witwatersrand, 1966.

Accordingly, the struggle for constitutionalism and democracy in Africa first took the form of a struggle for independence.

There is a correlation between the struggle for independence and the struggle for constitutionalism and democracy in post-colonial Africa.

4.2.1. Internal Challenge to the Belgian Colonial Rule and Independence Movements

The main attacks against the Belgian or any other colonial rule on the African continent were first and foremost the result of efforts by Africans themselves, both the masses and elite.

Generally, the masses wanted to secure better conditions of life for themselves and a brilliant future for their offspring in a country freed from colonial slavery. For them, independence that became a buzzword encapsulated almost everything desirable.

Although a few people had an idea about independence, they considered it the end result or the crowning of a struggle that could open wide the doors of the “paradise” or “Promised Land” where people could enjoy economic development, freedom, human dignity, and sovereignty.

On the other hand, Africans who were part of the elite were not primarily interested in independence.

They had been the main beneficiaries of the colonial system, working with the colonial authorities and being associated with them in several ways. Their first aim was to enjoy the same privileges as their White colonial masters.

4.2.1.1. Nationalist Awakening in the Congo

According to Crawford Young, nationalism was a recent phenomenon in the Congo and Congolese leaders laid no public and explicit claim to independence until 1956.¹¹⁴⁵ The *Evolués*¹¹⁴⁶ were more interested in receiving the same status and material advantages and privileges as the Whites than in independence or political emancipation of the country.

Young invoked a number of reasons to explain the belated nationalist awakening in the Belgian Congo.

A first reason related to the absence of Congolese elite before 1940. Belgium applied an obscurantist colonial policy. Very few Congolese people attended high schools and at independence on 30 June 1960, less than ten Congolese citizens had completed their studies and obtained a university degree.

Secondly, exchanges among the colonised people were made extremely difficult. Perhaps worse than under apartheid, the “indigenous people”, as they were called, were not authorised to move from one area to another without a relevant permit issued by the administrator of the territory.

It was even more difficult to leave the countryside since the colonial authority considered that the cities were “corrupt” places where exchanges with the Congolese people who enjoyed some degree of political culture could help others develop “subversive” ideas such as independence, emancipation, human rights and freedoms.

¹¹⁴⁵Young, C., *Introduction à la politique congolaise* (1979) 138-139.

¹¹⁴⁶*Evolués* or “civilised” Blacks enjoyed special status *vis-à-vis* other colonised people. An indigenous Belgian Congolese only qualified as or deserved the status of *évolué* if she or he could demonstrate that her or his education or way of life approximated to that of a “civilised” White from Belgium.

Thirdly, very few contacts existed between the Congolese people within the colony and the external world.

The Belgian colony was a big and obscure prison of the type of the South African Robben Island, isolated from the external world, with no developed media and only linked to the metropolis.

A small number of Congolese citizens had left the colony before 1958. Most of them were Catholic priests or seminarists.

Fourthly, contrary to the French and British who adopted assimilation or indirect rule and thereby contributed somehow to the political education of the colonised people, the Belgian colonial policy was platonic and paternalistic.

They did very little to prepare the Congolese people for independence, political emancipation or self-determination, as they hardly had a vision of it and did not foresee the end of their colonial enterprise.

Young's analysis was an interesting one. However, it glossed over the Congolese struggles throughout the Belgian Congo and even "Congo Free State".

It neglected those who fought against colonialism far away from the Westerners' "observation posts" or expressed themselves in languages that the Westerners could not or did not want to understand.

The absence of public and general claims to independence until 1956, as Young alleged, could not amount to a total approval of colonialism.

Young contradicted himself when he also alleged that some individuals and groups in the Belgian Congo or "Congo Free State" were vocal about their rights and even paid for their nationalism with their lives.¹¹⁴⁷

Nationalist awakening in the Congo was therefore prior to the political developments that took place in the late 1950s.

¹¹⁴⁷ Young, C., *Introduction ...* (1979) 143-144.

4.2.1.2. Independence Movements

Belgian colonisation was peppered with revolts and riots. Crawford Young distinguished five steps in the evolution of nationalist movements against Belgian colonialism in the Congo.

4.2.1.2.1. The First Resistance Movements

There was no general resistance movement throughout the colony. The traditional chiefs of some politically structured entities even militarily opposed colonisation as an encroachment on their authority. The Zande, Yaka, Luba Shankadi and Shi are among the peoples who violently resisted colonial domination.

On the other hand, there were revolts of local populations against colonisation through exploitative colonial companies in some rural areas. The Boa (1903-1904, 1910) and Budja (1903-1905) are among the best known of these revolts that occurred in many regions of the Belgian colony.

Young also mentioned the mutiny in the *Force Publique*, the colonial army, in Boma (1895) and the Batetela revolt in Luluabourg (1897) as part of resistance movements.¹¹⁴⁸

4.2.1.2.2. The Syncretic Religious Movements

African religion, a blend of Christianity and tradition, was also used against colonialism. The syncretic and religious movements were ethnically based and localised in two provinces, the Lower Congo and Katanga. These were mainly Kimbanguism, the Kitawala, and to some extent the Mwana Lesa movements.

¹¹⁴⁸ Young, C., *Introduction...* 143-144.

4.2.1.2.2.1. Kimbanguism

Kimbanguism is named after Simon Kimbangu, a former Protestant catechist, who reportedly received a divine message for the liberation of the Congo in particular and the Black people in general from the colonial and White rule. Kimbangu started preaching the Gospel in March 1921. He quickly had a big following, as he started making wonders, reportedly healing sick and raising people from the dead.

Kimbangu's liberation Gospel, preceding the Latin American Theology of Liberation, espoused the aspirations of the Black and colonised peoples and presented the Messiah as African or Black Christ. However, it conflicted with the conventional discourse of Catholic and Protestant Churches that were allied with the colonial authority and associated with them in their colonial enterprise. Accordingly, Kimbangu became a public enemy.

In June 1921, hundreds colonial workers deserted to follow Kimbangu near his home city of Thysville, now Mbanza Ngungu, and the population manifested the first signs of civil disobedience and opposition to colonialism. Kimbangu went in hiding for three months, as the colonial authority had decided to arrest him. He finally surrendered in September 1921. He was arrested, judged and sentenced to death in November 1921 during a trial that African people easily compared to that of Jesus before Pontius Pilate. King Albert of Belgium commuted Kimbangu's death sentence into life imprisonment. In 1952, he was found dead in his prison in Elisabethville, now Lubumbashi.

Arguably, Simon Kimbangu is one of the first and most prominent figures in the struggle against colonialism in the Congo. The Kimbanguist Church is the first African church in the DRC, with believers in other African countries and even outside the African continent. Kimbanguism became the epitome of nationalism. It inspired early nationalist groupings, particularly ABAKO¹¹⁴⁹ that was created as a cultural association before changing into a political party.

¹¹⁴⁹ *Alliance des Bakongo.*

4.2.1.2.2. The Kitawala and Mwana Lesa Movements

The Kitawala is another religious movement that appeared in the 1930s in Katanga province and quickly spread to several other regions of the Belgian colony.

Contrary to Kimbanguism, which was mostly a rural movement of the Bakongo, the Kitawala was not linked to any specific ethnic group but it likewise gave rise to a number of revolts against colonialism. So did the Mwana Lesa (Son of God) movement, which came from Northern Rhodesia.

4.2.1.2.3. Riots and Violence in Urban Centres

Urban movements had no leaders or specific objectives and remained ephemeral. Some urban revolts were unionist, involving workers or soldiers seeking better conditions of work and life. Others were politically motivated. The most important of these revolts and riots are those that took place on 4, 5, and 6 January 1959 in Leopoldville and reportedly resulted in the massacre of many Congolese demonstrators by the colonial army.

In view of the isolation or the “Bantustanisation” of the rural areas in Belgian Congo, as explained earlier, the burden of the nationalist struggle had to rest with the Congolese people who resided in the urban areas.

4.2.1.2.4. Pre-political groupings, Tribal or Ethnic, Cultural, Intellectual Associations and Trade Unions

Pre-political groupings were tribal or ethnic, cultural, and intellectual associations or trade unions. They were primarily forums for discussion of matters of interest to their members. They intended to address some problems encountered by their members and communities, and to serve as “insurance companies” where “African solidarity” could manifest itself.

The most important pre-political groupings, dubbed cultural associations, were ABAKO and *Lulua-Frères*. The former was an association of the Bakongo particularly active in Leopoldville, the capital, where the Bakongo were the majority of the population. The latter was a rally of the Lulua, the dominant ethnic group in Western Kasai. It was represented in many urban areas in the colony and even in the neighbouring countries.

Tribal or ethnic associations paved the way for the formation of political parties. They were the training grounds and schools for future political leaders.

According to Turner, "When Congo/Zaire made its abrupt transition to independence political competition was expressed to a great extent in ethnic terms."¹¹⁵⁰

There is no Congolese leader of the independence era who did not claim membership of a tribal or an ethnic association. Joseph Kasa-Vubu, the man who later became the first DRC president, was the leader of ABAKO.

All the same, P.E. Lumumba, the first Congolese Prime Minister, was previously the president of the Mutual of the Batetela, his ethnic group. He also led several cultural or intellectual associations. He was the president of the local branch of ADAPES¹¹⁵¹ in Stanleyville (now Kisangani) and the secretary of the Association of Indigenous Post Office Employees of the Eastern Province, the Association of the *Evolués* of Stanleyville, and the Belgo-Congolese Cultural Grouping.

Cultural and intellectual associations also played a major role in the struggle against colonialism. One of the most popular among these associations was the Group of *Conscience Africaine* that was created *circa* 1955 by Catholic intellectuals such as *Abbé* Joseph Malula, Mr. Joseph Ileo and Mr. Joseph Ngalula. The Group made history when it published its Manifesto of African Conscience in 1956, shortly after the Bilsen Plan was revealed.

¹¹⁵⁰ Turner, T.H., " 'Batetela', 'Baluba', 'Basonge': Ethnogenesis in Zaire", *Cahier d'Etudes Africaines*, No.132, XXXIII-4, 1993, 588.

¹¹⁵¹ *Association des Anciens Elèves des Frères de Scheut*.

The Manifesto did not necessarily oppose the Bilsen Plan. Nor did it demand immediate independence or departure of the colonial masters. However, it called for some kind of humanisation of the colonial rule and for more rights to be granted to the Congolese people.

Finally, trade unions also indirectly engaged in the struggle against colonialism.

4.2.1.2.5. Political Parties

The origins of the first political parties in the Congo may be traced back to December 1957, less than three years before independence.

ABAKO, the first Congolese party, was created in 1950 as a cultural association of the Bakongo. However, it shortly followed the *Action Socialiste* (Socialist Action), which was the first grouping to be recognised as a political party in December 1957.

Then came the *Union Congolaise* (1958), the *Mouvement National Congolais* (M.N.C.) (October 1958) that split into M.N.C. / K¹¹⁵² and M.N.C. / L¹¹⁵³, CONAKAT,¹¹⁵⁴ P.S.A.,¹¹⁵⁵ P.N.P.,¹¹⁵⁶ BALUBAKAT,¹¹⁵⁷ CEREAS,¹¹⁵⁸ PUNA,¹¹⁵⁹ and UNIMO¹¹⁶⁰ in 1959. These were the most important parties out of hundred that were created during the last 18 months of colonisation.¹¹⁶¹

Some of these parties were of colonial origin or affiliated with some Belgian parties or associations. The Belgian lawyer, Antoine Rubbens, for instance, was one of the two founders of the *Union Congolaise*, the other being Gabriel Kenge.

¹¹⁵² *Mouvement National Congolais / Kalonji.*

¹¹⁵³ *Mouvement National Congolais / Lumumba.*

¹¹⁵⁴ *Confédération Nationale des Tribus du Katanga.*

¹¹⁵⁵ *Parti Solidaire Africain.*

¹¹⁵⁶ *Parti National du Progrès.*

¹¹⁵⁷ *Baluba du Katanga.*

¹¹⁵⁸ *Cercle de Regroupement Africain.*

¹¹⁵⁹ *Parti pour l'Union Nationale.*

¹¹⁶⁰ *Union Nationale des Mongo.*

¹¹⁶¹ Young, C., *Introduction à la politique ...* (1979) 153-158.

The *Action Socialiste* of Mr. Adoula was affiliated with the PSB¹¹⁶² and the FGTB.¹¹⁶³ The PNP was so closely related to the colonial power that it came to be regarded as a “Party of the Negroes Paid” (by White colonialists). Other parties were essentially tribal or ethnic ones, as they were identified with some tribal or ethnic groups in the Congo.

As Young aptly remarked, it was very symptomatic that in Africa the few important political parties with tribal or ethnic names were to be found in the Belgian Congo.¹¹⁶⁴

As pointed out earlier, ABAKO, for instance, stood for Association of the Bakongo, the most important ethnic group in Lower Congo and in Leopoldville.

UNIMO was the Union of the Mongo, a dominant ethnic group in Equator province while CONAKAT just stood for Confederation of Tribal Associations of Katanga.

Tribalism and ethnicism were first used to combat colonialism. However, towards the end of colonisation, the colonial authority to counter radical nationalist movements that claimed total independence engineered them.

At the start, the colonialists divided according to the *divide et impera* rule. When the colonial masters realised that the process of decolonisation was irreversible, they again started dividing to make things worse after their departure, as they did not care about what happened when they were gone.

In the 1940s, Jawaharlal Nehru blamed the British for their colonial policy:

“During three centuries, the British divided India. They now divide before departing.”¹¹⁶⁵

The same happened in Africa when the British, French and Belgian colonial rule was drawing to an end.

¹¹⁶² *Parti Socialiste Belge*.

¹¹⁶³ *Fédération Générale de Belgique*.

¹¹⁶⁴ Young, C., *Introduction*... 160.

¹¹⁶⁵ See Lapierre, D. & Collins, L., *Cette nuit la liberté*, Paris: Edition Robert Laffont, 1975, 203; Banock, M., *Le Processus de démocratisation en Afrique. Le cas Camerounais*, Paris: L'Harmattan, 1993, 83. (Translation mine).

4.2.2. External Challenge to the Belgian Colonial Rule

Colonialism was set to suffer a serious blow with the creation of the UN and uncompromising attitude towards colonialism adopted both within the international community and the national community of the colonial States.

The League of Nations addressed the colonial question through the mandate system. The mandatory power was granted rights to administer the people and territory. On the other hand, it was subject to international duties such as the duty to improve the economic, social and political conditions and promote the rights of the people in the mandated territories.

The struggle against the authoritarian colonial rule was taken further with the creation of the United Nations, which superseded the League of Nations. As stated earlier, the UN Charter contains a number of provisions dealing with human rights and one of the main organs of the world body, the Trusteeship Council,¹¹⁶⁶ was given powers to monitor the activities of administering states.

Under the UN Charter, the administering States were accountable to the international community within the UN. Accordingly, they were requested to transmit to the United Nations information regarding the territories under their authority and actions taken by them to empower the people, improve their material, social and political conditions and prepare them for self-determination.¹¹⁶⁷ Self-determination was later enshrined as a right in the International Covenant on Civil and Political Rights adopted within the UN (ICCPR).¹¹⁶⁸

¹¹⁶⁶ Chapter XII of the UN Charter.

¹¹⁶⁷ In terms of Article 73 (e) of the UN Charter, although the term "independence" is not used, administering states were to develop "self-government". Article 76 (b) went further as proclaiming "development towards independence" as one of the major objectives of the International Trusteeship System.

¹¹⁶⁸ Article 1 of the ICCPR.

Under the UN, self-determination or independence became one of the basic peoples' rights. Accordingly, it is not surprising that the overwhelming majority of African countries that were still colonised gained their independence after the creation of the UN in 1945.

The anti-colonialism movement was favoured by the presence in the Security Council of permanent members such as China, the USA, and the USSR that did not colonise Africa and therefore had little interest in the pursuit of the colonial enterprise on the continent.

On the other hand, the UN General Assembly was increasingly dominated by former European colonies in South America and Asia that could only champion the right to independence in Africa.

Outside the UN, they organised with some other countries of East Europe and created the Non-Aligned Movement (NAM). The first NAM conference, which was held in Bandoeng, unreservedly condemned colonialism. African freedom fighters and Congolese leaders like Lumumba got in the NAM the necessary support for their struggle against colonisation. NAM's countries also played an important role in the adoption of the Declaration for Decolonisation¹¹⁶⁹ by the UN General Assembly that imposed an international duty to decolonise on the colonial powers.

Aided by the USSR and the USA, the new UN Member States inveighed against colonial rule. Indeed, such was the clamour that in 1962 Lord Home, the British Foreign Secretary, complained that the UN "was excessively preoccupied with colonial problems".¹¹⁷⁰

¹¹⁶⁹ Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (General Assembly Resolution 1514 (XV)). The General Assembly asserted the right of all peoples to self-determination and called on colonial powers to take immediate steps to grant independence to their colonies. In principle, declarations or resolutions of the UN General Assembly are not binding on Member States. However, their repetition and the number of states voting for them make them part of customary international law, which is binding as a source of international law (see Article 38 (1) of the Statute of the International Court of Justice).

¹¹⁷⁰ Van Blerk, A.E., "The Fate of Constitutions in Africa: Some Reflections", *De Jure*, Vol. 22, No.1, 1992, 310.

However, no colonial power could afford to ignore the stance taken by the UN and yet expect to be respected and play a major role within the community of nations.

Belgium could not remain indifferent to these developments in international affairs. As Young put it, Belgium is a small country that has always feared external intervention in its colonial affairs and remained very sensitive to its international obligations.¹¹⁷¹

The external challenge to colonialism also came from within the colonial power itself, as there was no total agreement among Belgian political parties and within the civil society about the continuation of the colonial Belgian enterprise in the Congo.

4.2.3. Colonial Response to the Struggle for Independence and the Bilsen Plan: From Repression and Liberalisation of Colonialism to Independence

Belgium did not have any decolonisation plan for the Congo and arguably many Belgians, including academics, never thought of it, as the Belgian Congo was considered a Belgian province.

Young lamented that there was no tradition of critical studies of colonialism in Belgian universities or among Belgian academics.¹¹⁷² Such a tradition was neither welcomed nor encouraged. Even the moderate Bilsen Plan published in 1955, which envisioned independence after 30 years was received with a great deal of criticism.

Professor Bilsen became a pariah, not only in Belgium but also in the Congo, where the champions of “immediate independence” and even moderate intellectuals dismissed his plan. Yet, Bilsen was among the very few people who spoke about independence and even pronounced the “damned” word. The Marzorati Group he set up in 1957 was the only group working with a view to promoting political emancipation of and in the Congo.

¹¹⁷¹ Young, C., *Introduction* ... 28.

¹¹⁷² *Idem* 20.

As it was attacked on all sides, the Belgian colonial power was bound to respond, at least for its survival as colonial power. The Belgian colonial response may be captured in a few words: repression, liberalisation, promise of independence and independence.

4.2.3.1. Repression of the Movement for Independence¹¹⁷³

Repression is the first language of any authoritarian rule. Accordingly, the first resistance movements were forcefully repressed. Religious syncretic movements and anti-colonial associations were disbanded. Their leaders were either killed or arbitrarily sentenced to life imprisonment, as in the case of Kimbangu.

Repression of urban riots and violence left hundreds injured or dead. The activities of many associations were closely monitored and political parties waited for a long time before they could be authorised. Arguably, Belgian colonialism was among the most brutal of all.

4.2.3.2. Liberalisation of Colonialism

As pressure intensified and Belgian colonialism was confronted with the crucial challenge whether to adapt and survive or face humiliation, Belgium felt bound to liberalise its authoritarian colonial rule in the Congo.

The most important signs of this liberalisation of Belgian colonialism were the reforms of March and May 1957 that decentralised the territory and affected the urban and rural administrative entities respectively. These reforms of local government were aimed at involving the Congolese people in the government of their own entities.

¹¹⁷³ See Nzongola-Ntalaja, G., *The Democratic Movement in Zaire*, supra; Idem, "Le mouvement pour la seconde indépendance..." 208-251; Verhaegen, B., *Congo 1961*, supra; Gerard-Libois, J. & Verhaegen, B., *Congo 1960*, supra; Beys, J. *et al.*, *Congo 1963*, Bruxelles – Léopoldville: CRISP & INEP, 1963.

Other reforms concerned the organisation of the first municipal elections, which saw the first Congolese leaders elected as mayors. Joseph Kasa-Vubu, for instance, became the first Congolese mayor of the municipality of Dendale in Léopoldville and from this time onwards the march to independence became irreversible. Political activities intensified as well as claims for independence.

The liberalisation of colonialism therefore required decentralisation and elections. This liberalisation of colonialism did not entail that the colonial power was prepared to grant independence to the people of the Congo. Nor did it imply that the repression era was over. As demonstrated by the repression of the riots of 4 January 1959 in Leopoldville, liberalisation alternated with repression in the colonial strategy and resulted in the accession to independence.

4.2.3.3. The 1959 Leopoldville Massacre, the Belgian Royal Speech and Governmental Declaration Promising Independence

4.2.3.3.1. The Massacre

In the afternoon of Sunday 4 January 1959, violent riots took place in Leopoldville following the interdiction of an ABAKO meeting that was convened by Mr. Kasa-Vubu, the mayor of Dendal and ABAKO president.

The *Force Publique* was sent to intervene. They opened fire on the demonstrators and hundreds were reportedly killed.

Riots continued on 4 and 5 January 1959. The massacre of 4 January 1959 became the most decisive event in the struggle for independence and it is no surprise that 4 January was later promulgated a national public holiday to celebrate the martyrs of independence.

After these violent riots and their repression, the colonial power could no longer be mistaken about the real intentions of the Congolese people who demanded total and immediate independence, and not just better conditions of life. Written in red with the blood of the Congolese people of Léopoldville, who certainly did not appreciate the magnitude of the event and its impact on their struggle for independence, the message was directly understood by the Belgian government and monarchy.

The January 1959 events broke the long silence of the Belgian government on the issue of independence. Just a few years after the rejection of the Bilsen Plan, considered to be a utopian dream of a naïve Negrophile Belgian intellectual, independence was no longer a myth, and the Belgian King had to take the stage and speak out.

4.2.3.3.2. The Belgian Royal Speech and Governmental Declaration

On 13 January 1959, just a week after the massacre, two important messages were delivered in Belgium concerning the fate of the Belgian colony.

The first was a royal speech and the second a governmental declaration by the Minister of the Colonies.

King Baudouin I announced the resolution made by the Belgian Kingdom to lead the Congolese peoples towards independence in prosperity and peace. On the other hand, Minister Van Hemelrijck affirmed that Belgium was committed to organising a democracy in the Congo capable of exerting the prerogatives of sovereignty and deciding about its independence.¹¹⁷⁴

The Governmental Declaration had been delayed several times before and it is certain that it would not have explicitly promised independence if the riots had not taken place.

¹¹⁷⁴ See Young, C., *Introduction...* 30.

After the promise on 13 January 1959, the colonial power gave the impression that it did not intend delivering on its commitment for independence.

Belgium first advocated elections of municipal and rural councils in December 1959. Municipal and rural councils were to constitute electoral colleges. In turn, the latter were to set up provincial councils that were responsible for the election of the members of the National Assembly. This unilateral organisation of the elections was rejected by the most important Congolese parties, namely ABAKO, PSA, MNC / L and MNC / K, which in return demanded direct negotiations in the form of a round table conference between Belgium and Congolese leaders.

After much hesitation, Auguste de Schrijver, the Minister of Belgian Congo and Rwanda-Urundi, called off the elections initially set for December 1959. On 15 December 1959, he finally accepted the idea of a round table conference in Brussels, which was to be attended by Belgian parliamentarians and leaders of important Congolese parties.

4.2.3.4. Brussels Round Tables, Constitutional Debates and Belgian Expectations

4.2.3.4.1. Round Table Conferences and Constitutional Debates

Two conferences were held in Brussels in the course of 1960 to decide on matters pertaining to independence. The most interesting one insofar as the road to constitutionalism and democracy is concerned, was the Political Round Table Conference. The other was the Economic Round Table.

After the colonial authority agreed to independence, debates revolved around a number of important issues that were to dominate the negotiations during the Political Round Table Conference from 20 January to 20 February 1960.

The first issue concerned the date of independence or the actual moment of transfer of power from the colonial authorities to the newly elected Congolese government. The second issue related to the nature of the political system or regime to be established and the third the division of power between the central government and the provinces or the form of the State.¹¹⁷⁵

On 27 January 1960, Belgium announced that independence would be granted on 30 June 1960. The problem about the time of independence was therefore settled.

As for the system of government, it was not really a big issue. The Congolese leaders unanimously adopted a parliamentary system, as they did not want something that could be less than in Belgium in order to gain some international legitimacy.

The question of the form of the State at independence was the most discussed by the Congolese leaders. The issue was whether the new Congolese State should be a federal or a unitary state.

According to Young, this issue was “the point the most dangerous”¹¹⁷⁶ during the Political Round Table Conference and afterwards. The debate opposed the “Federalists” and “Anti-Federalists”.¹¹⁷⁷

¹¹⁷⁵ Young, C., *Introduction...* 141.

¹¹⁷⁶ *Idem* 304.

¹¹⁷⁷ A similar debate took place in South Africa, almost 33 years later, during the Multi-Party Negotiations of 1993. It mainly opposed the Inkatha Freedom Party (IFP) and the National Party (NP) on the one hand, and the African National Congress (ANC) on the other.

IFP was predominantly an ethnic party, the party of the Zulu people, while the NP was mainly the party of the White minority that ruled the country during apartheid. Both were opposed to the ANC and championed a federal State or a federation. A charismatic leader, namely Nelson Mandela, led the ANC, which was the main party that combated the apartheid regime. Unlike the IFP and the NP, the ANC favoured a unitary State. For an interesting account of the “story” in South Africa, see, for instance De Villiers, B., (ed.), *Birth of a Constitution*, Juta & Co, 1994; De Villiers, B., “Federalism in South Africa: implications for Individual and Minority Protection”, *SAJHR*, 1993; Van Wyk, D.H., “Introduction to the South African Constitution”, in Van Wyk, D.H. *et al.* (eds.), *Rights and Constitutionalism...* 131-170.

The MNC/L, the leader of the unitarists, favoured a unitary State and opposed federalism. A provincial MNC/L congress declared in April 1960:

“Federalism... actually results in a dangerous ethnic separatism and tribal wars.”

To this, ABAKO as a federalist leader could respond that unitarianism was the real danger:

“A federal unity is much better.”

4.2.3.4.2. Belgian Expectations

Belgium expected that the Congolese leaders would accept King Baudouin I to be the King or Head of State of independent Congo, as had happened in the case of Ghana with the Queen of England who also became the Queen of Ghana on independence in 1954. However, King Baudouin I was unfortunate, for despite popularity among the people of the Congo, which he visited several times, the Congolese parties represented during the Political Round Table Conference opposed the monarchy.

Another issue that failed to be resolved according to Belgian expectations concerned the type of relations between Belgium and its former colony on independence. As understood by Minister Auguste de Schrijver and the Belgian government, Belgium intended to maintain its sovereignty on key matters such as defence, foreign affairs, currency, and telecommunications.¹¹⁷⁸

In the 1960 Congo, the equivalents of the South African federalist parties were mainly ABAKO, CONAKAT and MNC/K, which were mainly ethnic parties, the parties of the Bakongo, Balubakat and Baluba respectively. On the other hand, the MNC/L, like the ANC, was a majority party under the leadership of Mr Lumumba. It argued for a unitary state.

¹¹⁷⁸ See Young, C., *Introduction...* 105.

Belgium wanted to follow France, another colonial power, which managed to grant independence and yet keep its former colonies (except Guinea of Sékou Touré) within the system of Community, with France retaining sovereignty on several important matters.

Here again, Belgium failed because it did not prepare for decolonisation. The matter was left to a Treaty of Friendship and Technical Assistance signed on 29 June 1960 by the Belgian government and its Congolese counterpart. Unfortunately, neither the Belgian nor the Congolese Parliament ratified the treaty.

4.2.3.5. Enactment of the Fundamental Law, Elections and Establishment of the First Congolese Institutions

4.2.3.5.1. The Fundamental Law

As pointed out earlier, the DRC Fundamental Law at independence¹¹⁷⁹ was complemented and modified by two other Acts, also dubbed Fundamental Laws, assented to and enacted into law on 17 June 1960.

The first was the Fundamental Law on Parliamentary Inquiries and the second the Fundamental Law on Public Freedoms.

Compared to Fundamental Laws of other newly independent states, the Congolese Fundamental Law presented a few particular features. It was more Belgian in origin than Congolese, as it was drafted by Belgian (constitutional) experts and tabled by the Belgian government in Belgian parliament that discussed and adopted it. It was later assented to and promulgated by the King Baudouin I and countersigned by the Belgian Ministers of Justice and of Belgian Congo and Rwanda-Urundi, namely De Schryver and Merchiers, on 19 May 1960.

¹¹⁷⁹ In the following, reference will be essentially made to the major instrument, which is the *Loi Fondamentale relative aux structures du Congo* of 19 May 1960.

As stressed earlier, this made it essentially a Belgian law, despite taking into consideration many concerns of the Congolese leaders during the Political Round Table Conference. The Congolese Fundamental Law was enacted long before the DRC could exist as an independent state, and no Congolese institution was involved. Be that as it may, it is on the basis of this law that the first Congolese elections were held and institutions established.

4.2.3.5.2. Elections and Establishment of the First Congolese Institutions

According to resolutions taken during the Political Round Table Conference, legislative elections were to be organised prior to independence on 30 June 1960 to inaugurate the Chamber of Representatives and the Senate.

Acting on behalf of the people of the Congo in terms of the colonial “mandate”, the Belgian Government enacted an electoral law on 23 March 1960.

Legislative elections took place in May 1960. The MNC / L was the winner even though it did not get an absolute majority, obtaining only 41 out of 137 seats in the Chamber of Representatives and 19 out of 84 in the Senate.

Other great parties that obtained more than ten seats in the House of Representatives were PNP (15), PSA (13), ABAKO (12), and CERECA (10).¹¹⁸⁰

With these elections, the establishment of the first Congolese government became possible.

M. Lumumba was appointed Prime Minister and his Cabinet invested by the House of Representatives on 23 June 1960.

¹¹⁸⁰ For an account of the results of the legislative elections held in May 1960, see Young, C., *Introduction...* 157.

As for the Head of State, Joseph Kasa-Vubu was invested on the eve of independence, namely 29 June 1960, according to the Fundamental Law and the procedure prescribed by the Belgian King. On 30 June 1960, the former Belgian Congo obtained independence.

4.3. Constitutionalism and Democracy under the Fundamental Law and the First Congolese Republic (1960-1965)

4.3.1. Background

The present section deals with the constitutional framework and functioning of the regime and the state under the Fundamental Law, or the "First Republic", from independence up to the military *coup d'état* on 24 November 1965.

4.3.2. Constitutional Framework

4.3.2.1. The Political Regime

In order to ascertain the nature of the political regime established by the Fundamental Law, it is worth looking at national institutions vested with legislative, executive and judicial powers respectively and the relationship between them.

4.3.2.1.1. Parliament

In the Republic, at the national level, the legislative authority was vested in Parliament (Chapter III).

In terms of Article 8, Parliament was bicameral. It consisted of the Chamber of Representatives and the Senate. The legislative competence of the two Chambers was identical. Both participated in the legislative process (Article 50). The sittings were public, unless circumstances dictated and Parliament decided otherwise (Article 52).

The two Chambers were elected for a minimum three-year and a maximum four-year term (Article 67). No imperative mandate was prescribed. The members of the Chambers voted in their personal capacity (Article 57).

Each Chamber was to elect its own President and Deputy-President (Article 79). The Fundamental Law went as far as determining the pay of the members of Parliament (Article 79 and 80), a question that did not need be settled in a constitutional text.

4.3.2.1.1.1. The Chamber of Representatives

The Members of the Chamber of Representatives, called Deputies, were elected by direct universal ballot in constituencies determined by the electoral law of 23 March 1960. Their number was determined in the proportion of one Deputy for 100, 000 inhabitants and an additional Deputy for each fraction of the population less than 100, 000 but larger than 50,000 (Article 84). They represented the Nation and not their constituencies (Article 85).

4.3.2.1.1.2. The Senate

Provincial assemblies elected 14 senators *per* province, including at least three traditional chiefs or local personalities and could co-opt others equally by province.

The number of co-opted senators could not exceed 12 (Article 87). They represented their respective provinces (Article 96).

To fill a vacancy in the office of the Head of State, the President of the Senate was to be appointed Acting Head of State after having been sworn in by the two Chambers in the presence of the Government (Articles 13, 33, and 34).

4.3.2.1.2. The Executive

The executive as established by the Fundamental Law consisted of the Head of State and the Government.¹¹⁸¹

4.3.2.1.2.1. The Head of State

The Fundamental Law did not stipulate whether the Head of State was to be a president or a monarch. Likewise, the Congo was just presented as an “indivisible and democratic state” (Article 6).

No mention was made of its independence or sovereignty, as is generally the case in the first provisions of a Constitution.¹¹⁸² It mentioned 30 June 1960 as the date of independence, as if this was more important than independence itself.

Chapter 1 of the Fundamental Law dealt with the Head of State, its appointment and powers.

A very interesting question concerns the first Congolese Head of State and the nature of the State. Despite opposition by the Congolese leaders during the Political Round Table Conference in Brussels, according to the Fundamental Law, the first DRC Head of State was not an African or a Congolese citizen. It was not a president, but a king and this was covered by the title “Head of State”. The Belgian King Baudouin I was the first Congolese Head of State. There are a number of reasons to support this view.

¹¹⁸¹ The Head of State is head of the executive power of the State. The Fundamental Law, however, dealt separately with the Head of State (Chapter 1) and the “Executive Power” (Chapter 2). Executive power was confined to “Government”. This was unfortunate even in terms of the Fundamental Law itself since Article 17 provided that “The executive power ... belongs to the Head of State under the countersignature of the responsible minister”. Accordingly, there was no more reason to dissociate the Head of State (Chapter I) from the Executive Power and to confine the latter to the Government (Chapter II).

First, the King was the one who assented to and signed the Fundamental Law. The preamble to the Congolese Fundamental Law starts with “Baudouin, King of the Belgians”.

According to Article 10, the King determined the administrative organisation of the services of Parliament and the procedure for the election of the President and the two Deputy Presidents of both the Chamber of Representatives and the Senate.

Secondly, Article 22 provided that that the Prime Minister was appointed and dismissed by the Head of State. Accordingly, M. Lumumba was appointed Prime Minister by the Belgian King acting as the King and Head of State of the Congo in terms of Article 47.

4.3.2.1.2.2. The Government

The Government (Chapter II, Section I) should be understood in its narrow sense to mean the Cabinet. According to Article 35, it consisted of the Prime Minister and Ministers (at least one *per* province) who were appointed and could be dismissed by the Head of State (Article 22). Some powers were vested in the Prime Minister and others in the Council of Ministers.

The Prime Minister conducted the policy of the Nation in agreement with the Council of Ministers. He was the head of the government and presided over governmental activities (Article 36).

Specific provisions in the Fundamental Law concerned the formation of the first Congolese government. The members of this government were appointed by the Belgian King prior to independence, and even before the appointment of the “Congolese”¹¹⁸³ Head of State (Articles 47 & 48).

¹¹⁸² See Section 1 of the 1996 Constitution of the Republic of South Africa.

¹¹⁸³ Emphasis mine.

It is worth noting that the first constitutional task of the first Congolese government was to enter into treaties with the Belgian government, “before independence and even before the appointment of the Head of State” (Article 49). Through these treaties, Belgium intended to preserve its historical links with its former colony.

4.3.2.1.3. The Judiciary and the Constitutional Court

Chapter V provided for the judiciary and its independence.¹¹⁸⁴ However, the independence of the judiciary as a state institution cannot go without the independence of the State itself.

The judicial authority was vested in the Courts of Appeal, Courts¹¹⁸⁵ of First Instance (High Courts), District Courts, Police Courts, Traditional Courts, and Military Courts (Article 191).

At independence, appeals against judgements of the Courts of Appeal and Tribunal of First Instance in the Congo were to be lodged in Belgium, with the Belgian *Cour de Cassation*, which also acted as the *Cour of Cassation* of the Congo (Articles 189 & 190). Understandably, all the judges on the *Cour de Cassation* were Belgians.

On the other hand, Congolese ministers could be prosecuted and judged by a court of law in the Congo. In this case, the court consisted of three justices of the Belgian *Cour de Cassation* appointed by its First President, a Deputy Public Prosecutor before this Court appointed by the Public Prosecutor, and a registrar appointed by the First President of the *Cour de Cassation* (Article 40).

¹¹⁸⁴ Chapter 8 of the Fundamental Law.

¹¹⁸⁵ In French and Belgian judicial systems, “Court” is only used to design judicial institutions of a level equal or higher than that of Courts of Appeal. Inferior jurisdictions are referred to as “Tribunal”, which has another sense in the Anglo-American system where a tribunal basically deals with administrative matters.

Even after independence, the members of the Congolese government could therefore be prosecuted, judged and sentenced in their own country (Congo) by judges appointed for them by the government of the former colonial power. This speaks volumes for the formal independence granted to the Congo in 1960.

Another institution close to the judiciary was the Constitutional Court (Article 226 to 236, Title VI). The Fundamental Law determined the competence, organisation and procedure of the Constitutional Court. It consisted of a Chamber of Constitutionality, a Chamber of Conflicts and a Chamber of Administration (Article 226).

The Chamber of Constitutionality dealt with the constitutionality of Bills, Acts of Parliament and provincial Acts prior to their promulgation. Its competence included the certification of the provincial constitutions (Articles 230 and 231).

The Chamber of Conflicts decided the conflicts of competence between the central government and provinces (Article 232 to 235).

As for the third chamber, namely the Chamber of Administration, it was competent to deal with judicial review of the administrative acts and could grant appropriate relief or compensate anyone for exceptional damage resulting from a decision by a national, provincial or local authority (Article 236).

Despite the close relationship between them, the Constitutional Court was not listed as an institution of the judiciary.

4.3.2.1.4. The Parliamentary Regime

A close examination of the relationship between the executive and legislative powers under the Fundamental Law leads to the conclusion that it established a parliamentary regime.

First, the two chambers of Parliament elected the Head of State (Article 33). As a person, the Head of State was inviolable (Article 19). He was not responsible for the powers and functions of the executive vested in him by the Fundamental Law (Article 17). Only the Prime Minister and Ministers were responsible (Article 17 and 19).

No act of the Head of State was valid unless countersigned by a minister who thereby took responsibility for it (Article 17, 19, 20, and 21).

Secondly, the ministers were also members of Parliament (Article 38). After its formation, the government was subject to the confidence of the Chambers. It was a collegial institution accountable to Parliament. The government could be removed from office by a supporting vote of at least 2/3 of the members of each of the two Chambers or the absolute majority of all the members of Parliament (Article 43).

In this case, the government was requested to submit its resignation to the Head of State, but it remained in office until a new government was appointed (Article 44). The individual responsibility of a member of government could also be questioned through a vote of censure (Article 45) that could result in the resignation of the interested member of the government and not necessarily that of the entire government (Article 46).

Thirdly, the Chambers could be adjourned (Articles 31 and 70) or dissolved by the Head of State after deliberation of the government and with the approval of one of the Chambers (Articles 32, 71, and 72).

However, the parliamentary regime presented some particularities when compared with the one in Belgium, especially regarding more important powers granted to the Head of State and the two Chambers of Parliament. The Head of State and the two Chambers were the Constituent Power (Article 4). The Head of State could even be authorised by the Chambers, at the request of the government, to enact legislative ordinances and for a limited period measures that fell within the domain of law (Article 37).

4.3.2.2. The Form of State: Was the Congolese State a Unitary or a Federal State?

What ultimately emerged from the Fundamental Law was silence or consensus, a quasi-federal state. Like in the 1996 South African Constitution,¹¹⁸⁶ there were both federal and unitary features in the Congolese Fundamental Law.

4.3.2.2.1. Federal Features

The first federal feature in the Fundamental Law was the composition of Parliament whose one chamber, the Senate, represented the provinces (Articles 87 and 97).

Secondly, an entire Title of Title V provided for the distribution of legislative powers between the central and provincial governments.

It defined the functional areas of exclusive national legislative competence (Article 219), exclusive provincial legislative competence (Article 220), and concurrent legislative competence (Article 221).

A provincial assembly could pass a constitution for its province. Before it could come into operation such a constitution had to be certified by the Chamber of Constitutionality of the Constitutional Court (Articles 160 and 231.1).

¹¹⁸⁶ See Davis, D. *et al.*, "Democracy and Constitutionalism..." in Van Wyk, D., *et al.*, (eds.), *op. cit.* 115; De Ville, J., "The guidelines for judicial review on 'division of powers' grounds", *Stell LR* 1995 (2), 139; De Villiers, B., "Federalism in South Africa: implications for individual and minority protection", *SAJHR*, 1993, 374 -375; *Idem*, "Regional government in the New South Africa: The Experience of India and Nigeria", *SAPR / PL*, 1992, 112-113; Devenish, G.E., "The Prospects for Constitutional Litigation in Relation to the Powers of the Central and Provincial Governments as Contained in the Interim Constitution, and Related Issues", *THRHR* 1996, 35 - 48; Elazar, D.J., "Form of State: Federal, Unitary or ...", in De Villiers, B., (ed.), *Birth of a Constitution*, Juta & Co, 1994, 30, 35; Klaaren, J., "Federalism", in Chaskalson, M. *et al.*, (eds.), *op.cit.* 5.1-5.2, 5.7; Mangu, Mbata B., *Separation of Powers...* 22-23; Watts, R., "Is the new South African Constitution federal or unitary?" in De Villiers, B., (eds.), *op.cit.* 85.

The executive and legislative powers in a province were vested in the provincial government and assembly respectively (Article 17).

The provincial assemblies had also to approve the national constitution before it came into operation (Article 99 to 101).

A further federal mechanism to ensure cooperation between the central and provincial governments was the office of State Commissioner.

The State Commissioner represented the central government in every province (Article 180-184).

The Head of State appointed him with the approval of Senate and after consultation with the President of the provincial government or the President of the Assembly of the province where he was to be appointed.

The State Commissioner was appointed for a term of three years (Article 182) and State or national services in a province were under his authority (Article 184).

Finally, the Constitutional Court through one of its three chambers, namely the Chamber of Conflicts, decided disputes between the central and provincial governments (Article 232 to 235).

Despite the above federal features, as part of the consensus among the Congolese leaders, the word federalism or federal state was not used in the Fundamental Law itself. According to Young, federalism was “implicit”.¹¹⁸⁷

The partisans of federalism¹¹⁸⁸ nevertheless kept on asserting that the Fundamental Law was federalist and established a federal state. Those who favoured a unitary State and emphasised the unitary features in the Fundamental Law rejected this view.

¹¹⁸⁷ Young, C., *Introduction...* 304-306.

¹¹⁸⁸ It is worth outlining that the Congolese leaders like some scholars confused “federalism” or “federal principle” and “Federal State” or “Federation” that are related, but different concepts. See Chapter 2 of this work.

4.3.2.2.2. Unitary Features

Article 6 provided that the Congo was an indivisible state. Parliament enacted laws for all or part of the country (Article 208).

Furthermore, the distribution of powers was in favour of the central government (Title V). In matters of concurrent competence, any provincial legislation inconsistent with an Act of Parliament was invalid (Articles 209 & 221).

The number of the matters within the exclusive competence of the central government (Article 219, 36 matters) was far superior to the 16 matters in the exclusive competence of a provincial government (Article 220), while only two matters fell within the concurrent legislative competence: social security and the determination of minimum wages (Article 221).

The State Commissioner was an institution much more in the service of a unitary than a federal State.

As a representative of the central government in a province, he could through the provincial government call the provincial assembly for an extraordinary session (Articles 132, 134).

The duration of a session of the provincial assembly to adopt a provincial constitution was one month and could not exceed two months. However, the State Commissioner could extend this duration (Article 132).

Furthermore, the State Commissioner could adjourn a provincial assembly (Article 138) and even dissolve it (Article 139).

He could request the convening of the provincial assembly by the provincial government with a view to the election of members of the Senate (Article 140).

Finally, according to Article 184, in case of emergency and when two successive calls to either the President of the Provincial Assembly or the President of the Provincial Government were unsuccessful, the State Commissioner was entitled to enact measures to enforce a law, a legislative ordinance or an ordinance in a province (Article 184).

The interference of the central government in the provincial matters was inimical to the logic of a full-blown federal state. On the other hand, provinces did not actually have the financial means to give effect to their decisions.

All this served as argument for unitarists like PE Lumumba to claim that the Fundamental Law established a unitary state. However, given the mixture of both federal and unitary features, the more correct view is that it was not a fully-fledged federal or unitary state, but a quasi-federal state. However, looking at the predominance of national institutions (Parliament, State Commissioner) and the tremendous imbalance in the constitutional allocation of matters between the central and provincial governments, this author's view is that unitary features pre-empted the federal ones.¹¹⁸⁹

The Fundamental Law brought satisfaction neither to the federalists nor to the unitarists, but all parties accepted it.

4.3.2.3. Pluralism and Human Rights under the Fundamental Law

The Fundamental Law on Public Freedoms only entrenched first-generation or civil and political rights. These were namely respect for human dignity (Article 1); equality in dignity (Article 2); life and physical integrity, non-subjection to torture and inhuman or degrading treatment (Article 3); the right not to be subject to slavery or servitude, forced labour (Article 4); access to courts, fair trial, rights of arrested, detained and accused persons (Articles 5 to 7); inviolability of domicile (Article 9); freedom of correspondence

¹¹⁸⁹ Young, C., *Introduction...* 306.

and privacy of communications (Article 10); the right to marriage (Article 11); freedom of thought, conscience and religion (Article 12); education (Article 13); property rights (Article 14); freedom of expression (Article 15); the right to peacefully assemble, freedom of association, demonstration, picket and petition (Article 16); and freedom of occupation and profession, the right to strike, the right to work, the right to decent salary, the right to leisure, and the right to labour relations practices (Article 17). Article 18 was the suspension clause.

4.3.3. Functioning of the Regime and the State: The First Congolese Crisis¹¹⁹⁰

The first Congolese crisis manifested itself in mutinies, ethnic secessions, decline of Parliamentarianism, *coups d'état*, and rebellions.

The Congolese leaders called on the UN for assistance before resorting to inter-Congolese talks in order to put an end to the crisis.

4.3.3.1. Mutiny in the *Force Publique*

The first manifestation of the Congolese crisis was the mutiny in the *Force Publique*. On 7 July 1960, General Jansens, the Belgian commander of the *Force Publique*, called together the Congolese non-commissioned officers and wrote on the blackboard the following equation: "After Independence = Before Independence".

In the evening of the same day, a mutiny erupted in the main garrison of Léopoldville, namely Léopold Camp, and in several other camps in the country.

The Congolese soldiers demanded their promotion and the *Africanisation* of the army, as the only officers were still white and Belgians.

¹¹⁹⁰ We refer to this as the "First Congolese Crisis" since the history of this country since independence has been a succession of crises.

The mutiny had disastrous consequences and combined with other elements, it engulfed the Congo in a crisis that lasted for at least five years. The first blow against the Congolese State therefore came from the army.

Since then, it has been a key actor in the Congolese crisis. This should be considered whenever the rebuilding of the state and the establishment and consolidation of constitutionalism and democracy in the Congo are envisaged.

4.3.3.2. Secessions

The Congolese secessions had two common features. First, they were ethnically-based. Secondly, they came from the provinces and were promoted by the parties that were opposed to the central government led by Prime Minister Lumumba and that were supported by the former colonial power, namely Belgium.

The Belgians also hated Lumumba. The Congolese Prime Minister was considered a public enemy in Belgium for his radical anti-colonialism and his vehement criticism against the Belgian colonial rule, as expressed in the speech he made on 30 June 1960 in the presence of King Baudouin I.

On the other hand, the two provinces of Katanga and South Kasai were important for the former colonial power not only because they were led by politicians (Tshombe in Katanga and Albert Kalonji in South Kasai) opposed to M. Lumumba, their common enemy, but also because they were the richest provinces in terms of mineral resources, a matter of great interest to Belgium. Katanga had copper and South Kasai diamonds.

The province of Lower Congo, under ABAKO leadership, was opposed to the central government of M. Lumumba and would have also opted for secession. However, Joseph Kasa-vubu, ABAKO leader, was the President of the Republic, and that was instrumental in preventing ABAKO and the Lower Congo from seceding from the central government.

4.3.3.2.1. Katanga Secession

On 11 July 1960, the Katanga proclaimed itself independent and seceded from the central government with the full support of Belgian troops.¹¹⁹¹

Moïse Tshombe, CONAKAT president, became the president of the secessionist and puppet State of Katanga. By supporting the Katanga secession and M. Tshombe, the Belgians certainly wanted to take their revenge on Lumumba. It is also this author's view that they might have been inspired by Rhodesia and South Africa since the Katanga secession provided the Belgians who had fled Léopoldville with a golden opportunity for having their own State in Katanga.

Mr. Tshombe had no army, but Belgian troops. His chief advisors were Belgians. Besides, the 2000 Belgian parliamentary inquiry into the assassination of Prime Minister Lumumba revealed that the Secessionist State of Katanga and its government presided over by Mr. Tshombe were mainly a Belgian creation.

4.3.3.2.2. South Kasai Secession

The second province to secede from the central government was South Kasai, which, like Katanga, was under the leadership of a splinter group of MNC / L, namely the MNC / K of M. Albert Kalonji, another Lumumba foe.

A few weeks after the Katanga secession, on 8 August 1960, M. Kalonji announced the secession of South Kasai with himself as emperor, "Mulopwe". As such, he became the Head of the new State of South Kasai.

¹¹⁹¹ Young, C., *Introduction...* 169.

M. Kalonji was a close ally of Tshombe's, united in their visceral hate of Lumumba and with common support from Belgium.

However, despite diamonds, the Belgian community was smaller and Belgium had in South Kasai fewer interests than in Katanga. On the other hand, M. Kalonji did not enjoy the same political, diplomatic and financial backing as M. Tshombe.

Therefore, the central government was able to move swiftly to crush the secession of South Kasai, which was shorter than that of Katanga.

As stated earlier, the ethnic factor, a poor leadership without strong political maturity, hunger for personal power, and more importantly, the influence of the former colonial ruler that very reluctantly granted independence were the main factors to blame for secessions in the early years of the Congolese independent State.

4.3.3.3. Decline of Parliamentarianism

4.3.3.3.1. Dismissal of Prime Minister P.E. Lumumba by President J. Kasa-Vubu

On 5 September 1960, President Joseph Kasa-Vubu dismissed Prime Minister Patrice-Emery Lumumba.

A number of factors may help understand the dispute between the President of the Republic and the Prime Minister.

First, the opposition between the two nationalist leaders dated back to the period before independence. It continued during the Political Round Table Conference in Brussels and after the first legislative elections.

Mr. Lumumba opposed the designation of Mr. Kasa-Vubu, firstly as Prime Minister,¹¹⁹² and then as President of the Republic.¹¹⁹³

¹¹⁹² Gerard-Libois, J. & Verhaegen, B., *Congo 1960...* 284-289.

¹¹⁹³ *Idem* 294.

On the other hand, Kasa-Vubu's ABAKO was against the appointment of M. Lumumba as Prime Minister.¹¹⁹⁴ Finally, as events turned, they had to accept one another.

Nevertheless, there was more convenience than love in that constitutional "marriage". Each of the two actors awaited the first opportunity to get rid of the other.

Just after independence, Mr. Lumumba, for instance, was already thinking of new elections and a new Constitution that could establish a presidential regime wherein the powers of President and Prime Minister would be united in the hands of one man. The establishment of a fully-fledged presidential regime was very likely to result in the termination of the functions that were so far exercised by President Kasa-Vubu.

On the other hand, President Kasa-Vubu was obsessed with the idea of a *coup d'état* that could be perpetrated by Prime Minister Lumumba.

In the meantime, opposition to Lumumba had been growing in Léopoldville and in the rest of the country, especially after the mutiny in the *Force Publique* and the Katanga and South Kasai secessions.

Kasa-Vubu, Kalonji and Tshombe were united against Lumumba. This opposition block was ready to welcome any action, whether dismissal or assassination, of Prime Minister Lumumba.

In addition and more importantly, as highlighted earlier, there was the former colonial power, Belgium, which reluctantly accepted the appointment of Mr. Lumumba as Premier Minister, as it had no choice. Belgium therefore supported the "anti-Lumumbist" block.

Mr. Lumumba was reportedly a radical and an anti-Belgian leader, the Congolese Belgian Political Enemy Number One.

M. Lumumba and his party supported M. Bolikango, the leader of the *Parti de l'Unité Nationale* (PUNA) who ran for the presidency against Mr Kasa-Vubu.

¹¹⁹⁴Gerard-Libois, J. & Verhaegen, B., op.cit. 273-274, 293-294.

President Kasa-Vubu, however, was seen as a moderate leader and a friend of the Belgians. Key Belgian advisors, including Professor Van Bilsen, were working in the office of the Congolese President.

The speech he improvised on 30 June 1960 in the presence of King Baudouin I was the very death sentence for Prime Minister Lumumba, as it was for the Belgians an unforgivable crime against the Belgian King and people.¹¹⁹⁵

Prime Minister Lumumba was also held responsible for the termination of diplomatic relations with the former colonial power shortly after independence although it was a joint decision made by President Kasa-Vubu and Prime Minister Lumumba on 14 July 1960.¹¹⁹⁶

He was also blamed for the mutiny that resulted in the bad treatment of Belgians and saw many of them flee the Congo to return to Belgium or to head for the Katanga province that seceded from the central government.

Finally, Belgium held Mr. Lumumba responsible for its condemnation by the UN for aggression based on the presence of non-invited Belgian troops in the DRC after independence. That resulted in the UN sending troops to the DRC under code name "ONUC".

Belgium was therefore awaiting a better opportunity to settle its scores with the anti-Belgian Lumumba.

Arguably, the dismissal of Lumumba was in the pipeline even before independence. When it eventually happened on 5 September 1960, it was celebrated in Belgium as a national event, a victory of the nation over its most detestable enemy, while the majority of the Congolese people regretted the fate of their national hero. Unfortunately, they had no power to change the course of the history.

¹¹⁹⁵ See Lumumba's speech in Gerard-Libois & Verhaegen, B., *Congo 1960*, Tome 1, *supra*, 323-325.

¹¹⁹⁶ See Gerard-Libois, J. & Verhaegen, B., *Congo 1960*, Tome 2, 554; Young, C., *Introduction...* 170.

4.3.3.3.2. Constitutional Appraisal of the Dismissal of the Prime Minister

The dismissal of the Prime Minister by the President of the Republic was based on Article 22 of the Fundamental Law that provided: "The President appoints and dismisses the Prime Minister and Ministers."

On a strict construction or a literal interpretation of Article 22, the presidential decree dismissing Prime Minister Lumumba was constitutional since no proviso was attached to the exercise of the presidential powers entrenched in Article 22.

Article 20 provided that a presidential decision such as a decree dismissing the Prime Minister was to be countersigned by a minister. In the case of Mr. Lumumba, this requirement was met. The presidential decree dismissing him was countersigned by more than one minister, actually two, the Minister of Foreign Affairs, Mr. Justin-Marie Bomboko, and the Resident Minister in Belgium, Mr. Delvaux, implying that Mr. Lumumba had opponents in his own government.

On a contextual and purposive interpretation of Article 22 and in view of the logic typical of the parliamentary regime that was established by the Fundamental Law and inspired by the Belgian Constitution, the presidential decree was, however, unconstitutional.

Article 22 was a verbatim replica of article 65 of the Belgian Constitution. The requirement that the King may only dismiss the Prime Minister upon censure, or when the Prime Minister had lost the confidence of Parliament, resulted from political traditions one could not expect in the Congo three months after independence.

There was no article in the Fundamental Law, which provided that the Congo was bound by Belgian political customs.

Therefore, the first to blame was the first Congolese constituent power (that is the Belgian King and the Belgian Parliament) since the Fundamental Law was not explicit enough on the question and did not provide any mechanism to deal with the constitutional crisis of the kind.

The Constitutional Court, which could play a crucial role in the interpretation of the Fundamental Law, was not established. According to Article 51, the interpretation of the Fundamental Law fell in the exclusive jurisdiction of the two (Congolese) Chambers. The latter were, however, advised to refer to the Belgian Parliament that adopted it.

Moreover, the responsibility of the UN was involved since it considered the dismissal of Mr. Lumumba legal or constitutional. Belgium could hardly disagree.

In reaction to his dismissal by President Kasa-Vubu, Prime Minister Lumumba dismissed the President. That was a legal lunacy since nothing in the Fundamental Law provided for the dismissal of the President by the Prime Minister and there was no tradition in comparative constitutional law the Prime Minister could draw from.

On the other hand, on 7 and 8 September 1960, the overwhelming majority in the Chamber of Representatives and the Senate rejected the dismissal of the Prime Minister and demanded his stay in office.

Here again, the President was not constitutionally bound to maintain in office the Prime Minister already dismissed, but supported by the majority in Parliament. He could have dissolved Parliament and called new legislative elections.

The die was cast for Prime Minister Lumumba. The only thing Parliament could do was to wait for the appointment of a new Prime Minister and then refuse him its confidence in terms of Article 42, in which event the President could probably have recalled the dismissed Prime Minister who had the confidence of the Chambers.

Accordingly, the Chambers denied confidence to Mr. Joseph Ileo, appointed by the President to replace P.E. Lumumba as Prime Minister.

To sum up, on a literal construction, the dismissal of Prime Minister Lumumba by President Kasa-Vubu was consistent with the Fundamental Law, but politically and contextually a wrong decision that drove the country into a long crisis of constitutionalism and democracy.

This crisis consisted of *coups d'état*, rebellions, external interventions, military, one-party, and personal regimes, unsuccessful political round table conferences or talks, and chronic disrespect for the Constitution and gross human rights violations that continue to date.

4.3.3.4. *Coup d'Etat* by Colonel Mobutu and Rebellions

4.3.3.4.1. First Mobutu's *Coup d'Etat*

On 14 September 1960, a press conference was held in Léopoldville by Colonel Joseph-Désiré Mobutu, formerly Secretary of State in the government of M. Lumumba who had promoted and appointed him Chief of Staff after the mutiny in the *Force Publique*.

Colonel Mobutu announced that the army had neutralised the President as well as the Prime Minister and appointed a *Collège des Commissaires Généraux* (College of General Commissioners), mainly consisting of university students as the interim government of the Republic until the end of the year.¹¹⁹⁷

¹¹⁹⁷ Mr. Kazadi was appointed President of the Council and Mr Bomboko the Foreign Affairs General Commissioner. M. Lihau, the first Congolese law graduate, was the General Commissioner in charge of Justice. His deputy was a law student, Mr Etienne Tshisekedi, who later became the first Congolese citizen to obtain a law doctorate. For many years, Dr Tshisekedi has been the leader of the democratic opposition in the DRC.

Mr. Mobutu thereby succeeded in his first *coup d'état*, but refused to assume executive power himself. He was indisputably the main beneficiary of the conflict between Mr. Kasa-Vubu and Mr. Lumumba.

4.3.3.4.2. Government of the *Collège des Commissaires Généraux*

The College of General Commissioners was based on the constitutional law-decree enacted by President Kasa-Vubu under pressure of the army, especially its Chief of Staff, namely Colonel Mobutu.¹¹⁹⁸

This Law-Decree was manifestly unconstitutional, as it was not based on the Fundamental Law and did not even refer to it.

The College was established on 14 September 1960. Surprisingly, the Law-Decree that granted the College powers was promulgated only on 29 September 1960, after the creation of the College, and was initiated by the College itself.¹¹⁹⁹

Article 1 of the Decree provided for the creation of the Council of General Commissioners that consisted of General Commissioners and Deputy General Commissioners who were appointed and could be dismissed by the Head of State. Actually, it was clear that Colonel Mobutu appointed them.

According to Article 2, Parliament was adjourned. The legislative power was vested in the Council of General Commissioners who enacted Law - Decrees to be countersigned by the President of the Council and the competent General Commissioner.

¹¹⁹⁸ *Décret-Loi constitutionnel du 29 septembre 1960 relatif à l'Exercice des Pouvoirs Législatif et Exécutif à l'Echelon Central.*

¹¹⁹⁹ The preamble to this Decree provided:

“We, Joseph Kasa-Vubu, President of the Republic,

The Council of General Commissioners has adopted and We declare what follows”

(Translation mine).

The President of the Council and the General Commissioners assumed the executive power once vested in the Prime Minister and Ministers respectively.

In terms of Article 5, the termination of the mission of the College was to be ascertained by a Law-Decree.

This Law-Decree was effectively enacted on 9 February 1961 and provided for the replacement of the College by an Interim Government.

Under the College of General Commissioners, Prime Minister Lumumba was arrested and transferred from Leopoldville to Katanga after Mr. Albert Kalonji refused to receive the poisonous "parcel" dispatched from Léopoldville by Colonel Mobutu.

On 17 January 1961, Mr. Lumumba and his companions, including Mr. Mpooyo and Mr. Okito, were assassinated in circumstances that have not been clarified.

Although the secessionist government of Mr. Tshombe claimed responsibility and Mr. Mobutu was often blamed for the odious act, instructions to kill Mr. Lumumba came from Belgium in collaboration with the CIA.

The acknowledgement of responsibility and the apology to the Congolese people by the Belgian government came only in 2001, 30 years after the assassination of the first DRC Prime Minister.¹²⁰⁰

The assassination of Mr. Lumumba, the leader of the most important party in the Congo, namely the MNC/L, gave rise to the first rebellions in the DRC. The Congolese people were demanding a "Second Independence".

4.3.3.4.3. First Congolese Rebellions and Struggle for the “Second” Independence

In consequence of the dismissal and later the assassination of Prime Minister Lumumba, several members of his party, namely the MNC/L, and ministers loyal to him embarked on a rebellion against the central government.

Antoine Gizenga, Deputy Prime Minister in Lumumba’s government, and Gbenye, Minister of Interior, fled to Stanleyville (currently Kisangani) to lead a rival government in 1962. Laurent-Désiré Kabila is also said to have entered the rebellion at the same period.

Between 1963 and 1964, Lumumba supporters created a vast rebel movement named CNL.¹²⁰¹ Its aim was to overthrow the central government led by Kasa-Vubu, Adoula and Mobutu in Léopoldville.¹²⁰²

Pierre Mulele, PSA¹²⁰³ leader and former Education Minister in the cabinet presided over by Lumumba from Kwilu led an insurrection, which gained many provinces of the country and lasted five years, from 1963 to 1968.

Nzongola-Ntalaja called the insurrection movement in the Kwilu (Bandundu Province) the “Second Independence Movement”.¹²⁰⁴

¹²⁰⁰ The Belgian government acknowledged responsibility and apologised to the people of the Congo following the finding by a commission of inquiry in the assassination of Prime Minister Lumumba that was established by the Belgian Parliament. The *ad hoc* Commission concluded that Belgium was responsible.

¹²⁰¹ *Conseil National de Libération* (National Liberation Council). The leaders of the Council included Gbenye, Bocheley Davidson, Gizenga, Lubaya, and Kashamura. Laurent-Désiré Kabila closely worked with Kashamura in the Kivu province.

¹²⁰² Young, C., *Introduction...* 190-192, 203, 210, 268.

¹²⁰³ *Parti Solidaire Africain*.

¹²⁰⁴ See Nzongola-Ntalaja, G., *The Democratic Movement...* 1,13-14; Idem “Le mouvement pour la seconde indépendance ...” in Anyang’ Nyong’o, P., (ed.), *Afrique : la longue marche vers la démocratie...* 208-251; Ake, Cl., *Democracy and Development ...* 139. In Ake’s opinion, this second independence for the masses of the people entailed “independence from their leaders”.

The peasants and ordinary people in Bandundu, who had been politicised by the PSA during the independence struggle, considered that the first independence had failed.¹²⁰⁵ The *petits bourgeois* had confiscated it or “eaten” alone the “fruits of *Uhuru* (freedom)”. The people were not satisfied with what Van Blerk referred to as “Flag-independence”.¹²⁰⁶ It was time to fight for a second independence with a government led by the masses of the people themselves and for themselves.

According to Nzongola-Ntalaja, “The concept of ‘second independence’ is not of academic origin, nor a construct by a traditional intellectual. It came out of the popular classes from their own organic intellectuals.”¹²⁰⁷

4.3.3.5. Congolese and International Efforts aimed at ending the First “Congolese” Crisis

4.3.3.5.1. First UN Operation in the Congo (ONUC)¹²⁰⁸

On 12 July 1960, President Kasa-Vubu and Prime Minister Lumumba sent a message requesting intervention of the UN troops, as the country was aggressed by Belgium that militarily intervened allegedly to protect and evacuate Europeans from the Congo following the mutiny in the *Force Publique*.¹²⁰⁹

The first UN troops arrived in Léopoldville on 15 July 1960. The UN operation in the Congo in the 1960s was the first and most important action of the UN in post-colonial Africa.

¹²⁰⁵ Nzongola-Ntalaja, G., *The Democratic Movement...* 13-14.

¹²⁰⁶ Van Blerk, A.E., “The Fate of Constitutions...” 321.

¹²⁰⁷ Nzongola-Ntalaja, G., *The Democratic Movement...* 14.

¹²⁰⁸ I refer to “ONUC” as “the first” UN operation since the UN is back in the DRC (MONUC) since 2000 in terms of the Lusaka Agreement signed in July 1999 to end with the current crisis. See *infra*.

¹²⁰⁹ Young, C., *Introduction...* 170.

The UN played an important role in the settlement of the Congolese crisis between the dismissal of Prime Minister Lumumba and the inauguration of the Adoula government on 2 August 1961, the reunification of the country and the army, and the termination of the Katangese secession.¹²¹⁰

It also promoted constitutionalism and democracy, as it assisted the Congolese people in the making of their first Constitution. A UN task team prepared a draft that inspired the Luluabourg Constitution, which was approved during the 1964 referendum.¹²¹¹

4.3.3.5.2. Congolese Round Table Conferences and Avalanche of Governments

Three Round Table conferences were held in Leopoldville, Antananarivo and Coquilathville respectively to settle the Congolese crisis and several governments were negotiated to reconcile the people of the Congo.

The Léopoldville Round Table¹²¹² produced very little results, as neither the government of Stanleyville nor that of Elisabethville attended.

It was organised on the invitation of President Kasa-Vubu. The idea of a unitary state was rejected and debates revolved around “Federation” and “confederation”. The Commission on structures ultimately opted for a federal solution.

The Antananarivo Round Table Conference¹²¹³ was organised and dominated by Mr. Tshombe and his confederalist theses were even endorsed by some representatives of the central government in Léopoldville.

¹²¹⁰ Young, C., *Introduction...* 315.

¹²¹¹ *Idem*, 315-316.

¹²¹² 25 January -16 February 1960.

¹²¹³ 8-12 March 1960.

The Coquilhatville Round Table Conference¹²¹⁴ was again dominated by Léopoldville and its unitarist thesis.

Mr. Tshombe was even arrested for his opposition against the abandonment of his confederalist thesis in Antananarivo.¹²¹⁵ The government of Stanleyville did not attend any of these conferences. However, some positive results were obtained, such as the creation of new provinces, the determination of a federal structure for the State and the long awaited session of the Chambers to deal with the crisis.¹²¹⁶

In 1963, with the progressive return to peace in the Congo, it became possible to think of a definitive Constitution *in lieu* of the Fundamental Law inherited from Belgium on independence and that was an interim Constitution.

4.4. Constitutionalism and Democracy under the Luluabourg Constitution (1964)¹²¹⁷

4.4.1. Background

As stressed earlier, the Fundamental Law was a provisional instrument. Articles 98 to 105 provided for a final Constitution to be enacted and adopted by the Congolese Chambers acting as the Constituent Assembly.

Accordingly, a parliamentary committee was appointed in March 1963 to discuss two drafts of the final Constitution. The first was a Congolese one and emanated from a task force appointed by Prime Minister Ileo and placed under the authority of Mr. Marcel Lihau. At the same time, within the framework of the Plan of Mr. U Thant, UN General Secretary, a team of three experts under the direction of Mr. T.O. Elias, Justice Minister of Niger, was to prepare another draft. The discussions on the two drafts were dragging on within the *ad hoc* parliamentary committee.

¹²¹⁴ 24 April - 28 May 1961.

¹²¹⁵ Young, C., *Introduction* ... 182, 310-312.

¹²¹⁶ *Idem* 182-183.

¹²¹⁷ Constitution of 1st August of 1964.

Parliament was then convened on 31 August 1963 to seat as the Constituent Assembly, but the members of Parliament refused to stick to this only item of the agenda dealing with the adoption of the constitutional draft and on 29 September, President Kasa-Vubu adjourned the Chambers *sine die*.

A presidential ordinance established a special constitutional commission. This Commission consisted of representatives of the central government (4), the existing provincial assemblies (44) and governments (42), unions (12), employers (16), rural collectivities (9), National Youth Council (2), press (2), students (2), religious organisations (6), and a grouping which included some 93 members from the provinces or rural areas. All of them were Congolese citizens.

The Commission was placed under the chairmanship of former Prime Minister J. Ileo. It started its work on 10 January 1964 in Luluabourg, hence the name given to the final Constitution, and completed it on 11 April 1964.

The draft of the Constitution was presented to the government on 15 April 1964. It was then submitted to popular referendum and duly approved by the Congolese people from 25 June to 10 July 1964. On 1 August 1964, President J. Kasa-Vubu promulgated the new Constitution.

The 1964 Constitution differed from the Fundamental Law in several respects. First, the former was a single document while the latter was a multi-document Constitution. Secondly, unlike the Fundamental Law, which did not have a Preamble, the Luluabourg Constitution started with a brief Preamble proclaiming the adherence of the Congolese people to the Universal Declaration of Human Rights. It also referred to the values enshrined in it and expressed the determination of the Congolese people to consolidate their national unity with due respect to their regional characteristics and with a view to furthering, on the road of justice, their material well-being and their moral and spiritual fulfilment.

Thirdly, the 1964 Constitution was adopted by “We, the Congolese People; Conscious of our responsibility before God, the Nation, Africa, and the World”, and not drafted and enacted for them by a foreign Parliament.

Fourthly, the name of the country was no longer ignored in the constitutional text. “Democratic Republic of Congo” was entrenched in Article 1 that added the epithets “indivisible and democratic” and provided that the DRC was a sovereign, and social State.

There was no longer doubt about the nature of the regime: the DRC was a “Republic” and in a democratic Republic,

“All power proceeds from the people, who exercise it through their representatives or through referendum. No section of the people or any individual may assume the exercise of this power.”
(Article 3)

Article 4 dealt with the administrative divisions of the Republic and named the city of Léopoldville, as the headquarters of central institutions, and 21 provinces. New provinces could be created.

In terms of Article 5, “The Provinces are autonomous within the limits fixed by the present Constitution.”

4.4.2. Constitutional Framework

4.4.2.1. The Political Regime

4.4.2.1.1. The Executive

The national executive consisted of the President of the Republic, not only referred to as Head of State like under the Fundamental Law, and the “Government, under the direction of a Prime Minister” (Article 53).

4.4.2.1.1.1. The President of the Republic

In terms of Article 54, the President of the Republic represented the Nation. He was elected for five years and should be a native-born Congolese citizen of least 40 years of age (Article 55).

The President of the Republic appointed the Prime Minister and other members of the Central Government and could terminate their offices (Article 62).

He invested the Governors of the Provinces with the power of representing him in the Provinces. He was the Supreme Commander of the armed forces (Article 63).

Pursuant to national law, the President of the Republic appointed the Commander-in-Chief and other officers of the armed forces, the judges of the Constitutional Court, the Supreme Court of Justice, the Courts of Appeal and other tribunals.

He also appointed and could dismiss high-ranking officials of the national administration.

He received oaths, could remit, commute and reduce sentences and he conferred honours (Article 63).

4.4.2.1.1.2. The Central Government

Article 64 provided that the central government consisted of the Prime Minister, a maximum of 15 other ministers and could include, in addition, a maximum of three Secretaries of State who were to work under the authority of either the Prime Minister or a Minister.

The President of the Republic appointed the Prime Minister and other members of the central government on the recommendation of the Prime Minister.

The President of the Republic submitted to the approval of Parliament, meeting in national congress (the two Chambers), the act appointing the members of the Government. In case the Congress declined to give its approval the government was considered to have resigned. The President of the Republic then selected a new Prime Minister to form a new government approved by the Congress. Every new member of the government appointed by the President should obtain the approval of Congress in order to assume office (Article 66).

4.4.2.1.2. Parliament

The national legislative power was vested in the National Parliament that was composed of the Chamber of Deputies and the Senate. The Deputies were elected by the people by direct and secret universal ballot and represented the Nation (Article 75).

The Senators represented the province where they were elected. Léopoldville had its own Senators (Article 74).

The members of Parliament were elected for a term of 5 years (Article 76). The Chamber of Deputies and the Senate collectively exercised the legislative power (Article 90).

4.4.2.1.3. The Judiciary and the Constitutional Court

4.4.2.1.3.1. The Judiciary

Article 122 provided for the independence of the judicial power from the other powers, namely the executive and the legislative.

In terms of Article 124, The President of the Republic could, whenever a state of siege or emergency had been proclaimed, and with the approval of the General Public Prosecutor, suspend throughout a specified part of the Republic and for the period which he could determine, the criminal jurisdiction of the courts and tribunals, and substitute for them the military courts for such criminal offences as she or he could determine.

The courts were the Supreme Court of Justice, the Courts of Appeal, the military courts and the tribunals established by national law (Article 125). The Administrative Section of the Supreme Court of Justice could strike down, on the grounds of illegality, acts, regulations, and decisions of the central administrative authorities. Administrative Sections of Courts of Appeal enjoyed the same competence *vis-à-vis* acts, regulations and decisions of the provincial and local administrative authorities (Article 126. 2 & 3). No judicial review of national legislation was provided for. The judiciary was not empowered to nullify a law enacted by Parliament or a legislative decree made by the President of the Republic having force of law when Parliament was in recess or had given authorisation. This competence was vested in the Constitutional Court that was not listed as an institution of the judicial power (Article 165 to 169). This may be difficult to explain to a lawyer educated in the Anglo-American or South African system, but in the French one, as the one adopted in the DRC, not every court was a judicial organ. The Constitutional Court was not an institution of the judiciary. It was not considered part of the judiciary or depending on it and was rather a political institution.¹²¹⁸

4.4.2.1.3.2. The Constitutional Court

The Constitutional Court was given exclusive jurisdiction to deal with constitutional matters, including the constitutionality of laws and acts having the force of law, and the interpretation of the Constitution (Article 167, paras 1 & 2).¹²¹⁹

¹²¹⁸ The situation is different from the one under the South African 1996 Constitution where, for instance, the Constitutional Court is dealt with as a court in Chapter 8 on Courts and Administration of Justice (Articles 166 (a), 167, 172-178).

¹²¹⁹ In order to reinforce the constitutional state and avoid a backlog, the position adopted by the South African Constitution is far better. The power to interpret the Constitution is given to any court, tribunal or forum (Article 39 (1)). On the other hand, while the Luluabourg Constitution is silent, to avoid leaving the interpreter in the dark given the complexity of the task, the 1996 Constitution clearly indicates the way in which the Constitution and particularly the Bill of Rights should be interpreted. The court, tribunal or forum when interpreting the Bill of Rights must promote values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law, and may consider foreign law. This power of constitutional interpretation is ascribed to any court. So is the power to decide

The Constitutional Court was to supervise the regularity of the elections of the President of the Republic, Governors of Provinces, members of Parliament and Provincial Assemblies. It supervised the regularity of the operations of referendum and proclaimed the results (Article 167).

The Constitutional Court had also to decide on the constitutionality of national laws, acts of the President of the Republic having force of law, provincial laws, and acts of the Provincial Governors having the force of provincial law (Article 168).

In terms of Article 169, the decisions of the Constitutional Court were final and binding. Any act declared to be inconsistent with the Constitution was invalid.

Furthermore, according to Article 197, the Constitutional Court was to be established within the 12 years following the entry into force of the Constitution.

No reason was given for such a delay, which was prejudicial to the establishment and consolidation of constitutionalism and democracy.

The creation of the Supreme Court was also delayed, presumably due to lack of competent personnel, as the country was still training its first lawyers.

on the constitutionality of laws, any act of the president of the Republic or any other authority in the Republic, leaving the final decision to the Constitutional Court (Section 167 (4) & (5) and 172.).

4.4.2.1.4. Nature of The Political Regime

The political regime under the 1964 Constitution had both parliamentary and presidential features.

4.4.2.1.4.1. Parliamentary Features

The regime consisted of three main features typical of the parliamentary regime.

First, there was the executive power with its two heads, the President of the Republic and the Prime Minister (Article 53).

Secondly, the Constitution provided that the Central Government should enjoy the confidence of Parliament in order to assume office (Article 66).

Thirdly, Ministers and Secretaries of State had to countersign the acts of the President of the Republic (Article 69).

However, regime was not a parliamentary one in substance, as there were many presidential features.

4.4.2.1.4.2. Presidential Features

The first presidential feature was the preeminence of the President of the Republic. The President was the Chief of the Central Executive. He determined and conducted the policy of the State. He established the framework of the activities of the government, oversaw its application, and kept Parliament informed of its development (Article 54).

He appointed and dismissed the Prime Minister, Ministers, Judges, Ambassadors, and Governors of Provinces, Army Chief of Staff and Officers, and high-ranking Officials of the national administration (Articles 62 & 63).

Despite the provision of Article 53, the Prime Minister was not the Head of Government. He directed the actions of the Central Government within the framework of the programme outlined and the decisions taken by the President who was fully informed of the conduct of the affairs of the Government (Article 67).

Ministers under the direction of the Prime Minister carried out the programme and decisions made by the President (Article 68).

Secretaries of State, under the authority of the Minister to whom they were assigned, fulfilled duties that were expressly ascribed to them by the President of the Republic (Article 68).

The Prime Minister, Ministers and Secretaries of State had no real powers. They were rather "secretaries" and "executing" officers of the President.¹²²⁰ Members of the central government were accountable to the President (Article 69).

The countersignature only conferred on them the duty to enforce the presidential acts (Article 69).

They were subject to oral or written questions, interpellation, hearing before commissions, warning or blame by Parliament (Article 69 *in fine*), but that had no effect on their stay in office.

¹²²⁰ Brinton, J.Y., op. cit. 9.

The responsibility of each member of the Central Government to the President of the Republic was reinforced by the oath they took only before him and not the Constitutional Court or Parliament, "to observe the Constitution and laws of the Republic of the Congo and to loyally and faithfully fulfil the functions which are conferred upon me." (Article 65 *in fine*).

This provision alone unfortunately made the President, instead of the Constitutional Court or Parliament, the guardian and watchdog of the Constitution and laws of the Republic.

Furthermore, the President actively participated in the legislative power. The right to initiate national laws belonged concurrently to the President of the Republic and to every Member of Parliament (Article 90). The President was entitled to convene Parliament for an extraordinary session (Article 80).

Where the President declared a legislative project or proposition to be urgent,¹²²¹ it had to be given priority by the Chambers (Article 93).

The President could also veto a law enacted by Parliament and request a new deliberation by the Chambers of all or some articles thereof prior to its promulgation. To defeat the presidential veto and allow the promulgation of the law, 2/3 of the members of Parliament had to adopt it. Should the President fail to promulgate a law adopted by Parliament, the promulgation was made by the President of the Chamber of the Deputies (Article 60).

In addition to the involvement of the President in legislative matters, he could issue legislative decrees called law-decrees that had the force of national law. These Law – Decree were deliberated in the Council of Ministers (Articles 61, 95, 96 & 97).

¹²²¹ In the constitutional system of the Congo and many other African countries that inherited from the French and Belgian law, a "project" of law is a bill initiated by the executive while a "proposition" is initiated by the members of Parliament.

Law-Decrees were not valid if the Chambers did not approve them. On the other hand, the Chambers could at any time by law modify or withdraw the power delegated to the President to legislate by Law-Decrees (Article 95 & 96).

Finally, Article 97 gave the President an unprecedented power. In time of war, he could proclaim a state of siege.

When an external danger threatened the Republic or the regular functioning of its institutions or one of the provinces, the President could also proclaim a state of emergency and take the necessary measures to face the situation.

This provision was borrowed from Article 16 of the 1958 Constitution of the 5th French Republic and allowed the President to establish a provisional dictatorship.

As far as the relationship between the President and the Chambers was concerned, the President could not dissolve the Chambers.

The regime established by the Luluabourg Constitution was all in all a presidential regime.¹²²² Presidential powers were even more significant than in the classic presidential regime, such as that of the USA.

4.4.2.2. The Form of State and Federalism

The Congolese leaders during the Political Round Table Conference in 1960 failed to agree on the form of State. M. Auguste de Schryver, the Belgian Minister for Belgian Congo and Rwanda Urundi then cut it short:¹²²³

“The Congolese people themselves will decide how the regime shall be described.”

¹²²²Brinton, J. Y., op. cit. 8.

¹²²³ Minister De Schryver quoted by Brinton, J. Y., idem 7.

The question surfaced in 1963 and 1964, as a new Constitution had to be drafted and adopted by the Congolese people themselves to supersede the Fundamental Law.

It was one of the questions the most discussed during the framing of the Luluabourg Constitution and by its later critics. As Brinton noted, this question bothered the framers of the Constitution and was the subject of lively and at times acrimonious debate.¹²²⁴

Amongst others, M. Bomboko (for the central government) and Mr. Munongo (Provincial government of Eastern Katanga) were of the view that the Congo should be designated as a "federal" State:

"Having accepted the reality why not frankly accept its formal designation?"¹²²⁵

However, the minority urged that the previous regime had been in substance a federal one and that this element had been the source of much of the evil that it was sought to correct.¹²²⁶

The contention by Brinton that "the term 'federal' nowhere appears in the Constitution"¹²²⁷ was inaccurate and unfortunate since the learned justice confined his commentary to the main text of the Constitution, ignoring the Annex,¹²²⁸ which was also part and parcel thereof.

¹²²⁴ Brinton, J.Y., op. cit. 6-7.

¹²²⁵ Jean-Marie Bomboko and Godefroid Munongo quoted by Brinton, J.Y., supra 7.

¹²²⁶ Brinton, idem.

¹²²⁷ Idem.

¹²²⁸ Unlike Schedules that are included in many other Constitutions, the Annexe to the DRC Constitution of 1964 was almost a replica of the Constitution itself. Constitutional provisions were nearly identical in the two texts. The 1964 Constitution consisted of 204 Articles while its Annexe contained 203. One may wonder why the Annexe or Schedule should be the same as the main text. In this author's view, the 1964 Constitution was designed for a progressive implementation and the Annexe was to provide for the different steps of this implementation. Arguably, that was the ideal purpose of the Annexe.

The Annexe to the Luluabourg Constitution, as provided by Article 178,¹²²⁹ left no doubt on the form of the State as a federal one.

Article 1 of this Annexe started with the proclamation that "The Federal Republic of Congo is a federal, sovereign, indivisible, democratic and social state."

On examination, the Luluabourg Constitution clearly established an essentially federal political structure with the following main features:

- Parliament, as under the Fundamental Law, was bicameral, consisting of the Chamber of Deputies and the Senate (Article 74). The Deputies represented the Nation while the Senate represented the 21 provinces and Léopoldville;
- Provinces were autonomous, with their own organs, namely Provincial Governments and Assemblies (Article 100 to 121);
- Legislative powers were divided between the Republic and the Provinces in terms of the Constitution (Article 47 to 52). There were exclusive and concurrent powers.¹²³⁰ The residuary powers fell within the jurisdiction of the provinces.¹²³¹
- The Constitution provided for a distribution of revenues between the Republic and the Provinces whose finances are separated (Article 140). Such a provision did not exist under the Fundamental Law.

¹²²⁹ According to Article 178, the "Federal" Republic of Congo was to become effective during the third legislature following the entry into force of the Constitution. It means that possibly in the late 1970s the Congo would have been actually and formally a federal State. In my view, there was no reason why only the use of the terminology could be delayed while the reality was already that of a federal regime. On the other hand, it was hypocritical and not convincing to reject the term "State" for that of "Province" on the mere ground that "If the head of one of the Provinces is designated 'President' there is the danger of an unfortunate multiplication of 'presidents' – of the Republic, the Senate, the Chamber of Deputies, etc., etc." (Brinton, J.Y. op. cit. 7) In social life nobody complained about the multiplication of "presidents" of political parties, associations, etc.

¹²³⁰ Contrary to the Fundamental Law, 20 matters instead of 16 fell within the exclusive jurisdiction of Provinces (Article 50); 35 in that of the Republic (Article 48), and 10 instead within the concurrent jurisdiction of the Republic and the Provinces (Article 49). Parliament could not legislate upon matters within the exclusive competence of a Provincial Assembly and *vice versa*, unless authorised (Article 51).

¹²³¹ Brinton, J.Y., op. cit. 10.

In conclusion, although the name was not used in the main document, the State under the Luluabourg Constitution was a federal one with, however, a few unitarist features. One of these features was the presidential power to invest the Governors who represented him in the Provinces and had to take an oath before him despite their election by the Provincial Assembly (Articles 63 and 104). That is somehow an infringement on the federal principle of self-rule and autonomy.

The granting of exceptional powers to the President during a state of siege or emergency was also a unitarist feature, as Article 101 *in fine*, for instance, provided:

“Whenever a state of siege or of emergency has been proclaimed or whenever the Provincial Assembly requests it, the President of the Republic shall by decree, name a Committee presided over by a High Commissioner of the Republic, who shall have the direction of the provincial affairs.”

4.4.2.3. Plural Democracy and Human Rights under the Luluabourg Constitution

The Preamble to the 1964 Constitution proclaimed the adherence of the Congolese people to the “Universal Declaration of Human Rights” (UDHR). Fundamental Rights were mainly enshrined in Title Two.

Article 12 was the application clause. It stressed the duty for the legislative, executive, and the judicial powers of both the Republic and the Provinces to respect rights entrenched in the Constitution.

As is common in the Constitutions of French-speaking African countries, there is no general limitation clause, but particular and internal limitations. Paragraph 2 of Article 12 was the suspension or derogation clause.

When a state of emergency was proclaimed, a number of rights could be derogated from or suspended.

Rights that could be derogated from or suspended were the right to equality before the law and equal protection of the laws (Article 13), the right to non-discrimination in matters affecting education or access to public office, on the grounds of religion, tribal association, sex, ascendance, place of birth or residence (Article 14), the right not to be subjected to torture or any other inhuman or degrading penalty or treatment, or to death except as provided by law and in the form prescribed by it (Article 15, paragraphs 2 and 3), the right not to be held in slavery or servitude or under any conditions analogous thereto, the right not to be condemned to forced or compulsory labour except in the cases provided by law (Article 16). Individual liberty was guaranteed. Detention or arrest except by law was proscribed (Article 17).

Arrested and detained persons were granted rights (Article 18 to 23): the right to be informed immediately or within 24 hours of the reasons for arrest and any charge made against oneself, the right not to be held in preventive detention except in accordance with an ordinance of an authorised judge and the right to appeal against such ordinance (Article 18); the right to a just reparation for damage or equitable indemnity in case of illegal arrest or detention (Article 19); the right to be heard equally and within a reasonable time, to defend oneself or to be represented by a defender of one's choice; the right to be judged by the Court to which one's case has been properly assigned; the right to legal assistance in conditions provided by law (Article 20); the right to public hearings of the courts and tribunals, except in conditions provided by law (Article 21); the right to be prosecuted only in terms of a law (Article 22); the right to be presumed innocent until his guilt had been established by final and motivated judgment, the right to be subjected to penalties only in accordance with a law (Article 23); freedom of thought, conscience, and religion (Article 24); freedom of expression (Article 25); freedom of the press without prior authorisation for publication and interdiction of censure (Article 26); freedom of the media and public media to be public services working under guarantee of impartiality (Article 27); the right to assemble peacefully and unarmed; the right of

association, the right to create and affiliate with a union and to strike in conditions prescribed by law (Article 28).

Members of the armed forces and the police were denied the right to create unions or associations and the right to strike (Article 29).

Article 30 provided for the right to create a political party and join any political party. It was prohibited to create a single political party on all or part of the territory of the Republic.

The right to free marriage was guaranteed by Article 31 that also referred to the family and its special protection. Considering the reference to the family and its special protection in the Preamble, one could expect the Bill of Rights to elaborate on this. Unfortunately, Article 31 was vague.

The protection of the family was confused with the rights of children and the duty for parents to care for their children with the aid of the public authorities. There was no precision on how this aid could be provided.

Youth protection against exploitation and moral neglect was provided as well as the support to youth organisations. It was only unfortunate that Article 32 provided for moral support of public authorities where special protection for the family was vowed in the Preamble and repeated in Article 31.

The right to education was entrenched in Article 33. Education was free (Article 34) and public authorities were duty-bound to organise it (Article 35) without discrimination against any Congolese (Article 36).

Private schools could be established according to the law (Article 37). The pursuit of art and scientific research was free (Article 38). Moreover, everyone had the right to the inviolability of his domicile (Article 39).

No Congolese could be expelled from the territory of the Congo. All Congolese were entitled to the right to leave the country and to return in conditions provided by law (Article 40).

The right to establish domicile in any part of the country was entrenched (Article 41) as well as the right to the secrecy of correspondence and every form of communication (Article 42).

Property rights were recognised and could only be restricted by law (Article 43). The right to engage in commerce was guaranteed and free movement of property was recognised throughout the country (Article 44).

Article 45 was the enforcement clause. Appeal to justice was available to everyone whose rights were abused by public authorities that were held responsible for acts of their agents in the exercise of their functions.

Most of the rights entrenched in the Bill of Rights were ascribed to Congolese citizens. However, Article 46 provided:

“Every foreigner within the territory of the Republic enjoys the protection accorded to persons and property under the present Constitution, subject to exceptions established by law. He shall enjoy the rights reserved for Congolese citizens only in the measure established by a national law.”¹²³²

Compared to the Fundamental Law relative to Public Liberties or Freedoms, the Bill of Rights under the Luluabourg Constitution was definitely more elaborated.

However, there was no provision for cultural and other second or third-generation rights such as the right to work, which was ignored by both instruments.

¹²³² Translation mine.

4.4.3. Functioning of the regime

4.4.3.1. Election of a New Parliament and Dismissal of Prime Minister Tshombe

In 1964, President Kasa-Vubu dissolved Parliament that was elected in May 1960. The dissolution of Parliament paved the way for the second legislative elections.

A new Parliament was in place and M. Tshombe became Prime Minister. By the end of 1965, the Congo was heading for the presidential elections. Between President Kasa-Vubu and Prime Minister Tshombe, the relationship was as tense as between the President and Prime Minister Lumumba in September 1960.

Mr. Tshombe was likely to be elected president since he was presented as the man who managed to pacify the country, end the rebellion and reconcile its people together.

Accordingly, President Kasa-Vubu thought the best way to secure his own reelection was to get rid of him before the elections.

He repeated what he did in September 1960 when he dismissed P.E. Lumumba. He dismissed Prime Minister Tshombe, despite the fact that the latter enjoyed the confidence of Parliament, and relying on the policy of *divide and impere*, he appointed Mr. Evariste Kimba, a political leader from the same province as Mr. Tshombe.

Although Parliament opposed the appointment of Mr. Kimba, President Kasa-Vubu refused to reappoint Mr. Tshombe and the country was facing the same political crisis as in September 1960.

4.4.3.2. The 24 November 1965 *Coup d'Etat*, Proclamation of the High Command of the Congolese National Army (ANC), Military Rule, and Demise of Constitutionalism and Democracy

4.4.3.2.1. Mobutu's Second *Coup d'Etat*

Mr. Joseph-Désiré Mobutu, the former Colonel now appointed Lieutenant-General by President Kasa-Vubu was there to act as both coach and referee.

In September 1960, he neutralised President Kasa-Vubu and Prime Minister Lumumba and imposed an interim government.

In November 1965, the time had come for the coach and referee to act by and for himself as the main political player.

Accordingly, in the night of 23-24 November 1965, he successfully achieved his second *coup d'état*.

This time, the Army and its Chief of Staff were determined to overthrow the President of the Republic who was the political survivor of the first *coup d'état*, and to exercise the political power, alleging that civilians had failed and led the country to chaos.¹²³³

¹²³³ In the Proclamation of the High Command of the Congolese National Army, senior military officers gathered in Mobutu's residence on his invitation declared:

"If the military situation is satisfactory, the failure is complete in the political domain. Ever since the accession of the country to independence, the Congolese National Army has never spared its disinterested efforts to secure a better fate for the population. The political leaders have concentrated on a sterile struggle to accede to power without any consideration for the well-being of the citizens of this country... As the power struggle among politicians is likely to provoke once more a flow of Congolese blood, all the military chiefs of the Congolese National Army met this Wednesday 24 November 1965 around their Commander-in-Chief, and have in view of the above situation taken the grave decisions that follow..." (Translation mine).

4.4.3.2.2. Proclamation of the High Command of the Congolese National Army

The first part of the Proclamation served as a justification of the decisions taken by the High Command of the Army. It invoked the failure of the civilian government while claiming for the Army the confidence of the people.

Then followed a 13-point decision announcing the discharge of Mr. Kasa-Vubu and Mr. Kimba and their replacement by Lieutenant-General Joseph-Désiré Mobutu and Colonel Leonard Mulamba as President of the Republic and Prime Minister respectively. General-Major Louis Bobozo was appointed Commander-in-Chief of the ANC, "for all the time Lieutenant-General Mobutu was to act as President of the Republic".¹²³⁴

Other decisions were designed for external consumption. The military proclaimed that the DRC acceded to the UN and the OAU Charter as well as the Charter of the *Organisation Commune Africaine et Malgache* (Common African and Madagascar Organisation).

According to the Proclamation, the DRC continued to abide by all international agreements entered into by the country, unless Parliament decided otherwise.

The Proclamation also stated that the interests of the entire African continent were to inform the foreign policy of the Congo. Accordingly, friendly relations with other African countries should be continued and the interference in the domestic affairs was prohibited.

Moreover, the Army announced that measures on the interdiction of Congolese and foreign newspapers were lifted and the owners were invited to the Army Headquarters to obtain indemnity for damage suffered.

¹²³⁴ This provision was only in connection with the appointment of General-Major Louis Bobozo, who was Mobutu's uncle. It did not concern the Prime Minister, allowing his dismissal less than 12 months later, in 1966.

Rights and freedoms enshrined in Articles 24, 25, 26, 27 and 28 of the Constitution, namely freedoms of thought, conscience, religion, expression, media, meeting and association, were guaranteed and political detainees were to be freed, except for the members of criminal bands who had threatened the internal security of the State.

The High Command of the ANC pledged to guarantee the security of all the Congolese and foreign goods and persons. However, political freedoms and parties were suspended. Finally, the High Command of ANC called for public support while proclaiming that the army did not intend establishing a military dictatorship and was only acting in the interest of the country and fulfilling its obligations *vis-à-vis* the Congolese Nation. Unfortunately, that never materialised.

4.4.3.2.3. Military Rule

The first act of the High Command of the ANC was a betrayal of the commitment not to install a military dictatorship.

Some members of the government led by Colonel Mulamba were civilians, but the majority of the ministers were military officers.

On the other hand, with the disqualification of civilian institutions, the army, especially its High Command, became the single institution of the Republic.

4.4.3.2.4. Demise of Constitutionalism and Democracy: Concentration of Powers in the Hands of General President Mobutu

The demise of the nascent constitutionalism and democracy, as provided by the 1964 Constitution, manifested in the abrogation of the Constitution, the suspension of elected institutions, namely the Chamber of Deputies, the Senate and Provincial Assemblies, and the excessive concentration of executive and legislative powers in the hands of the President of the Republic.

Although all the military regimes such as the Mobutu's proclaimed their democratic intentions,¹²³⁵ it is hard to accept that the progress of democracy requires the destruction of all institutions that embodied, however incompletely and imperfectly, the participation of the citizens in the exercise of power.¹²³⁶

The first act of this concentration of power was the legislative ordinance, which granted the President special powers¹²³⁷ on 30 November 1965.

The Preamble to this Ordinance referred to the Proclamation of the High Command of the ANC, even before the Constitution.

In terms of the single Article of this Ordinance, the President was granted power to enact legislation through Law-Ordinances that were tabled in Parliament within the two months of their signing and remained valid as long as they were not repealed by the legislative Chambers.

The 1965 Law-Ordinance was justified in terms of the Constitution, but no reference was made to the specific provisions in terms of which the President could claim legislative power although Parliament was not dissolved. Reference to the Constitution was therefore a mockery.

A new Law - Ordinance enacted on 7 March 1966¹²³⁸ repealed the one of 30 November 1965. It clearly provided that the legislative power was assigned to the President. Under the first Law-Ordinance, the President exercised it through Law-Ordinances to be submitted to Parliament for approval within the two months following their signature and remained invalid as long as they were not repealed by a legislative act.

¹²³⁵ See the Proclamation of the High Command of the Congolese National Army, *supra*.

¹²³⁶ Mangué, Bata B., *Les régimes pluralistes...* 37.

¹²³⁷ *Ordonnance-Loi No. 7 du 30 Novembre 1965 accordant des Pouvoirs Spéciaux au Président de la République.*

¹²³⁸ *Ordonnance-Loi No. 66/92 bis du 7 Mars 1966 attribuant le Pouvoir Législatif au Président de la République.*

Under the Law-Ordinance of 7 March 1966, the President of the Republic continued to exercise the legislative power through the same Law-Ordinances. However, these Law-Ordinances were no longer submitted to Parliament for approval, but for mere information.

On 21 October 1966, the President repealed this Law-Ordinance of 7 March 1966 and returned the legislative power to Parliament, except in case of emergency where he could still legislate by Law-Ordinances that were not subject to any approbation or ratification.¹²³⁹

As the state of emergency continued, Parliament did not enjoy real power and the President of the Republic became the normal legislature, a one-man Parliament.

4.4.3.2.5. Towards a New Constitution and Return to Constitutionalism and Democracy

Military regimes are exception regimes and authoritarian regimes.¹²⁴⁰ They originate in a rupture of legality. They have no Constitution in the technical sense of the term. When the military manage to take control of power, their first act is very often to repeal or suspend *sine die* the existing constitutional order.

The suspension of the Constitution, the dissolution of representative institutions, and the prohibition of political parties and associations are decisions whenever the military seized power.

The termination of the existing legal order is accepted because nobody believed in the real value of the constitutional framework. Most often, the Constitution was only a fiction.¹²⁴¹

¹²³⁹ *Ordonnance-Loi No. 66/621 du 21 Octobre 1966 relative aux Pouvoirs du Président de la République et du Parlement.*

¹²⁴⁰ Lavroff, D.-G., *Les systèmes constitutionnels en Afrique noire*.... 26-41, 51-53.

¹²⁴¹ Mangu, Mbata B., *Les régimes pluralistes africains*...36.

If the grasp of power by the military was generally characterised by the termination of the existing constitutional order, a new tendency manifested.

It consisted in the commitment of the leaders emanating from the military putsch to constitutionalise their power in order to stabilise it.

After a few years of exceptional power, they became aware that their situation was an unstable one. They had to give the people the impression that they were fulfilling their promises and bringing about the announced changes.

On the other hand, they needed to show an all-time vigilance to avoid that fellows in the army did not challenge their authority. Accordingly, they generally had to ensure that they kept the bulk of the army away from the direct exercise of power.

A new Constitution was drafted and submitted to popular referendum, in line with the democratic principle of popular sovereignty.¹²⁴²

The adoption of a new Constitution by popular referendum offered a double advantage. It helped forget the origin of power and conferred democratic legitimacy on the regime while securing the military leaders by driving away dangerous support from some former comrades in the army.¹²⁴³ Mobutu, as a genial military leader perfectly understood this.

A new Constitution was drafted and submitted to popular referendum. New elections were also held to ensure that Mobutu's power was based on the Constitution and the people rather than the Proclamation of the Army and the barrel of a gun.

¹²⁴² Mangu, Mbata B., *Les régimes pluralistes...* 37.

¹²⁴³ See Mangu, Mbata B., *op.cit.* 37; Lavroff, D.-G., *Les systèmes constitutionnels en Afrique noire* 41.

4.5. Constitutionalism and Democracy under the Constitution of 24 June 1967 or Under the so-called “Second Republic”¹²⁴⁴

4.5.1. Background

The importance of the Constitution of 24 November 1967 in the Congolese constitutional history lies in the fact that despite the difference of the context it was the second text the Congolese people adopted by constitutional referendum after the Luluabourg Constitution. The referendum was held from 4 to 24 June 1967.¹²⁴⁵

The 1967 Constitution is generally referred to as the Constitution of the Second Republic in Zaire. It broke with the previous lengthy Constitutions as it only consisted of 85 articles, compared to the 258 under the Fundamental Law and 407 (main document plus Annexe) under the Luluabourg Constitution.

¹²⁴⁴ The Second Republic in the DRC generally refers to the “Mobutu regime” (1965 - 1990). To me such confusion between “Republic” and “Regime” is regrettable. A new Republic implies a fundamental change in the form of government and several regimes may occur in the course of a Republic. In France, for instance, the passage from the 4th to the 5th Republic was characterised by a drastic constitutional change from a parliamentary to a semi-presidential regime. President General de Gaulle inaugurated the 5th Republic with the adoption of the 1958 Constitution. From 1958 to date, the regime remains fundamentally the same and is known as the 5th Republic despite there having been four Presidents and Heads of the French State after General de Gaulle, namely George Pompidou, Valéry Giscard d’Estaing, François Mitterrand (two 7-year terms), and Jacques Chirac (two 7-year terms also). The advent of a new President did not usher into a new Republic in France. It is possible for a Republic to be confused with the political regime established by a particular Head of State. However, the Republic generally survives a political regime. Several “Republics” existed under Mobutu and “Second Republic” as a label for the Mobutu regime was only understandable when the Republic was assimilated to M. Mobutu himself who could claim as the absolute French King Louis XIV: “The Republic (or the State), it is me.”

¹²⁴⁵ This Constitution started with a big lie that affected all the lofty principles entrenched therein:

“The Government of the Democratic Republic of Congo has proposed;
The Congolese people by referendum held from 4 to 24 June has adopted;
The President of the Republic promulgates the Constitution whose terms follow.”

The date of the promulgation of the Constitution (24 June 1967) coincided with the last date of the referendum. That could not be true in the case of a semi-continental state and an underdeveloped country such as the 1967 Congo where communication problems were huge, the distance between Kinshasa and the provinces enormous. I therefore disagree with the statement that referendum was closed on 24 June 1967 and on the same day the Constitution promulgated. Arguably, the President did not wait for the results of the referendum before signing and assenting to it.

The Preamble to the 1967 Constitution referred to the total liberation of the African continent from foreign domination and insisted on African unity as a way of achieving this liberation.

The 1967 Constitution was dubbed “Revolutionary Constitution” and brought about radical change in the constitutional framework of the DRC.

4.5.2. The 1967 Constitution

4.5.2.1. The Political Regime

4.5.2.1.1. The Executive

The executive power was vested in the President of the Republic and the Government.

4.5.2.1.1.1. The President of the Republic

As compared to his powers under the Luluabourg Constitution, the powers of the President were reinforced in the 1967 Constitution (Article 20 to 30).

The President represented the State. He was the head of the executive. He determined and conducted the policy of the Nation. He determined the governmental action programme, oversaw its application and kept the National Assembly informed of its development (Article 20). He was elected for 7-year term by universal direct ballot (Article 21). Article 22 provided for the presidential oath to be taken before the Constitutional Court, in the presence of the National Assembly.

In case of vacancy due to death, resignation, impeachment by the Constitutional Court, or any other reason, prior to the organisation of a new election, the President of the National Assembly acted as President (Article 23).

According to Article 24, the President directed and controlled the foreign policy of the Republic. He accredited the Ambassadors. Extraordinary Envoys of foreign powers were accredited with him.

The President negotiated and ratified treaties and international agreements without any outside interference, except for agreements implying exchange and annexation of territory that required prior consultation by popular referendum or other treaties whose ratification was subject to authorisation by law (Article 68).¹²⁴⁶

The President of the Republic communicated with the National Assembly either directly or indirectly through messages that were not to be debated. At least once a year, he addressed the National Assembly and outlined the governmental policy (Article 25).

Bills assented to and signed by the President became Acts of Parliament. The President could veto them prior to their promulgation. The presidential veto was only overridden by a 2/3 majority of the members of the National Assembly (Article 26).

The President assured by Ordinances the enforcement of laws and the regulation of the administration (Article 27).

He could put to referendum any legal text, which once adopted was only modified in the course of the legislature with his approval (Article 28).

The President appointed and dismissed the members of the Government. He determined the conditions under which the governmental action was coordinated. Before assuming office the members of the Government took an oath before him (Article 29).

¹²⁴⁶ These treaties included peace treaties, trade treaties and treaties and agreements relating to international organisations and settlement of international conflicts, treaties that engaged public finances, modified legislative provisions and those relating to the state of the persons, and those concerning exchange or annexation of territory.

The President also appointed and dismissed the Governors of Provinces, the prosecuting magistrates and the Commander-in-Chief and officers of the Armed Forces and the police. He appointed and dismissed senior officials in the administration.

The members of the Government, Governors of Provinces, judges of the Constitutional Court, the Supreme Court of Justice and officers of the Armed Forces and the police took an oath before him. He could commute or reduce sentences.

He conferred the honours and national awards, pursuant to law. He was entitled to mint the national currency (Article 30).

The President of the Republic was also entitled to call the National Assembly in an extraordinary session on an agenda determined by him.

He closed the sessions of the National Assembly, either ordinary or not (Article 41, paragraphs 3 & 4).

4.5.2.1.1.2. The Government

Only three Articles (Articles 31, 32 and 33) dealt with the powers of the Government, as compared to seven under the Luluabourg Constitution.

As stressed earlier, the Ministers were appointed and dismissed by the President (Article 29).

According to Article 31, the ministers were the heads of their respective departments and executed the programme as determined and the decisions taken by the President of the Republic, meaning they had no real power. For the first time after independence, no provision was made for the office of Prime Minister, which was suppressed.

The Ministers were merely executing officers of the President. They were responsible and accountable to him. This was not a government in the true sense of the word, but a team of President's collaborators or assistants.

Parliament could control the government through written and oral questions, interpellations, hearings before commissions, commissions of inquiry, or warnings (Article 32).

However, this control was without sanction since the government was not accountable to Parliament and the latter could not vote it out of office.

The members of the Government were responsible for criminal acts in the exercise of their functions. They could be prosecuted if they were committed for trial by the President and could be removed from office if they were sentenced (Article 35).

4.5.2.1.2. Parliament

Parliament was no longer bicameral and comprised a single chamber, namely the National Assembly (Section II, 1).

According to Article 45, the legislative power was vested in the National Assembly that enacted laws.

The Deputies of the National Assembly represented the Nation in the proportion of one Deputy for 50,000 inhabitants and an additional Deputy for a fraction equal or superior to 25, 000 (Article 36). Article 37 provided for a 5-year term of office for the Deputies.

Article 39 held that when a Deputy who was elected on the list of a political party lost the membership of this party, he *ipso facto* lost the membership of the National Assembly and was replaced by his substitute.

The remaining provisions concerning the legislature were substantially similar to those of the 1964 Constitution.

4.5.2.1.3. The Judiciary and the Constitutional Court

4.5.2.1.3.1. The Judiciary

The judicial power was vested in the Courts and Tribunals. It was independent from the legislative and executive powers. The creation of extraordinary courts or tribunals was prohibited (Article 56).

Courts and tribunals enforced laws¹²⁴⁷ and customs. They enforced the administrative acts as long as they conformed to the laws (Article 57).

Courts and tribunals comprised the Supreme Court of Justice, Courts of Appeal, military courts and tribunals. Article 59 provided for their organisation and functioning. The Supreme Court, the highest judicial authority of the Republic, consisted of judicial and administrative sections (Article 60).

The judicial section decided appeals in *cassation* for violation of the law or customs, against final decisions rendered by Courts of Appeal. It also judged the members of the government (Article 35).

The administrative section decided in the first and last instance appeals for violation of the law, against acts, regulations and decisions made by the central administrative authorities.

It pronounced in the last instance on appeals against the decisions made by the administrative sections of Courts of Appeal. When there was no competent jurisdiction, it dealt with the demands for damage resulting from any decision taken or ordered by a national authority.

¹²⁴⁷ Arguably, "law" was understood in its broad sense, including the Constitution that was not cited in the provisions dealing with the judiciary.

The competence of the Supreme Court of Justice covered all the territory of the Republic. Its decisions were final and binding (Article 61).

4.5.2.1.3.2. The Constitutional Court

As under the 1967 Constitution, the Constitutional Court was separated from the judicial power,¹²⁴⁸ but it remained a big constitutional fiction. Its composition and powers were however crucial to the establishment and consolidation of constitutionalism and democracy.

Article 70 provided for a 9-member Constitutional Court (unlike 12 under the Luluabourg Constitution) appointed by the President of the Republic. The National Assembly and the High Council of the Magistracy¹²⁴⁹ nominated the two-thirds of the members of the Constitutional Court equally.

In terms of Article 71, the Constitutional Court was competent to decide appeals in respect of the constitutionality of laws and acts having the force of law, appeals in interpretation of the Constitution and other matters for which it was granted competence by the Constitution. It was also the judge of the President of the Republic for high treason or conduct that was inconsistent with the Constitution.

¹²⁴⁸ For a law-student educated in the Anglo-American system, that may be difficult to understand. It is worth repeating that in the French system adopted by African French-speaking countries, the Constitutional Court is not dealt with as an institution of the judiciary. It is rather considered a political institution higher than the ordinary courts and is dealt with in a separate chapter or title of the Constitution, and not under the chapter or title dealing with the judiciary. The main reason lies in the fact that it is the "judge of the constitutionality". It may declare an Act of Parliament or a presidential conduct or decision to be invalid. The judiciary, including the Supreme Court of Justice, was not granted such a power under the 1967 Constitution.

¹²⁴⁹ This institution was equivalent to the South African Judicial Service Commission (See Sections 174 and 178 of the 1996 Constitution). The main difference is that the High Council of the Magistracy was presided over by the Head of State and consisted of judges only. Advocates, attorneys, law teachers and politicians were excluded.

4.5.2.1.4. Nature of The Political Regime

The supporters of the 1967 Constitution contended that it established a presidential regime.¹²⁵⁰ However, the presidential powers were enormous and the interference of the President in legislative matters was inconsistent with the logic of a presidential regime.

The President could initiate laws to be adopted by Parliament (Article 45). He could also submit any legal text and even a constitutional amendment for adoption by popular referendum (Article 28 read with 75) or by the National Assembly (Articles 74 & 75).

Furthermore, Title IX on Provisional Measures granted exorbitant powers to the then President, General Mobutu. For instance, Article III provided that the powers of the legislative Chambers under the previous Constitution came to an end on the day the new (1967) Constitution entered into operation, which was on 24 June 1967. A new National Assembly was to be elected on a date that was determined by the President. On the other hand, Article II extended the powers of President Mobutu to the swearing-in of his successor who was to be elected 90 days after 24 November 1970.

The powers of Parliament were terminated while those of President Mobutu were extended.

Until a new Parliament was elected, General Mobutu could act as Parliament and enact law.

He was even “democratically” entitled to do so by the people who adopted the Constitution by referendum in June 1967.

¹²⁵⁰ This view was supported by constitutional experts of the Mobutu regime, the most prominent among them being M. Vundawe Te Pemako, Professor of Administrative Law at the University of Kinshasa. Mr Vundawe Te Pemako was *Vice Premier Commissaire d'Etat* (Deputy First State Commissioner or Deputy Prime Minister) and head of staff of the then President Mobutu.

With Parliament out, President Mobutu assumed the powers of the Head of the Executive, Prime Minister and Parliament for three years. During this period, he exercised by Law-Ordinances the legislative power once possessed by Parliament.

Article IV even gave him the exceptional power to modify the Constitution, especially the whole of Title IX and to decide on his own powers. He could only by mere Ordinances modify all the previous legislative texts (Article V).

With the adoption of the 1967 Constitution, a personal regime was established in the DRC.

The Congolese people could no longer remember the man who vowed in 1965 that he was there for only 5 years, the necessary time to restore order and end with the chaos.

As the presidential powers were unlimited and Parliament dissolved, the regime under the 1967 Constitution could hardly qualify as a presidential one. It was rather a “presidentialistic”¹²⁵¹ regime characterised by the concentration of (legislative and executive) powers in the hands of the President.

4.5.2.2. The Form of State: Unitarianism and Centralisation

According to Article 1er of the 1967 Constitution, the DRC was a unitary State. It consisted of eight provinces besides the city of Kinshasa, the capital.

In terms of Article 65, the provinces, regional and local collectivities were organised by law and not by the Constitution itself.

The concentration of powers in the hands of General Mobutu required nothing but a unitary and centralised State.

The nature of the state has gone unchanged since 1967. Accordingly, we shall not dwell on it any longer.

¹²⁵¹ On the distinction between “presidential regime”, as known in the USA, and “presidentialistic regime” in Africa, see our comments in Chapter 2, *supra*.

4.5.2.3. Plural Democracy and Human Rights

On paper, the DRC under the 1967 Constitution was a democratic state based on the principle of plural democracy and respect for human rights.

Article 2 provided:

“The power emanates from the people who exercise it through their representatives or by way of referendum. No component of the people, no individual can alone claim its exercise.”¹²⁵²

Title II was the Bill of Rights (Article 5 to 18). Compared to the Bill of Rights under the Luluabourg Constitution (Article 11 to 46), this was a poorly drafted Bill of Rights.

It only entrenched first-generation rights, namely the right to equality before the law and equal protection of the law and non-discrimination in education or access to public office (Article 5); the right to life, physical integrity, no subjection to torture or inhuman treatment (Article 6); the right to personal promotion and not to be subjected to slavery or forced labour except military service (Article 7); the right to individual freedom, the right to be prosecuted, arrested and detained only by law, and the right to legal representation and access to courts as prescribed by law (Article 8); the right to be presumed innocent until proven guilty and the right to a motivated judgment pronounced in public audience (Article 9); freedom of thought, conscience, religion and interdiction of state religion (Article 10); the right to freedom of speech in conditions prescribed by law (Article 11); family rights, marriage, and children’s rights (Article 12); the right to education provided by the State or private institutions (Article 13); the individual and collective right to property (article 14); freedom of movement for Congolese citizens, the right to establish anywhere on the territory of the Republic and not to be expelled (Article 15); the right to domicile and inviolability of domicile (Article 16); the right and duty to work, to adhere to a union or to strike as by law (Article 17); and the right to constitute associations or societies (Article 18).

¹²⁵² Translation mine.

There was no general limitation clause, but only internal limitations. On the other hand, there was no provision dealing with the interpretation or enforcement of rights. No specific duty was put on state organs or institutions to abide by the Bill of Rights and no sanction or remedy was provided in case the rights entrenched therein had been infringed or threatened.

As far as political parties are concerned, they could be created in terms of Article 4 that provided:

“Political parties shall collaborate in giving expression to the public suffrage. There cannot be created more than two political parties in the Republic. These parties organise and carry out their activities freely. They must respect the principles of national sovereignty, democracy and the laws of the Republic.”¹²⁵³

In fact, this biparty system was never established. What emerged, as a normal development of the military regime was rather a *de facto* and later on a *de jure* one-party State.

As the author emphasised elsewhere:

“Besides the exceptional situation where the military take power to restore order in the country, create conditions for a better functioning of democracy before returning the power to the civilians, they are generally keen to lay the foundations of a single party whose leadership will logically fall to the strong man of the regime while they keep on banning any (other) political activity.”¹²⁵⁴

The practice of a single party preceded its theory.¹²⁵⁵ The theory was fabricated *a posteriori* and aimed at conferring an absolute and somewhat timeless character on a form of organisation that emerged and imposed itself as a result of historical development that was its own justification.¹²⁵⁶

¹²⁵³ Translation mine.

¹²⁵⁴ Mangu, Mbata B., *Les régimes pluralistes*... 38.

¹²⁵⁵ See Mahiou, A., *L'avènement du parti unique en Afrique noire*... 156; Mangu, Mbata B., *Les régimes pluralistes africains*... 38.

¹²⁵⁶ See Benot, Y., *Idéologies des indépendances africaines*, Paris: Maspero, 2 ed. 1972, 308; Mangu, Mbata B., *Les régimes pluralistes africains*... 38.

The political unification around the strongest and most advanced organisation of the national struggle imposed itself in the very course of the struggle and was not the result of the application of a full-grown theory, but the practical conclusion of painful experiences.¹²⁵⁷

In many independent African countries, single parties were institutionalised long after they were formed and in some cases, they were not institutionalised at all.

In Guinea, for instance, Sékou Touré went on record as saying:

*“Si nous mettons dans la Constitution que le parti est l’organe suprême de la Nation, nous serons en conformité avec la réalité. Mais nous ne connaissons pas les réalités de demain.”*¹²⁵⁸

Later on, the Democratic Party of Guinea (PDG.) was constitutionally established as a single party. It became the State-Party of Guinea and the first State-Party that inspired many others on the continent, notably the Zairian one-party, which also transformed into a State-Party.

The PDG having disappeared with its founding father, history has proved Sekou Touré right. The “realities of tomorrow” appeared inimical to the State-Party in Guinea and in other African countries where it hardly survived its founding president.

In the Ivory-Coast, the single party was never institutionalised and the provision of the Constitution providing for multipartyism remained unchanged during Houphouët Boigny’s 30-year rule. Yet, the Democratic Party of Ivory Coast (PDCI) was the single party of the country.

¹²⁵⁷ See Benot, Y., op.cit. 311; Lavroff, G., *La République du Sénégal* 241-248; Mangu, Mbata B., *Les régimes pluralistes africains...* 38.

¹²⁵⁸ “If we entrench in the constitution the provision that the party is the supreme law of the Nation, we certainly will be right, but we do not know what may happen tomorrow.” (Literal translation)

In Senghor's Senegal, the leaders used to refer to the Senegalese Progressist Party, the *Union Progressiste Sénégalaise* (UPS.), as a "dominant party"¹²⁵⁹ to disguise the "horror" of monopartyism. The UPS was a *de facto* single party¹²⁶⁰ like the PDCI in Ivory Coast.

So was the *Mouvement Populaire de la Révolution* (MPR) (Popular Movement of the Revolution), which started as the *Corps des Volontaires de la République* (CVR) (Corps of the Volunteers for the Revolution) in 1966 just after Mobutu's *coup d'état* on 24 November 1965 and was aimed at securing and consolidating his power.

Many scholars in following African leaders intellectually justified the one-party rule and praised the one-party as a new and authentic form of democracy, the best and ideal instrument to help build and consolidate the nation, secure or achieve economic development and stabilise power.¹²⁶¹

The 1967 Constitution gave too many powers to President Mobutu. M. Mobutu became sovereign instead of the people. Parliament never functioned in practice. Institutions such as the Constitutional Court were not established. On the other hand, instead of the biparty system as envisaged by Article 4 of the Constitution, only one party actually existed and the key institution were the army and the Commander-in-Chief.

Accordingly, despite the 1967 Constitution's adoption by popular referendum, the regime it established was neither democratic nor constitutional.

A cascade of constitutional texts that claimed to be its amendments followed the 1967 Constitution.

¹²⁵⁹ See *Club Nation et Développement du Sénégal*, Paris: Présence Africaine, 1972, 306-316; Sylla, L., *Tribalisme et parti unique en Afrique noire*, Paris: Fondation Nationale de Science Politique, 1977, 26; Mangu, Mbata B., *Les régimes pluralistes africains...* 38.

¹²⁶⁰ See Benot, Y., op.cit. 308; Gonidec, P.F., *La République du Sénégal*, Paris: Berger-Levrault, 1968, 23-24; Sylla, L., op.cit. 25-26; Mangu, Mbata B., *Les régimes pluralistes africains...* 39.

¹²⁶¹ See Mangu, Mbata B., *Les régimes pluralistes africains ...* 39.

4.5.3. Constitutional Acts Relating to the 1967 Constitution

4.5.3.1. Amendments to the 1967 Constitution? Challenging the Official Thesis

According to the official thesis embraced by many constitutional law experts,¹²⁶² the 1967 Constitution was the constitutional basis of the “Second Republic”.

Other constitutional texts adopted under Mobutu’s regime were considered amendments to the “Revolutionary Constitution,” as the 1967 Constitution was officially called. As many other official truths propagated by the one-party rule, the official thesis was disputable and proved scientifically wrong.

The different constitutional Acts allegedly related to the 1967 Constitution are reviewed to help understand that they were not just amendments, but sometimes new Constitutions. Such a review is important to understand the constitutional and political history of the DRC.

However, it will be brief since in order not to praise unconstitutionalism and authoritarianism, we should not dwell on constitutional texts that were just enacted to suit the single party and its autocratic leader and definitely marked the demise of constitutionalism and democracy in Zaire.

¹²⁶² This position was held, amongst others by M. Vunduawe Te Pemako, identified *supra*. Other scholars include Iyeleza Moju-Mbey, Masika Katsuva and Isengingo Kambere, authors of the famous *Recueil des Textes Constitutionnels de la République du Zaïre* (Editions Ise - Consult: Kinshasa, April 1991).

4.5.3.2. Law-Ordinance¹²⁶³ No. 70-025 of 17 April 1970

Article 1 of this Law-Ordinance amended Article II, sub-section 1 of Title IX of the 1967 Constitution and provided that the first election should be held within and not 90 days after 24 November 1970. This was a minor amendment. The Law-Ordinance no. 70-001 may be considered the only amendment to the 1967 Constitution.

4.5.3.3. Law No. 70- 001 of 23 December 1970

Article 1 of the 1970 Law amended Article 4 of the 1967 Constitution that provided that no more than two parties could be created in the Republic. It stated:

*“Le Mouvement Populaire de la Révolution est le seul parti politique de la République Démocratique du Congo.”*¹²⁶⁴

According to Article 2, which modified Article 19 of the 1967 Constitution, the single party, namely the MPR, became a new institution and the first in the hierarchy of the institutions of the Republic. The remaining institutions were the President of the Republic, Head of State and Government, the National Assembly, the Government, the Constitutional Court and the Courts and Tribunals.

Articles 3, 4, 5, 6, 7, 8, and 9 brought about some minor change. Article 3 reversed the position of sections I, II, and III of Title III that became sections II, III, and IV respectively.

¹²⁶³There was a difference between “law” and “Law-Decree” or “Law-Ordinance”. The former was an Act of Parliament and the latter an act of the President. The President could enact a Law-Decree or a Law-Ordinance with the authorisation of Parliament or when it was not sitting. He could do the same when Parliament did not exist because it had been dissolved. A Law-Decree or Law-Ordinance has the same legal value as an Act of Parliament and was valid as long as it had not been repealed by Parliament. On the other hand, the French and Congolese equivalent to the Anglo-American Act of Parliament is Law in short.

¹²⁶⁴ “The MPR is the single party of the Democratic Republic of Congo.” (My translation)

Article 4 introduced in Title III a section on the MPR with an Article 19 *bis* providing:

“The MPR is the supreme institution of the Republic. Its President represents it. All other institutions are subordinated to it and function under its control. The structures and organs of the MPR are determined by its statutes and regulations.”¹²⁶⁵

Article 5 suppressed section 4 of Article 21 and replaced Article 5 on the nomination of the candidates to the presidential election, vote and proclamation of results.

Article 6 superseded Article 22 and changed the oath of office and solemn affirmation by the President.

Article 7 changed the sixth paragraph of Article 37 and dealt with the electoral law, especially concerning the election of the members of the National Assembly.

In terms of Article 8, which replaced Article 39, a deputy lost the membership of the National Assembly and was replaced by a substitute in case he gravely infringed the discipline of the party.

Article 9 provided that the Law came into force on the date of its promulgation and was to be enforced as a State law.¹²⁶⁶

By establishing the single party MPR as the supreme institution of the Republic to which other institutions, namely the President, the National Assembly, the Government, the Constitutional Court, and the Courts and Tribunals, were subordinate, the constitutional Law of 23 December 1970 was a shift away from the 1967 Constitution.

It became the constitutional basis of the one-party rule in the DRC. This Law was not a mere amendment, but a new Constitution due to unprecedented change it introduced in view of the institutionalisation of the MPR rule.

¹²⁶⁵ Translation mine.

¹²⁶⁶ The notion of “State Law” was introduced. No definition was given. It is suspected that it only referred to Constitutional Act or Law.

4.5.3.4. Law No. 71-006 of 29 October 1971

This Law aimed at changing the name of the country from DRC to “Zaire” to avoid confusion between the country and the “Ne Kongo” Kingdom that existed in pre-colonial Congo and with which the Bakongo who belong to one out of many Congolese ethnic groups identified themselves.

President Mobutu alleged to be acting in line with the “permanent search of our authenticity” and “our revolution initiated on 24 November 1965”.

Article 1 of the new Law provided for the replacement in any legislative or administrative act of the words “Republic of Congo” and “Congolese” by “Republic of Zaire” and “Zairian” respectively.

Article 2 changed “Central Congo” and “Eastern Province” into “Lower Zaire” and “Upper Zaire”.

According to its Article 3, the constitutional Law was made retroactive to 27 October 1971, when the MPR Political Bureau announced changes.

Dealing with the minor issue of change of names or denominations, the Act did not bring about any change in the structuring and the functioning of the regime as already established by the constitutional Law 70-001 of 23 December 1970.

4.5.3.5. Law No. 71-007 of 19 November 1971

Like the constitutional Law 71-006 of 29 October 1971, this Law was of very little importance and impact on the regime.

It only provided for change of colours of the national flag to light green, with in the middle a yellow circle in which a hand, reportedly that of President Mobutu, was holding a torch with a red flame (Article 1).

4.5.3.6. Law No. 71-008 of 31 December 1971

Article 1 of this Law introduced Article 14 *bis* that provided:

“The Zairian soil and subsoil as well as their natural products belong to the State. Conditions for their cession and concession, recovery and retrocession are determined by law. However, the recovery or retrocession in case of non-exploitation does not give rise to any compensation.”¹²⁶⁷

4.5.3.7. Law No. 72-003 of 5 January 1972

This Law also consisted of two articles. The first changed the second paragraph of Article 1 of the previous constitutional Law by replacing the word “Katanga” with “Shaba”. In terms of Article 2, this Law was made retroactive to 1 January 1972.

4.5.3.8. Law No. 72-008 of 3 July 1972

This constitutional Law dealt with the judiciary, especially the organisation and functioning of the Supreme Court of Justice.

Article 1 subdivided the Supreme Court of Justice into three Sections, namely the Judicial, the Administrative and the Legislative Sections.

¹²⁶⁷ Translation mine.

The Judicial Section was the highest court of appeal. Article 2 of this Law modified paragraph 2 of Article 60 of the constitutional Law to give it an additional competence. Accordingly, it also became the judge of the members of the Political Bureau, the National Assembly, the Government (in terms of Article 35), and the Executive Committee of the MPR, the Constitutional Court, the Supreme Court of Justice, and the Office of the General Prosecutor of the Republic.¹²⁶⁸

The competence of the Administrative Section as the highest court in administrative matters remained unchanged.

Article 3 dealt with the competence of the Legislative Section to advise the President and the National Assembly on the constitutionality of bills emanating from either the executive (*projets de loi*) or the legislature (*propositions de loi*). The conditions under which the Legislative Section had to advise on constitutional matters were to be prescribed by law. Unfortunately, this law was never enacted.

4.5.3.9. Law No. 73-014 of 5 January 1973

This Law aimed at harmonising the different constitutional, legal and statutory texts following the decision of the Political Bureau of the MPR to change the names of the political and administrative structures of the country.

Article 1 provided that the denominations of “National Assembly”, “Deputy,” “Government”, “Ministry”, “Minister”, “Province”, “Governor of Province” “Town Governor” should be changed for “National Legislative Council”, “Commissioner of the People”, “National Executive Council”, “Department”, “State Commissioner”, “Region”, “Commissioner of Region”, and “Urban Commissioner” respectively.

¹²⁶⁸ This was the first time that the *Law* referred to the Political Bureau and the Executive Committee, as institutions of the MPR, and dealt with the prosecution of their members without telling us when these two organs were created. The insignificance of formal law under the one-party rule should not be forgotten. On the other hand, one should always consider the “golden rule” according to which the *Word* of the Founding President of the single party was *Law* in the Republic.

“District”, “Commissioner of District”, “Territory”, “Administrator of Territory”, “Municipality”, “Mayor”, “Local Collectivity” and “Chief of Local Collectivity” also became “Sub-region”, “Commissioner of Sub-Region”, “Zone”, “Commissioner of Zone”, “Collectivity”, and “Chief of Collectivity” or “Chief of the City”.

Article 2 dealt with the electoral regime. It modified the first paragraph of Article 46 by changing “National Assembly and Provincial and Local Councils” for “National Legislative Council”.

It was clear in M. Mobutu’s mind and that of Party officials themselves that they were not people’s representatives, but the “Commissioners” of President Mobutu who held the plenitude of powers, who appointed and could also dismiss them.

4.5.3.10. Law No. 74-020 of 15 August 1974

Although it was presented as a constitutional amendment of the 1967 Constitution,¹²⁶⁹ this constitutional Law effected the most radical change thereto and was a new Constitution that became the constitutional basis of the State Party.

It encapsulated the apogee of authoritarianism under monopartyism in post-colonial Congo.

Arguably no African country went as far as Mobutu’s Zaire in the personalisation and concentration of power.

¹²⁶⁹ See Paragraph 1, *Exposé* of Motives of Law No. 74-020 of 15 August 1974.

The first extraordinary Congress of the MPR held in N'sele in May 1970 decided on the institutionalisation of the MPR that dictated the Legislative Council (National Assembly) to adopt the constitutional Law of 23 December 1970.

The MPR then became the single party of the Republic and the supreme institution. The President of the Republic, the National Assembly, the Government, the Constitutional Court, and the Courts and Tribunals were maintained as institutions although subordinate to the single party.

With the constitutional Law of 15 August 1974, the red line was crossed. An entire Title of the constitutional Law dealt with the MPR.

The Preamble already referred to "We the Zairian People, reunited within the MPR". The MPR was no longer one of the institutions, but the single institution of the Republic incarnated by its President (Article 28). It was defined as "the Zairian Nation politically organised" (Article 8 & 29).

Traditional state institutions such as the National Assembly (Legislative Council), government (Executive Council), and the judiciary (Judicial Council) ceased to exist as institutions to become mere organs of the MPR, a unique situation where the party absorbed both the State and the Nation.

MPR organs such as the Political Bureau and the Congress prevailed over the Legislative, Executive, and Judicial Councils (Article 43).

The President of the MPR did not feature amongst the public organs that were listed in Article 43. He was everything, being assimilated to the party, the unique institution.

The State Party was Mobutu's State, characterised by an over-centralisation of powers in the hands of the President.

The whole of the 1974 constitutional Law was a song to the glory of General Mobutu. Special provisions were made to suit the man who henceforth was referred to as the "Founding-President" of the MPR, even before being "President of the Republic".

The President of the MPR was the Party incarnate (Article 28) and *de jure* President of the Republic (Article 30 paragraph 1). He had full exercise of power, be it executive, legislative or judicial.

The Founding President was the only holder of the governmental power, as legislator, judge and executive officer. Other officials or organs were just there to advise or assist him in the exercise of the power allegedly emanated from the people (Article 9).

The President of the MPR presided over all the organs of the MPR State Party, namely the Political Bureau, the Congress, the Legislative, Executive and Judicial Councils (Article 30). He determined the structures of the Party other than those provided by the Constitution (Article 34). These provisions applied to any person who became the President of the MPR.

However, Title III contained special provisions for the Founding President, General Mobutu himself.

Article 31 (election of the President of the MPR), Article 39 paragraph 2 (Prohibition on the President of the MPR to change a third of the membership of the Political Bureau) and Article 46 (impeachment for deviationism) did not apply to him.

Accordingly, Title III indirectly consecrated General Mobutu president for life. He could change the entire Political Bureau, the first organ of the State-Party and he could not be impeached.

To pay a vibrant tribute to General Mobutu, MPR Founding-President, *Mobutism* was consecrated the ideology of the party.¹²⁷⁰ Moreover, the Preamble to the Constitution started with the proclamation:

“We, Zairian people, reunited within the MPR;
Guided by Mobutism...”

Mobutism was defined as a body of “actions, thoughts, and acts of the Founding-President” Mobutu Sese Seko Kuku Ngbendu Wa Za Banga.¹²⁷¹ Understood this way, *Mobutism* had implications for everything in the country.

It meant that any wish, desire, dream or action of General Mobutu, either in his public or private life, had the force of law even higher than the Constitution or had to be obeyed by every citizen and State-Party organ or enforced by the judiciary. Mr. Mobutu was Law; he was the Constitution and even more.

Zaire under Mr. Mobutu became a *Mobutustan*. Zaire was Mobutu and Mobutu was Zaire. That was not new in post-colonial Africa.

According to the “*Osagyefo*”, “The Redeemer”, as followers called Mr. Nkrumah (also “Iron Boy” and his “High Dedication”), the Ghana was Nkrumah and Nkrumah was the Ghana.¹²⁷²

Kirk-Greene held that in certain of the newly independent States of Africa, there was to be an immediate “synonymity” between State and statesman which ensured an initial measure of political identity.¹²⁷³

¹²⁷⁰ *Exposé* of Motives of the 1974 Constitutional Law, *in fine*.

¹²⁷¹ The full name adopted by President Mobutu in line with his “Authenticity” policy.

¹²⁷² Memel-Fote, H., L., “L’Héritage Africain et les processus démocratiques...” 13.

¹²⁷³ Kirk-Greene quoted by Van Blerk, A.E., “The fate of constitutions in Africa...” 316-317.

Thus Nkrumah was Ghana (and even Africa and Independence); Kenyatta was Kenya (and at one time also Mau Mau); Nyerere was Tanzania (and Ujamaa and African Socialism); Senghor was Senegal (and *Negritude* also); Boigny was the Ivory Coast; Sékou Touré was Guinea; Abacha and Babangida were Nigeria in turn; Kaunda was Zambia (and also Humanism) and after him Chiluba wanted to be Zambia too; Bokassa was the Central African State; Amin was Uganda; Hassan II was Morocco; Tombalbaye was Chad; Macias Nguema was the Equatorial Guinea; Haïle Selassié was Ethiopia; Bourguiba, the “Supreme Commander”, was Tunisia; Boumediene was Algeria; Banda was Malawi; Habyarimana was Rwanda; Mugabe was Zimbabwe (and Nationalism also, which even Nkomo had to concede), and so on.

The phenomenon has been going on. It is clear that even now, for their followers and in the mind of the leaders themselves, Mugabe remains Zimbabwe; Mswati III is Swaziland (but so were Nswati I and Nswati II); Nujoma is Namibia; Gaddafi is Libya; Moi is Kenya; Bongo is Gabon; Taylor is Liberia; Bachir is Sudan; Buyoya is Burundi; Eyadema is Togo; Biya is Cameroon; Ngouesso is the Republic of Congo; Ratsiraka still considers himself Madagascar (even after losing to Marc Ravalomanana); Dos Santos is Angola (and Savimbi, another contender, had to leave way); Muluzi, Banda’s successor, wants to be Malawi; Ben Ali is Tunisia; Moubarak is Egypt as Nasser used to be; Laurent-Désiré Kabila was DRC and Joseph Kabila would like to be seen the same way, even though he only reigns over a third of the country. One probably “meets” Uganda when one discusses with Kaguta Musevini and some visitors would find it of little interest to visit Rwanda after having been with Paul Kagame.

Every African leader wanted to be seen as “Moses” leading his country to Canaan, the “Promised Land”. On the way, unlike Moses who was a humble servant of God who alone had to reign supreme over His people, African leaders were granted many titles.

The leader was an absolute ruler in his country. He was anything: “The Beauty”, “The Goodness”, and “The Truth”.¹²⁷⁴

Mobutu, for instance, was called by several names. He was “The Founding President” (of the Party and of the State), “The Redeemer” (the Zairian “*Osagyefo*”), “The Savior”, “The Unifier”, “The Pacifier”, “The Helmsman”, “The Guide”, and a whole lot of other things too.

One should not dwell on this any further. However, *en passant*, two or three last things may be said about one of the most “titled” African leaders, namely Macias Nguema.

Macias Nguema was called “The Genius”, “The Single Miracle of the Equatorial Guinea”. He was “The Master in Education and Traditional Culture”. Accordingly, he was the only one who “knew”, meaning the single holder of “Knowledge” in the country, the single “Intellectual”.

To many African intellectuals, it is worth recalling that under Macias Nguema’s regime in Equatorial Guinea, it was a “*Crime*”¹²⁷⁵ to be called or to consider oneself “Intellectual”.¹²⁷⁶

The 1974 Constitution consecrated Mobutu a superman. He had only the best thoughts for his country and his people. *Mobutism* being the ideology of the MPR and the “set of actions, thoughts, and acts of the Founding President”, it was quite logic that he could not be charged or impeached for “deviationism” as stipulated in Title VIII since he could not betray himself. Like the Roman Catholic Pontiff, Mobutu was infallible.

¹²⁷⁴ Mangu, Mbata B., *Les régimes pluralistes africains* ... 42-43.

¹²⁷⁵ Emphasis mine.

¹²⁷⁶ On this, see Liniger-Goumaz, M., *La Démocrature* ... 47-49.

Mr. Mobutu was infallible in whatever he could do, say or think. Mobutu could not even be charged for embezzlement or corruption since all wealth in the country belonged to him.

As he used to say, having brought peace without which there could not be any life or joy in the country, he did not owe anything to the people, but the people owed him everything.

President Mobutu was also deified. Following the promulgation of the 1974 Constitution, seminaries to train Catholic priests became public schools. Monuments in the honour of the Virgin Mary and other saints were vandalised, demolished and replaced by the effigy of the Founding President. That gave rise to a conflict between President Mobutu and the Catholic Church. The main streets and places were given his name. Mobutu and his family were worshipped. The places he frequented became high places for meditation. In this context, there could not be any place for constitutionalism or democracy.

The 1974 Constitution marked apotheosis for Mobutu. Mobutu was a king and an absolute king.

4.5.3.11 Law No. 78-010 of 15 February 1978

As stressed earlier, the Word of the Founding President was Law and prevailed over any other piece of legislation, including the Constitution.

In 1977, he had “spoken” twice. On 1 July 1977, he spoke to the leaders of the different organs of the MPR. On 25 November 1977, the Founding President spoke to the Congress of the MPR.

Almost four years after the enactment of the 1974 constitutional Law that transformed MPR into State Party and gave its Founding President quasi-royal powers, his message to Party officials in these two instances was clear and unambiguous: the MPR had failed and a constitutional change was needed.

The constitutional Law of 15 February 1978 constituted a constitutional and political *mea culpa*, an acknowledgment of the failure of the regime.

Its preamble stressed:

“This reform was inspired by the desire to render accountable the organs of the *Mouvement Populaire de la Révolution* and allow the people to express themselves more democratically. The previous changes seem to have been effected somehow on the periphery of the Constitution. The only motivation was the need for efficiency. Time has therefore come to put the provisions of our fundamental charter in line with this new vision of the exercise of power. Such is the *raison d’être* of the constitutional amendment bill that the Founding President of the *Mouvement Populaire de la Révolution*, President of the Republic, has put forward to our debate, after discussing it with the Political Bureau according to Article 78 of the Constitution.”¹²⁷⁷

Wherever there is over-centralisation of powers in the hands of a single person or organ, there is a general lack of responsibility.

The concentration of powers in the hands of the Founding President under the 1974 Constitution logically resulted in State and Party officials no longer accepting responsibility for their actions.

The 1978 constitutional Law was therefore designed to bring this general sense of irresponsibility to an end:

“The concern to liberalise our democracy and render all State organs responsible has led, within the framework of this project, to propose the abandonment of the plenitude of the exercise of power granted to the President of the *Mouvement Populaire de la Révolution*, President of the Republic, by the 1974 constitutional amendment.”¹²⁷⁸

¹²⁷⁷ *Exposé* of Motives of the 1978 (constitutional) Law (My translation).

¹²⁷⁸ *Idem*.

Accordingly, Mr. Mobutu attempted to liberalise his authoritarian rule or to humanise it merely to prevent popular explosion, as the colonial rulers once did, but unfortunately failed.

In terms of the 1978 constitutional Law, the President of the MPR, President of the Republic, renounced plenary power.

Article 9 provided:

“The power emanates from the people who exercise it through the President of the *Mouvement Populaire de la Révolution* who is *de jure* President of the Republic, *and through the organs of the Popular Movement of the Revolution or by way of referendum.*”¹²⁷⁹

The liberalisation of the regime under the 1978 constitutional Law manifested in three main ways.

First, new rights were enshrined, especially the right to vote (Article 29), the rights of foreigners (Article 31) and the right to prior and fair compensation in case of expropriation for public utility (Article 21). These rights were not recognised under the 1974 Constitution.

Accordingly, the members of the Legislative Council were elected in 1975 by “acclamation” of the people who voted without choosing.

On the other hand, foreigners were left at the mercy of the power holders with no guarantee for the protection of their lives and properties.

¹²⁷⁹Translation mine. Italics are also mine to stress that this was new. The 1974 text provided that the people exercised power through the President of the MPR, MPR organs only assisted him and no reference was made to popular referendum. However, the referendum in the 1978 Law did not have the same significance as in democratic countries:

“Unlike in other countries, this procedure is not conceived as a mode for the settlement of possible conflicts between the President of the MPR, President of the Republic, and any other Party organ. Our only wish is to secure, whenever it is possible, a direct participation of the people in the making of important decisions.” (*Exposé of Motives*. Translation mine)

The 1974 Law paved the way the way for the conception and implementation of the policy known as “Zairianisation” in terms of which many foreigner entrepreneurs were expropriated without prior and fair compensation. The victims were mainly Portuguese and Belgian citizens or companies operating in Zaire.

Secondly, the 1978 Law innovated with the creation of a position of “First State Commissioner”, a sort of Prime Minister (Articles 88 – 93). The President remained Head of State and Government. He determined and guided the policy of the Nation, the programme of action of the Executive Council and ensured its execution (Article 34). The President appointed and dismissed the First State Commissioner (Article 88). The First State Commissioner coordinated the action of the Executive Council within the framework of the programme and directives given by the President who was to be kept fully informed of the course of State affairs (Article 90).

Thirdly, the Legislative Council controlled the Executive, the Judicial Council and the Public Services by written and oral questions, interpellations or commissions of inquiry (Article 84). However, it could not pass a motion of no confidence in the Executive Council. On the other hand, the Legislative Council could not be dissolved.

On the other hand, under the 1974 Law, the President of the MPR presided over all the organs of the State Party, including the Legislative Council. However, under the 1978 Law, the Legislative Council (Article 74) was presided by a Bureau elected by its members and the Judicial Council by its own president who was to be a magistrate (Article 95).¹²⁸⁰

¹²⁸⁰ However, there was no independent judiciary. The President of the Judicial Council was appointed by the President of the MPR, President of the Republic, and controlled the judges. The instructions given by him even in the sense of a reversal of a judgement already handed down were binding on the courts (Article 98).

Despite the above innovations to alleviate the burden of power on the tropic-equatorial “Leviathan”, the regime remained authoritarian since the spirit of the beast remained alive.

The President of the MPR, President of the Republic, directly presided over three of the five organs of the State Party, namely the Congress, the Political Bureau and the Executive Council and indirectly the remaining two, the Legislative and Judicial Councils (Article 34). He was a legislator with power to initiate laws (Article 41), constitutional amendment (Article 109) or to legislate by way of Law-Ordinances in case of emergency and when the Legislative Council was in recess and he promulgated laws enacted by the Legislative Council (Articles 41, 83, 109). His person was “inviolable”.

The President of the MPR could not commit any crime or become liable to high treason. He could only be charged for deviating from the doctrine of the State Party (Articles 51 & 62).

According to the *Exposé* of Motives, “This inviolability is consistent with our authenticity that requires that the person of the chief is sacred”.¹²⁸¹

Here again, it is worth stressing that these provisions did not apply to the Founding President of the MPR. Title VIII maintained special provisions that gave him special powers. In the main, the Founding President remained above the law and even the Constitution.

¹²⁸¹Translation mine. The contention was, however, totally denigrating and distorting of the culture and authenticity of the African people of Zaïre since it insinuated that only the person of the chief was sacred. In African culture, any person, whether chief or not, as a divine creation, is sacred. The assertion that only the person of Mr Mobutu was sacred had a very negative impact on the human rights situation in Zaïre. The Zairian people became the subjects of his “Majesty” Mobutu. As their lives were not sacred, at least as sacred as Mobutu’s life, they enjoyed very few rights.

4.5.3.12. Law No. 80-007 of 19 February 1980

As with previous constitutional changes, a presidential speech, the address of the Founding President to the Nation on 4 February 1980, commanded a constitutional amendment. The address came after the Legislative Council had taken its constitutional powers more seriously than in the past and organised several sessions of interpellation of the members of the Executive Council and the chief executive officers of public enterprises. These interpellations were broadcast live on national television and radio and followed by the majority of the people who became aware of the mismanagement of the government and its spoliation of national resources, managed as private properties.

Before Parliament, some State Commissioners and chief executive officers of public enterprises dismissed their own responsibility and indirectly charged the Founding President himself, allowing some deputies to go as far as questioning the leadership of the President and indirectly demanding his interpellation.

In the meantime, on 13 January 1980, a number of Deputies (13) addressed a letter to the Founding President, calling for radical change of the structures of the State-Party.

The "Thirteen", as they came to be known, then clandestinely started the first opposition party to Mobutu, the Union for Democracy and Social Progress (UDPS).

Criticism against the regime also became rife, especially among students and academics. During a meeting organised by the State-Party, one of the Zairian top constitutional lawyers¹²⁸² publicly scrutinising the Constitution reached the conclusion that the Founding President was above the law of his country.

¹²⁸² M. Djelo Empenge Osako, constitutional law professor at the University of Kinshasa, brilliantly expressed this view before the leadership of the Party (MPR) in N'sele. President Mobutu appointed him Minister of Higher Education a few days later, just to prevent "more talks" and criticism, as he did with some other Zairian academics earlier.

The message was heard. The President had to speak and did speak to the Nation. The Constitution that gave so much power to Deputies and maintained special provisions for the President had to be amended.

Accordingly, the Legislative Council quickly adopted a new constitutional law, which brought some significant change to the existing constitutional order. However, because some of its members ventured to challenge the leadership of the Founding President, the Legislative Council was the greatest victim of the constitutional amendment of 19 February 1980.

Article 2 added to Article 41 a new Article 41 *bis* providing for the dissolution of the Legislative Council by the President of the MPR, President of the Republic, after consultation with its Bureau.

Article 7 also added to Article 74 a second paragraph providing that in case of dissolution, the new Legislative Council met the second Monday that followed its election.

Another and probably the most important change was brought by Article 10. This provision suppressed Title VIII and its Article 110 relating to Special Provisions that granted special powers to the Founding President, "not to give the impression that the Founding President of the *Mouvement Populaire de la Révolution*, President of the Republic, is above the laws regulating his country."¹²⁸³ The Founding President thus came to realise that he was seen and gave the impression that he himself was above the law.

However, while he made this concession with one hand, he took with the other a concession he made earlier concerning the appointment of the members of the Political Bureau.

¹²⁸³ *Exposé* of Motives of the (constitutional) Law of 19 February 1980, *in fine*.

The people directly elected 18 members of the Political Bureau while 12 were appointed by the Founding President in terms of Article 59 of the 15 February 1978. Article 31 of the new Law replaced this provision by the one stipulating that the Founding President who could also dismiss them appointed all the members of the Political Bureau.

Other changes concerned presidential powers to appoint several officials: the members of the Political Bureau, the First State Commissioner and Commissioners, Ambassadors, Army Officers, Special Envoys, Commissioners of Region, high-ranking officials in the public administration and public enterprises, judges and prosecutors (Article 1).

Article 5 dealt with the oath of office to be taken by the Political Commissioners (members of the Political Bureau) before the Founding President. Article 6 related to the termination of their office. Article 8 referred to the oath to be taken by the First State Commissioner and other members of the Executive Council. Article 9 suppressed the previous Articles 95 to 98.

Articles 11 and 12 dealt with the change in the numbering of some Articles of the previous constitutional Law, especially Title IX, Articles 61 to 94, and Articles 99 to 109 that became Title VIII, Articles 60 to 93, and Articles 94 to 104 respectively.

4.5.3.13. Law No. 80-012 of 15 November 1980

This constitutional Law was in line with the decisions of the Political Bureau that met from 31 July to 4 August 1980 and decided the restructuring of the State Party.

The reform was informed by the concern to reaffirm the leading role of the MPR in the dynamics of nation building and to ensure a better application of the principle of unity of command.¹²⁸⁴

¹²⁸⁴*Exposé* of Motives of the constitutional Law of 15 November 1980.

The main innovations of the 1980 Law concerned the creation of three new organs of the MPR, namely the President of the MPR and President of the Republic, who for the very first time became an organ of the State Party to which he was closely assimilated. The other two organs were the Central Committee and the Executive Committee of the MPR (Article 3).

The President presided over the Congress, Central Committee, Political Bureau, Executive Committee and Executive Council (Article 6 *in fine*).

Most of powers formerly ascribed to the Political Bureau passed to the Central Committee that became the organ of conception, inspiration, orientation and decision of the MPR.

The Central Committee was to ensure respect for the fundamental decisions of the State Party and enforced the resolutions of the Congress.

It was the guardian and depository of *Mobutism* (Article 22 modified Article 58, which became Article 60). Its decisions, called State Decisions, were binding on the Legislative and Executive Councils and Committee (Article 26).

The Political Bureau became the permanent organ of control of the decisions of the State Party (Article 30).

The Executive Committee, another new organ, was responsible for the coordination of specialised branches of the Party and exercised control over the activities of subordinate organisations from Region to Cells (Article 40).

4.5.3.14. Law No. 82-004 of 31 December 1982

The 1982 constitutional Law was mainly inspired by State Decision no.31/CC/82 of the Central Committee of the MPR.

As decided by the Central Committee, the Executive Committee was dissolved. Article 1 amended Article 34 and reduced the number of the State Party organs to seven instead of eight, namely the President of the MPR, President of the Republic, the Congress, the Central Committee, the Political Bureau, the Legislative, Executive and Judicial Councils.

Article 2 modified Article 36 in the sense that it no longer mentioned the disbanded Executive Committee among the organs presided over by the President of the MPR, President of the Republic.

Article 3 amended Article 40 by providing that in case of vacancy, the Central Committee through the eldest of its members assumed the functions of the Founding President, President of the Republic.

However, he could not exercise powers as prescribed in Article 42 and his main task was to organise the presidential election.

Article 6 modified Article 68 and changed the denomination of "Political Commissioner" into to that of "Member of the Political Bureau".

The remaining provisions dealt with the Political Bureau, changed the numbering of some provisions and brought some minor change to the organisation and exercise of power.

4.5.3.15. Law No. 88-004 of 27 January 1988

This constitutional Law was initiated by the Founding President in his opening address to the special meeting of the Central Committee of the MPR gathered in Kinshasa-N'Sele from 17 to 20 August 1987.

President Mobutu deplored a number of lacunas in the organisation of the elections of the members of the Zones and Collectivities Councils in May and July 1987.

In its declaration numbered 10/CC/87 dated 28 August 1987, the Central Committee claimed the competence to deal with electoral matters and contended that it was an essentially political matter to be dealt with by a political organ and not a judicial one like the Supreme Court of Justice.

Article 1 of this Law amended Article 60 by bringing the electoral disputes in the jurisdiction of the Central Committee while Article 2 modified Article 103 paragraph 1 by removing it from the jurisdiction of the Supreme Court of Justice. A political one replaced the judicial appeal.

The argument that electoral disputes were an “essentially political matter to be dealt with by a political organ instead of a judicial one”¹²⁸⁵ was debatable, but understandable insofar as Zaire was not a constitutional or a democratic country under President Mobutu.

In countries such as the USA and South Africa, they fall within the competence of the Supreme Court or the Constitutional Court, which are judicial organs.

¹²⁸⁵ *Exposé* of Motives of the Law of 27 January 1988, para 3.

4.5.3.16. Law No. 88-009 of 27 June 1988

The 1988 constitutional Law was dictated by a wish of the Founding President first expressed in his opening address to the 3rd Ordinary Congress of the MPR and reiterated in his address to the 4th Ordinary Congress held from 16 to 20 May 1988.

According to the President, the country was under-administrated and there was a crucial need to bring the administration much closer to the people.

With this in view, an effective administrative decentralisation was required that could result in a new administrative partitioning of the national territory. The Congress therefore adopted a resolution in this regard.

The Legislative Council then adopted and the Founding President assented to and signed the constitutional Law no.88-009 of 27 June 1988.

Article 1 of this Law amended Article 2 to provide:

“The Republic of Zaire consists of the City of Kinshasa and Regions. The boundaries of the City of Kinshasa and Regions as well as the number and denominations of the latter are determined by law.”

Following this constitutional amendment, the former Kivu Region (Province) was divided into three new Regions, namely South Kivu, North Kivu and Maniema.

4.6. Constitutionalism and Democracy in Zaire in Unfinished Transition (Since 1990)

4.6.1. Background

In the late 1980s, the wind of change was blowing throughout the world and especially on the African continent.

People were demonstrating against their authoritarian leaders and demanding democracy with almost the same vehemence as they claimed independence.

Mr. Mobutu, as a strategist leader, decided to anticipate change in order to manipulate it and politically “survive”.

In early 1990, President Mobutu decided to hold a series of public meetings to discuss the country's problems.

From 14 January to April 1990, he initiated what he called “popular consultations”, toured the country and called for views or comments on the future of the MPR and a new political order.

The choice of Mr. Mokolo wa Pombo, former head of the political police, as the director of the Office of Popular Consultations, was a clear indication that they were an operation to contain rather than promote change.¹²⁸⁶

In his address to the Nation on 24 April 1990 in N'Sele, President Mobutu delivered the conclusions of the three-month popular consultations.

Many memoranda called for Mobutu's resignation, the dismantling of the MPR, and the establishment of a multiparty democracy.

¹²⁸⁶ See Schatzberg, M.G., “Hijacking Change...” 116; Banock, M., *Le Processus de Démocratisation en Afrique...* 9.

The President pretended the contrary, alleging that the majority of memoranda agreed with the maintenance of his single party and expressed their confidence in his leadership while a small minority demanded multipartyism. Despite this, the President chose to side with the minority.

The irony is that the change President Mobutu announced was widely acclaimed by the majority of the Congolese people.

In line with the logic of the MPR according to which the presidential word was law, the presidential speech had to be followed by a constitutional change. 24 April 1990 is generally considered the starting point of the transitional process to democracy in Zaire.¹²⁸⁷

Since then, the country has been torn between authoritarianism on the one hand and constitutionalism and democracy on the other.

4.6.2. Constitutionalism and Democracy under Mobutu's "Granted" or "Decided" Transition (1990-1991) and "Mobutu's Third Republic" (1991-1997)¹²⁸⁸

4.6.2.1. Guided Democracy: Hijacking Discourse for Change and Mobutu "Royal" Speech

In his speech delivered on 24 April 1990, President Mobutu announced several important measures.¹²⁸⁹

The first measure concerned the introduction of a multi-party system limited to three parties, "tripartyism", as we called it elsewhere,¹²⁹⁰ and plural unionism.

¹²⁸⁷ Mulambu, Mvuluya, "Les masses populaires et les préalables d'une transition démocratique au Zaïre (1990-1992)", in Nzongola – Ntalaja, G. & Lee, MC, (eds.), *The State and Democracy...* 53-57.

¹²⁸⁸ Schatzberg, M.G., op.cit. 114.

¹²⁸⁹ *Exposé* of Motives of Law No. 90-002 of 5 July 1990.

¹²⁹⁰ Mangu, Mbata, B., *Démocratie, régime pluraliste ...* 86.

Secondly, the MPR ceased to exist as State Party and State institution. The State Party was abolished. Any reference to the MPR in the Constitution was suppressed while the traditional three powers, namely the legislature, the executive, and the judiciary, were rehabilitated as the only constitutional institutions. President Mobutu also tendered his resignation as the President of the MPR.

Thirdly, the President announced that the transitional period would run up to 30 April 1991 and the Constitution was to be modified to adapt it to the envisaged change.

Finally, a Constituent Commission had to be set up to draft a final Constitution to be adopted by popular referendum to govern the "Third Republic".

Mr. Mobutu's speech, which ended the process of Popular Consultations, was in fact a very successful political exercise that helped him recover power.

He managed to confiscate or "hijack"¹²⁹¹ the discourse for change that was so far monopolised by the members of the democratic movement, namely the political leaders and the civil society components such as churches, students, and workers.

Mobutu's democratisation was an "authoritarian democratisation,"¹²⁹² and his transitional programme that of "guided democracy".¹²⁹³

According to the Mobutist scheme, democracy was to be a "top-down affair,"¹²⁹⁴ or a kind of "*démocratie par le haut*" or "*démocratie d'en haut*" decried by Bakary and belittled by Lizhi.¹²⁹⁵

¹²⁹¹ Schatzberg, M.G., "Hijacking Change..." 114.

¹²⁹² Kamto, M., "Quelques réflexions sur la transition vers le pluralisme politique au Cameroun", in Conac, G., (ed.), op.cit. 228.

¹²⁹³ Adejumobi, S., "The Two Political Parties and the Electoral Process in Nigeria: 1989-1993", in Nzongola – Ntalaja, G. & Lee, MC, (eds.) op. cit. 125.

¹²⁹⁴ Schatzberg, M.G., "Hijacking Change..." 116.

¹²⁹⁵ See Bakary, A.T., *Démocratie par le haut en Côte d'Ivoire*, supra; Lizhi, F., quoted by Liniger-Goumaz, M., op. cit. 254.

According to Schatzberg,

“To label this historically open-ended autocratic recession as democratization is to confuse a normatively desired goal with a complex series of political processes whose outcome is far from predetermined.”¹²⁹⁶

Schatzberg defined “hijacking” of change as

“The co-optation and subversion of political movements directed either against autocrats who have long been part of the political landscape or against the repressive and antidemocratic forms of political order that have survived their departure.”¹²⁹⁷

This “liberalisation of Mobutism”¹²⁹⁸ was akin to the transitional programme of the Nigerian State (1986-1993) under the administration of General-President Babangida, which was characterised by a strict regimentation or what Richard Joseph¹²⁹⁹ referred to as “extreme political engineering”. Like many other authoritarian leaders, Mobutu was a “Master of manipulation”.

By an incredible political turn of events in the afternoon of 24 April 1990, the authoritarian leader who had already fallen into disgrace all of a sudden regained the sympathy of the people by presenting himself as the “Father” of democracy.

In Schatzberg’s and this author’s views, this was a maneuver to forestall potentially more extreme forms of protest against the regime and an effort to channel popular discontent into forms that the regime’s security apparatus could handle easily.¹³⁰⁰

Mobutu’s exercise was remindful of *Sister Act*, a movie featuring Whoopi Goldberg, where the fear of danger and desire to survive transformed a prostitute into a pious and good sister.

¹²⁹⁶ Schatzberg, M.G., “Hijacking Change...” 113.

¹²⁹⁷ Idem.

¹²⁹⁸ Liniger-Goumaz, M., *Démocrature...* 16, 273.

¹²⁹⁹ Quoted by Adejumobi, S., “The Two Political Parties...” 125.

¹³⁰⁰ See Schatzberg, M.G., “Hijacking Change...” 115.

Everywhere besieged by the forces of change, African long-ruling autocrats of both the left (Kerekou, Sassou Ngouesso...) and the right (Mobutu, Bongo, Eyadema...) pursued a range of strategies to remain in power.

Few gracefully ceded their coveted positions as Heads of State Party without resistance. Fewer openly and sincerely embraced the new crosscurrents of political change. The overwhelming majority waged a fierce and violent political war to retain their positions. Zaire's President, Mobutu Sese Seko, was no exception.¹³⁰¹

Mobutu's speech was a "royal" speech, akin to the address made by King Baudouin I when he announced independence on 8 January 1959. On the other hand, by terminating the MPR unilaterally, without even consulting with his supporters, President Mobutu was not different from Baudouin's great-father, King Léopold II.

As stressed earlier, the Congo Free State was to the Belgian King Léopold II a personal affair, but so was the MPR State Party to the Zairian President Mobutu.

Following the presidential address, the Legislative Council adopted and the President later assented to and signed the constitutional Law No. 90-002 of 5 July 1990.

4.6.2.2. Law No. 90-002 of 5 July 1990

This constitutional Law brought about dramatic change to the one-party constitutional order, as many provisions of the previous Constitution were repealed. Any reference to the single party, namely MPR, and to its role in the State was removed from the Constitution. The main change introduced by this Law affected Titles I, II and III of the Constitution.

¹³⁰¹ Schatzberg, M.G., "Hijacking Change..." 113.

In Title I dealing with Territory and Sovereignty of the Republic, a new Article 8 provided:

“Political parties are recognised in the Republic of Zaire.
There cannot be more than three political parties.
The law determines the organisation and functioning of political parties.”¹³⁰²

The Republic, which was organised as a single party state and later on as a State Party, became a multiparty State, but Mr. Mobutu remained the master of the political game. Related to the above, as the previous one-party system only allowed a single union, a major change in Title II on Fundamental Rights and Duties of Citizens was introduced by Article 26 that read as follows:

“All Zairians have the right to form unions, associations and societies.
Groupings whose aim or activity is inconsistent with laws or directed against public order are prohibited.”¹³⁰³

Title III on the Organisation and Exercise of Power reestablished the principle of the separation of powers and rehabilitated the three traditional powers, namely the executive, legislative and judicial powers that were no longer under the Party's control. Section 1 dealt with the President of the Republic who was no longer presented as “President of the MPR, President of the Republic”.

Section 2 concerned the National Assembly, the new name of the Legislative Council.

Section 3 concerned the Government or the Cabinet. Here again, the name “Executive Council” lost to the traditional “Government”.

Section 4 was concerned with “Courts and Tribunals,” which replaced the Judicial Council.

¹³⁰² Translation mine.

¹³⁰³ Idem.

Article 4 of Title VIII on Transitional and Final Arrangements prolonged the term of office of the President and the members of the "Legislative Council" that were to expire by 5 December 1990, as it provided:

"The incumbent President of the Republic remains in office until the forthcoming election. The same goes for the members of the Legislative Council in office. The members of legislative organs of territorial entities also remain in office until the forthcoming municipal and local elections."¹³⁰⁴

4.6.2.3. Failure of "Decided Democracy" and Law No. 90-008 of 25 November 1990: From "Tripartyism" to "Integral Multipartyism"

The leaders of the democratic movement opposed the limitation of the multiparty system to only three parties, as unilaterally decided by President Mobutu and provided by the constitutional Law of 5 July 1990. They then embarked on a vast campaign for a multiparty system without limitation on the number of parties.

In September 1990, President Mobutu already envisaged a system of four instead of three parties. However, while the political tension remained high, the President came to realise that after all integral multipartyism was to serve his interests. He therefore urged his MPR-dominated National Assembly to amend anew the Constitution.

It was recognised that the limitation on the number of parties to three was not welcomed by the different socio-political, economic and cultural groups that formulated reflections, observations and suggestions in the sense of an integral multiparty system that allowed the full exercise of democracy in the country.¹³⁰⁵

Article 1 of the constitutional Law of 25 November 1990 provided:

"Article 8:
Multipartyism is recognised in the Republic of Zaire.
The law determines the organisation and the functioning of political parties".

¹³⁰⁴ Article 2 of Title VIII that introduced Article 4.

¹³⁰⁵ *Exposé* of Motives of the constitutional Law No. 90-008 of 25 November 1990.

As pointed out later, the establishment of an integral multiparty system was a big trap in which many Zairian political leaders fell. The result was a great division of the political opposition that helped M. Mobutu prolong his reign.

By proceeding from tripartyism to integral multipartyism, Mobutu probably drew inspiration from President Senghor who did the same in Senegal in the 1970s.

Article 3 of the constitutional amendment Act of 19 March 1976,¹³⁰⁶ which symbolised the return to political pluralism in Senegal, provided that “political parties should be three and represent different trends of thoughts.”¹³⁰⁷

These three trends were “socialist and democratic,” “liberal and democratic,” and “Leninist-Marxist” or “Communist”.

The ruling party, the Socialist Senegalese Party (*Parti Socialiste Sénégalais*, PSS) claimed to belong to the “socialist and democratic” trend.

PSS’s claim to belong to the most popular ideological trend in the African context of Senegal was contested by the two remaining parties, namely the Democratic Senegalese Party (*Parti Démocratique Sénégalais*, PDS) of Mr. Abdoulaye Wade and the African Party for Independence (*Parti Africain de l’Indépendance*, PAI) of Mr. Majmout Diop, created in 1974 and 1975 respectively.

Nevertheless, they accepted to rank behind the banners “liberal and democratic” (PDS) and “Leninist-Marxist” or “Communist” (PAI).

As their Senegalese counterparts did more than ten years earlier, the Zairian opposition leaders argued against the limitation on the number of parties.

¹³⁰⁶ Constitutional Act amending the Constitution of the Republic of Senegal, Act no. 76 - 01 of 19 March 1976.

¹³⁰⁷ Translation mine.

The Senegalese opposition parties won the battle and first obtained the extension of multipartyism to four parties,¹³⁰⁸ or quatripartyism,¹³⁰⁹ and finally an integral multipartyism.¹³¹⁰

Article 8 of the Zairian constitutional Law of 5 July 1990 and that of 25 November 1990 was akin to Article 3 of the Senegalese Constitution of 1976 that provided for the existence of three parties in the Republic.

The division of the opposition in so many political parties helped the single party to survive and overstay in power. The *divide et impera* rule once used by the "foreign" colonial masters also assisted the local "neo-colonial masters" in retaining power in their countries.

As this author put it elsewhere,

*"A notre avis, une double raison a amené le PSS à libéraliser complètement le système politique sénégalais. D'abord, la pression exercée par des personnalités qui ne se reconnaissaient pas dans l'un des trois, puis quatre partis reconnus, a été déterminante. Mais c'est aussi et surtout la prise de conscience au niveau du PSS qu'un pluralisme sauvage, dans un pays où il a tout de même de solides assises, renforçait son pouvoir en améliorant son image aux yeux des populations et du monde libéral dont le Sénégal s'est toujours réclamé."*¹³¹¹

However, one cannot go further in the comparison between Senegal and Zaire, Mobutu and Senghor, PSS and MPR.

¹³⁰⁸ See Constitutional Act No. 78-60 of 28 December 1978 amending Article 3 of the Senegalese Constitution. The party, which benefited from this amendment and was registered, was the Senegalese Republican Movement (*Mouvement Républicain du Sénégal*, MRS) of Mr Boubakar Gueye.

¹³⁰⁹ Mangu, Mbata B., *Les régimes pluralistes africains...* 68.

¹³¹⁰ See Constitutional Act No. 81-16 of 6 May 1981 amending Article 3 of the Constitution.

¹³¹¹ Mangu, Mbata B., *Démocratie, Régime pluraliste...* 90 :

"In our view a two-fold reason led the PSS to a complete liberalisation of the Senegalese political system. First, the pressure exerted by the leaders who did not find their place in any of the three, then four recognised parties played a major role. Secondly and mostly, it was the realisation within the PSS, that an integral multipartyism in a country where it has solid foundations was likely to consolidate its power in the eyes of the population and the liberal world to which Senegal has always claimed to belong." (Translation mine).

On the eve of the *Conférence Nationale Souveraine*/Sovereign National Conference (CNS/SNC) the attendance of which was subject to the leadership of a political party recognised by Mobutu's government, there were more than 400 parties registered with the Department of Interior.

According to Mulambu, there were 226 parties on 18 June 1991, at the end of the preparatory works to the CNS/SNC and more than 460 parties in Zaire by the end of June 1995.¹³¹² Almost the two-thirds of these parties were created by Mobutu's cronies and funded by Mr. Mobutu himself.¹³¹³

Liniger-Goumaz referred to multipartyism under Mobutu as "multimobutism".¹³¹⁴ Hence Bayart's remark:¹³¹⁵

*"Nul n'est plus multipartiste que Mobutu, il a créé plus de soixante partis tout seul."*¹³¹⁶

4.6.2.4. Appreciation of the Constitutionality of the Constitutional Laws of 5 July and 25 November 1990

When the constitutional Law of 5 July 1990, later modified by that of 25 November 1990, was enacted, it was expected to conform to the constitutional Law in operation for its validity as constitutional amendment.

The relevant provision read as follows:

"The initiative of constitutional amendment belongs concurrently to the President of the MPR, President of the Republic, and half of the members of the Legislative Council after advice of the Congress or the Central Committee."¹³¹⁷

¹³¹² Mulambu, M., "Les masses populaires..." 57.

¹³¹³ See Liniger-Goumaz, M., op.cit. 273; Mangu, Mbata B., *Démocratie, Régime Pluraliste...* 89

¹³¹⁴ Liniger-Goumaz, M., op.cit. 16.

¹³¹⁵ Quoted by Liniger-Goumaz, op. cit. 310.

¹³¹⁶ "No one is more multipartyist than Mobutu; he alone has created more than sixty parties" (Translation mine).

¹³¹⁷ Translation mine. This provision was Article 111, according to Article 18 of the constitutional Law of 31 December 1982, and Article 116 in terms of Article 54 of that of 15 November 1980.

In terms of this provision, a valid constitutional amendment had to be initiated by the President of the MPR, *de jure* President of the Republic, or half of the members of the Legislative Council, on advice of either the Congress or the Central Committee.

An examination of the constitutional validity of the two 1990 constitutional amendments would revolve around three legal points.

First, Mr. Mobutu lost the presidency of MPR and *ipso facto* that of the Republic when he publicly announced his resignation in his speech on 24 April 1990. Accordingly, he was no longer entitled to initiate any constitutional amendment, as he did twice in 1990.

Secondly, Mr. Mobutu initiated both constitutional amendments of 5 July and 25 November 1990 without prior advice of the Congress or the Central Committee, as required by the Constitution.

Thirdly, the Legislative Council that adopted the two amendments and the Congress or the central Committee that could have given advice no longer qualified to do so. They were MPR organs and had ceased to exist with the dissolution of the Party.

In view of the above argument, the 1990 amendments were unconstitutional and invalid. The democratisation *à la* Mobutu was therefore based on another Mobutu's *coup d'état*. The State Party actually survived and MPR militants considered "liars" the leaders of the democratic movement and all those who announced the "death" of the Party.¹³¹⁸ However, the one-party rule was confronted with an unprecedented opposition.

¹³¹⁸ A Party's song popularised in Lingala, one of the four national African languages in Zaïre, said the following to those who considered the single party "dead" :

"*Lokuta Monene, Lokuta Monene, Oyo Akanisaka, MPR Akokufa, Waya*".
 ("Big Lie, Big Lie, let them go to Hell, those who ever thought of MPR's death." Translation mine)

4.6.2.5. Popular Opposition to Mobutu's "Guided" Democratisation, Long Struggle for the Sovereign National Conference and Results

4.6.2.5.1. Opposition to the Constitutional Commission and Struggle for the Sovereign National Conference

Despite some concessions to the democratic movement, the people remained opposed to the democratisation *à la* Mobutu.

After the enactment of constitutional Law of 25 November 1990, the struggle changed its face and objectives. The fight for an integral multiparty system having been won, the focus became the Sovereign National Conference, and not the Constitutional Commission advocated by President Mobutu to draft the Constitution to be adopted by popular referendum.

Arguably, the most important African contribution to constitutionalism and democracy in post-colonial Africa was the National Conference that was "invented" by Benin when it organised its "*Forces Vives*" Conference (19 - 28th February 1990).¹³¹⁹

Many other African countries, namely Burkina Faso, Chad, Comoros, Congo, Gabon, Mali, Niger, and Togo, emulated the good example set by Benin.

The Zairian people did not want some thing that could be of a lower status than the National Conference that allowed the people, especially the opposition and civil society, to negotiate with the incumbent leader or regime and participate in the process of transition to democracy instead of giving *carte blanche* to the dictator and his cronies to decide unilaterally on the organisation and functioning of the transitional government. Mobutu firmly opposed the Sovereign National Conference that could result in power-sharing or confiscation of political power by the opposition.

¹³¹⁹ Eboussi-Boulaga, F., *Les Conférences Nationales en Afrique Noire: Une Affaire à Suivre*, 31.

A first concession made by President Mobutu to the democratic movement in early 1991 was the transformation of his proposed Constitutional Commission into a Constitutional Conference.

On 1 March 1991 in N'sele, President Mobutu met with the leaders of 66 already registered parties to explain his decision.

On 6 March 1991, the President enacted an ordinance convening the "Constitutional Conference".¹³²⁰

The purpose set for the Conference was the determination of the fundamental or constitutional options for the Third Republic. Its duration was 30 days and it was to consist of delegates of public institutions, political parties, civil society and experts.¹³²¹

Shortly after the promulgation of the Presidential Ordinance, Mr. Tshisekedi, the leader of the UDPS dismissed the very idea of such a conference convened by President Mobutu. He pointed out that Mr. Mobutu was no longer a legitimate and legal President since his resignation as the President of the MPR on 24 April 1990, and therefore he was no longer entitled to convene such an important meeting.¹³²²

On 9 March 1991, Mr. Joseph Ileo, the leader of the *Parti Démocratique et Social Chrétien*/Christian Social Democratic Party (PDSC) joined Mr. Tshisekedi and the UDPS in their opposition to the Constitutional Conference and openly requested a "National Conference".

¹³²⁰ Presidential Ordinance No. 91-10 of 6 March 1991.

¹³²¹ See Mangu, Mbata B., *Démocratie, Régime pluraliste...* 93; *Zaire-Afrique* (1991) 269-270.

¹³²² See *Zaire-Afrique* (1991) 269-270.

Mr. Tshisekedi and Mr. Ileo were followed and supported by other political leaders such as Jean-Nguz of the *Union des Fédéralistes et Républicains Indépendants/Independent Republicans and Federalists Union (UFERI)* and Bernardin Mungul Diaka of the *Rassemblement pour la République/Rally for the Republic (RDR)*. The former (Jean-Nguz) rejected the Constitutional Conference because Mr. Mobutu unilaterally decided it. The latter (Mungul Diaka) just demanded it being boycotted.

However, other political leaders accepted the principle of the Constitutional Conference. Nathanaël Mbumba of the *Front de Libération Nationale du Congo/Front of the National Liberation of the Congo (FLNC)* agreed with President Mobutu.

Mr Mandungu of the *Front Commun des Nationalistes/Nationalists' Common Front (FCN)* only deplored the procedure of its convocation as undemocratic.

The time then came for constitutional scholars to sink their teeth into the constitutional conference.

In his opposition against a negotiated transition, a dictator like Babangida enlisted the services of "IBB professors". Mr. Mobutu could also count on the support of some members of the academia, the "Mobutist Professors" who tried anything to discourage the people and militants for democracy.

As Mulambu pointed out, several university professors mobilised or canvassed by "the Power" became familiar with public television channels to explain that a constitutional conference was equivalent to the National Conference sought by the people.¹³²³

¹³²³ Mulambu, M., op.cit. 61. Mr Kikete Okumba, a constitutional law professor at the University of Kinshasa, became famous for his equation "National Conference = Constitutional Conference".

The people nevertheless continued to oppose, multiplying actions of “ghost towns”¹³²⁴ and strikes that rendered the country ungovernable.

On 14 March 1991, Prime Minister Lunda Bululu, professor of law at the University of Kinshasa, tendered his resignation.

On 15 March, he was replaced by Mr. Mulumba Lukoji, a colleague in the Faculty of Law who immediately started consulting with political leaders for the formation of his Cabinet.

On 8 April 1991, after consulting with the leaders of 104 parties, Prime Minister Mulumba Lukoji announced the concession made by President Mobutu that the National Forum of Dialogue around the transition towards the Third Republic would be called “National Conference”.¹³²⁵

The National Conference was convened on 11 April 1991.¹³²⁶ A preparatory commission that was set up to determine the composition and the agenda of the Conference started its work on 25 May and completed it on 12 June 1991.

The very same day, Prime Minister Mulumba Lukoji announced that the National Conference would open on 10 July 1991 with the participation of 2850 delegates, 1100 from civil society, 900 from political parties, 750 from public institutions, and 100 personalities invited to the Conference.

After the postponement of its opening to 31 July 1991,¹³²⁷ the National Conference finally got under way on 7 August 1991 at the People’ Palace in Kinshasa.

The Zairian National Conference was the longest on the continent, as it had lasted 16 months when it closed on 6 December 1992. Books have still to be written on this Conference that was suspended several times, but produced some results to assist the Zairian people on their road to constitutionalism and democracy.

¹³²⁴ “Ghost Towns” refer to those general strikes during which nobody was allowed to go to work so that there appeared to be no life in town.

¹³²⁵ Mangu, Mbata B., *Démocratie...* 97.

¹³²⁶ See Presidential Ordinance No. 91-097 of 11 April 1991.

¹³²⁷ Presidential Ordinance No. 91-205 of 15 July 1991.

4.6.2.5.2. Results of the Sovereign National Conference

The main results of the *Conférence Nationale Souveraine*/Sovereign National Conference (CNS/SNC) were the following:

- Adoption on 5 May 1992 of the Act proclaiming the sovereignty of the CNS. Article 1 of this Act provided:
 “The decisions of the Sovereign National Conference are enforceable and binding on all”;
- Adoption on 4 August 1992 of the Act relating to the constitutional provisions applicable to the transitional period;
- Election on 15 August 1992 of Prime Minister Tshisekedi as head of the transitional government;
- Election of the *Haut Conseil de la République*/High Council of the Republic (HCR), as Transitional Parliament, on 5 December 1992; and
- Elaboration of a draft of the Constitution for the Third Republic.

Moreover, the CNS adopted other Acts in several domains. It helped the Zairians come together engage in dialogue, and imagine ways and means to get out of the multidimensional crisis facing their country.

However, despite it being the longest, most onerous and best attended National Conference on the continent, it achieved very little, especially in terms of national reconciliation and in taming the Zairian Leviathan.

4.6.3. Constitutionalism and Democracy under Mobutu's "Negotiated" Transition: The Sovereign National Conference Regime and the Permanent *Coup d'Etat*

The constitutional regime established by the *Conférence Nationale Souveraine*/Sovereign National Conference (CNS/SNC) was from its inception confronted with the logic of a permanent *coup d'état* typical of the Mobutu's regime. Therefore, from 1992 to 1997, at least two constitutional texts were competing for the government of the transition.

The *Conférence Nationale Souveraine* (CNS) Constitutional Act first came in competition with the constitutional Law of 5 July 1990 as amended by that of 25 November 1990 but repealed by the CNS Constitutional Act.

When the constitutional Law inherited from the Second Republic could no longer sustain the competition, it gave way to the Harmonised Constitutional Act adopted by the Political Conclave of Kinshasa convened by President Mobutu and that then came in confrontation with the CNS/SNC Constitutional Act.¹³²⁸

The constitutional crisis was finally settled by the Transitional Constitutional Act enacted by the *Haut Conseil de la République-Parlement de Transition*/High Council of the Republic-Transitional Parliament (HCR-PT) agreed upon by all parties. However, the political crisis remained.

¹³²⁸ Developments on this, *infra*.

4.6.3.1. The Sovereign National Conference Constitutional Act versus the Constitutional Act of 5 July as amend on 25 November 1990

4.6.3.1.1. Constitutional and Institutional Duplication

Since the adoption of the Sovereign National Conference Constitutional Act on 4 August 1992, President Mobutu and his cronies who earlier denied the sovereignty of the Conference continued to invoke the constitutional Law of 5 July 1990 as the supreme law of the Republic.

On the other hand, the opposition and democratic forces that supported the SNC Constitutional Act held that its Article 114 repealed the constitutional Law of 5 July 1990.

On 15 August 1990, President Mobutu congratulated Mr Tshisekedi on his election by the SNC as Prime Minister of the transition. However, the presidential decree that appointed him did not leave any doubt about the fact that the President deliberately ignored the SNC.

The President did the same with the decree of 19 August 1992 when appointing the members of Tshisekedi Government.

The President declared that he would not sign the SNC Constitutional Act, unless his conditions were met. Meanwhile the constitutional Law enacted by the National Assembly of his erstwhile single party remained in force as the only constitutional text governing the country.¹³²⁹

In September 1992, the President signed other decrees appointing close collaborators Ambassadors or directors of intelligence services and so the show went on.

¹³²⁹ *Zaire-Afrique* (1992 (c)) 571-572.

Although President Mobutu accepted to work with Prime Minister Tshisekedi and the Government of National Union, he continued to recognise the National Assembly yet dissolved in terms of the Global Political Compromise of 31 July 1992. When the SNC on 5 December 1992 appointed a transitional Parliament, namely the High Council of the Republic (HCR), President Mobutu rejected it.

The above competition resulted in a constitutional pandemonium in Zaire: two constitutional acts and two Parliaments for the Republic.

On 2 December 1992, President Mobutu dismissed the Transitional Government and invited Prime Minister Tshisekedi to form a new one.

On 10 December 1992, following the opposition of Prime Minister Tshisekedi and the HCR considering the presidential decrees unconstitutional, Mr Mobutu repeated what he did in September 1960.

He appointed an interim government of Directors General of Public Administration. Mr. Zushi, the coordinator of the College of the Directors General, was to act as the Prime Minister.

In December 1992, Mr. Mobutu played the two roles held by President Kasa-Vubu and Colonel Mobutu respectively in September-October 1960.

The country now had not only two competing constitutional texts and Parliaments, but also two rival governments and Prime Ministers.

4.6.3.1.2. Zairian Armed Forces and Constitutional and Institutional Duplication

On 17 September 1992, a *communiqué* of the *Forces Armées Zaïroises* (Zairian Armed Forces) (FAZ) threatened political leaders in the *Conférence Nationale Souveraine* (CNS/ SNC) who feared a *coup d'état*.

On 21 October, the military delegation led by General Elese, Deputy Chief of Staff, withdrew from the CNS. On 17 November, their threat of a military *coup d'état* was repeated.

In a memorandum issued on 24 February 1993, the High Command of the Army under the direction of General Eluki, the new Chief of Staff appointed to replace General Mayele Bokungu, made it clear that the FAZ were not concerned with the CNS Constitutional Act and ignored it.¹³³⁰ They rather supported the constitutional Law of 5 July 1990 and the National Assembly that adopted it.

When the National Assembly yet dissolved by the Sovereign National Conference Constitutional Act resurrected in 1992, it had to rely on the FAZ to organise its ordinary October session. Moreover, following the example of the Togolese army in October 1992, the FAZ took hostage the Councillors of the Republic¹³³¹ from 24 to 26 February 1993.¹³³²

As far as the government rivalry was concerned, the FAZ opposed the Tshisekedi government.

On 2 December 1992, according to the decision by President Mobutu to dismiss this government, the military sealed off the ministerial offices.

¹³³⁰ *Zaire-Afrique* (1993 (a)) 261-262

¹³³¹ As the members of the HCR were then called.

¹³³² *Zaire-Afrique* (1993 (a)) 262.

As in October 1960, when the first Congolese government of Prime Minister Lumumba was unconstitutionally dismissed by President Kasa-Vubu, the military backed the Government of Directors General appointed by President Mobutu after the unconstitutional dismissal of the government of Prime Minister Tshisekedi. The army was therefore behind President Mobutu as the first gravedigger for the Sovereign National Conference.

4.6.3.1.3. The Supreme Court of Justice and Constitutional and Institutional Duplication

The Zairian Supreme Court of Justice remained silent about the constitutional and political competition and for a long time failed to administer justice in this regard.

The first reason for this was the dependence of the judiciary on the executive. The second reason referred to the procedure, as only four institutions had *locus standi* before the Supreme Court, namely, the President of the Republic, the Bureau of Parliament, the General Prosecutor of the Republic, and the Courts and Tribunals.

The Court was not approached to decide on the validity of the Sovereign National Conference Constitutional Act or the National Assembly amended Law of 5 July 1990. However, it incidentally addressed the issue when it decided the case *Association des Témoins de Jéhovah versus La République du Zaïre*.¹³³³

In this case, the Association of Jehovah's Witnesses had been banned in the country by the Presidential Ordinance 86-086 of 12 March 1986.

¹³³³ *Association des Témoins de Jéhovah contre la République du Zaïre*, Judgement RA 266 of 8 January 1993.

On 6 July 1991, the members of the Association took the opportunity of the adoption of the Sovereign National Conference Constitutional Act to challenge the constitutionality of the Presidential Ordinance and the Supreme Court declared it to be unconstitutional and invalid.

The Supreme Court ruled that the Constitutional Act enacted by the Sovereign National Conference was the only constitutional text valid for the transitional period and the Constitution of the Second Republic was repealed.¹³³⁴

The judgment of the Court was a legal victory for the Sovereign National Conference and its supporters over those of the constitutional Law of 5 July 1990, namely President Mobutu, the National Assembly, the army and the cronies of the erstwhile one-party, the MPR.

Some Mobutist scholars levelled a great deal of criticism against the ruling of the Court.¹³³⁵ Unfortunately, the judgements of the Supreme Court were binding and final. The presidential camp had no choice but to find a new source of legitimacy.

On 9 March 1993, President Mobutu convened 285 political leaders close to him for a special meeting at the Nation's Palace in Kinshasa. The "Conclave", as it was called, brought together Mobutu's supporters in the MPR, those who infiltrated the opposition as well as those who felt disappointed by the Sovereign National Conference.¹³³⁶

¹³³⁴ See Judgment RA 266, *supra*.

¹³³⁵ See Vundwawe, Te Pemako, "Réflexions sur la validité de l'Acte Constitutionnel de la Transition au regard du Compromis Politique Global et de l'Arrêt RA 266 de la Cour Suprême de Justice", *Le Soft de Finance*, 1993, No. 127, 1-4.

¹³³⁶ *Zaire-Afrique* (1993 (b)) 320-325.

The aim was to draft a new constitutional act to be enacted by the National Assembly in order to compete with the Constitutional Act of the Sovereign National Conference.

The Conclave finished its work on 19 March and President Mobutu convened the National Assembly.

On 28 March, Mr Mobutu appointed Mr Birindwa Prime Minister of a new government.

On 1 April 1993, the National Assembly closed its extraordinary session and on 2 April the President assented to and promulgated a constitutional law set to harmonise the different constitutional texts of the transition and transform them into a unique and complete constitutional text.¹³³⁷

Unfortunately, the 1993 Law failed to be a conciliatory text and to impose itself as a unique text, since with its rejection by those who did not participate in the Conclave, a new constitutional and institutional duplication had begun.

4.6.3.2. The Sovereign National Conference Constitutional Act *versus* the Harmonised Constitutional Act

On 30 March 1993, Mgr. Monsengwo, President of the High Council of the Republic, declared:¹³³⁸

*“Le Zaïre notre pays vient de rééditer depuis ce lundi 29 mars 1993 une douloureuse et peu glorieuse page de son histoire, une page que tous espéraient désormais révolue. Deux textes constitutionnels, deux gouvernements, deux organes législatifs qui se disputent la légitimité.”*¹³³⁹

¹³³⁷ *Loi No. 93-001 du 2 April 1993 portant Acte Constitutionnel Harmonisé Relatif à la Période de Transition.*

¹³³⁸ *Zaïre-Afrique (1993 (b)) 327.*

¹³³⁹ “Since this Monday 29 March 1993 Zaïre our country is reliving a very painful and less glorious page of its history, a page that every body believed it could not be rewritten. Two constitutional texts, two governments, and two legislative institutions compete for legitimacy” (Translation mine).

4.6.3.2.1. Constitutional and Institutional Duplication

The new duplication concerned two constitutional Acts drafted in two different palaces during two different dialogue frameworks, one from the People's Palace and Sovereign National Conference and the other from the Nation's Palace and the Political Conclave. The former resulted from a revolutionary logic and the latter from a conservative one.

Besides the competition between the Sovereign National Conference Constitutional Act and the constitutional Law no.93-001 of 2 April 1993 adopted by the Political Conclave, there was a rivalry at both the executive and legislative level.

On the side of the Conclave supporters and based on the Conclave Law, there was a new government appointed by President Mobutu and led by Faustin Birindwa as Prime Minister. Mr Birindwa and Mr Tshisekedi were from the same party, the UDPS.

To differentiate his government from that of the Conclave, Mr Tshisekedi referred to it as the "Legal and Legitimate Government" while the Birindwa government was labelled "*de facto* Government" or "Government *bis*".

The two governments confronted one another even on the international scene, each accrediting its representatives with some international agencies or foreign governments. The Sovereign National Conference government led by Mr Tshisekedi could claim legitimacy and legality, but it did not enjoy *imperium* since it was deprived of the command of the army and administration. President Mobutu was opposed to it.

When legitimacy or legality confronts efficiency even in international law, it is unfortunately the latter that usually prevails. Democratic forces have generally been abused in this regard.

As far as the transitional legislature is concerned, there were also two rival Parliaments, the one which was appointed by the Sovereign National Conference, namely the High Council of the Republic with its President, Mgr. Monsengwo, and the other which survived the State Party, namely the National Assembly, which was presided over by Mr. Anzuluni Bembe.

The attempt by the Conclave constitutional Law to “harmonise” or maintain both the National Assembly of the past State Party and the High Council for the Republic as the legislative institutions of the transition failed.

The members of the High Council for the Republic who were appointed by the Sovereign National Conference refused to compromise with the National Assembly that was dissolved in terms of the Sovereign National Conference Constitutional Act. Accordingly, Zaire continued to have its two Parliaments.

4.6.3.2.2. Zairian Armed Forces and Constitutional and Institutional Duplication

As in early 1992 under the constitutional Law of 5 July 1990 amended on 25 November 1990, the FAZ backed the Conclave constitutional Law assented to by President Mobutu. The army supported the National Assembly against the High Council of the Republic established by the Sovereign National Conference.

The FAZ also pledged allegiance to the government led by Prime Minister Birindwa and refused to obey the one led by Mr. Tshisekedi on the ground that President Mobutu already dismissed the latter.

In February 1993, General Eluki, the Chief of Staff, trumpeted:

“The army must obey one man, only one man, President Mobutu.”¹³⁴⁰

On 6 April 1993, as Prime Minister Tshisekedi was to present his reshuffled cabinet to the High Council for the Republic (HCR), the army surrounded the People’s Palace and refused entrance to the members of the transitional Parliament, to the diplomats and other personalities who were invited. The transitional Parliament therefore failed to meet for its ordinary session.

Moreover, the army invaded the residences of Mr. Tshisekedi and his ministers, turning everything upside down from 13 to 15 April 1993.

On 12 June 1993, the FAZ organised an unprecedented ceremony to salute Prime Minister Birindwa and his government. General Eluki declared on the occasion that the government of Prime Minister Birindwa was a legal one,

“because President Mobutu alone can confer legality upon a government.”¹³⁴¹

On 13 June 1993, Mgr. Monsengwo could respond to General Eluki:

“The army has not to decide what is legal or not. It must protect the legality. It is the responsibility of the Constitutional Court and the Supreme Court of Justice to decide what is legal.”¹³⁴²

In Mobutu’s Zaire as in many other African countries, it was unfortunately the military and not the judges who had to decide constitutional matters.

¹³⁴⁰ *Zaire-Afrique* (1993 (a)) 260 (My translation). In the run-up to March 2002 presidential elections in Zimbabwe, army generals also pledged their unconditional support to the candidate President Robert Mugabe and vowed not to salute or obey any government that would be led by Mr Morgan Tsvangirai, the leader of the MDC (Movement for Democratic Change).

¹³⁴¹ *Zaire-Afrique* (1993 (c)) 451. (Translation mine).

¹³⁴² *Idem*.

4.6.3.2.3. The Supreme Court of Justice and Constitutional and Institutional Duplication

Arguably, the constitutional Law 93-001 of 2 April 1993 was unconstitutional and invalid. It was adopted by the National Assembly that was already dissolved in terms of Article 114 of the Sovereign National Conference Constitutional Act declared the only valid constitutional text for the transition by the Supreme Court of Justice acting as the highest judge in constitutional matters in the country.¹³⁴³

4.6.3.3. The Transitional Constitutional Act and Constitutionalism

Mgr. Monsengwo, with President Mobutu's consent, embarked on new political negotiations with political leaders to bring the constitutional and institutional crisis to an end. The agreement reached by all parties was encapsulated in the Constitutional Act for the Transition that was assented to and signed by the President on 9 April 1994.¹³⁴⁴

4.6.3.3.1. The Political Regime

4.6.3.3.1.1. The Executive Authority

4.6.3.3.1.1.1. The President of the Republic

The President was the Head of State, the symbol of national unity and the guardian of the Nation (Article 39).

Compared with the *Conférence Nationale Souveraine*/Sovereign National Conference (CNS / SNC) original Constitutional Act, his power was reinforced in the legislative domain. He could, for instance, request a second deliberation of the law or some of its provisions before its promulgation (Article 40 (2) – (3)). He could legislate through Law-Ordinances in case of emergency (Articles 48 & 49).

¹³⁴³ See *Association des Témoins de Jéhovah contre la République du Zaïre.*, Judgement referred to supra.
¹³⁴⁴ Acte Constitutionnel de Transition, Journal Officiel de la République du Zaïre, 35e année, Numéro Spécial, Avril 1994.

According to Article 47, the President appointed and dismissed Governors and Deputy Governors of Provinces which he only invested with power under the Sovereign National Conference Constitutional Act. He declared war and state of emergency and the Nation was informed through a message (Article 48). He also presided over the government when meeting to decide measures required by the situation (Article 48).

In consequence of a declaration of siege or emergency, the President could on the initiative of the government suspend in the territory of the Republic and for the period he could determine, the criminal jurisdiction of civilian courts and tribunals and replace them with military jurisdictions for determined crimes (Article 77).

The President also participated in the governmental activity. National defence and foreign affairs were domains of collaboration between the President and the Government (Article 75).

Article 85 required the Prime Minister to keep the President fully informed of the governmental activity and provided that an ordinance should regulate the practical modalities of collaboration between the President and the Government. This was an innovation introduced by the supporters of the President who did not participate in the governmental activity under the Sovereign National Conference Constitutional Act.

The President was inviolable (Article 93 para 1).¹³⁴⁵ However, he was criminally responsible for high treason or intentional violation of the Constitution (Article 93). In case of vacancy, the President of the High Council for the Republic, the Transitional Parliament, (HCR-PT), replaced the President of the Republic (Article 54).

4.6.3.3.1.1.2. The Government

The Prime Minister was the leader of the government consisting of Ministers and Deputy Ministers. He was “presented, after consultation with the political class, by the political group other than that of the Head of State” (Article 78 partra 1).

The executive was therefore two-headed, but much of the executive power was vested in the government rather than in the President.

4.6.3.3.1.2. Parliament

The legislative authority during the transition was vested in the *Haut Conseil de la République-Parlement de Transition*/High Council of the Republic-Transitional Parliament (HCR-PT) whose members were called “Councillors of the Republic” (Article 55).

The members of the HCR-PT were the members of the National Assembly, of the High Council of the Republic (HCR),¹³⁴⁶ and personalities who participated in the Political Consultations of the Nation’s Palace without being members of the National Assembly or of HCR (Article 56).

The HCR-PT remained in office until the inauguration of the corresponding institution of the Third Republic (Article 63 and 118).

¹³⁴⁵ Such a provision on the inviolability of the President did not exist in the CNS Constitutional Act.

¹³⁴⁶ There was a difference between HCR and HCR-PT. The former was the Transitional Parliament appointed by the Sovereign National Conference. This Parliament changed into HCR-PT when it brought its members together with those of the past National Assembly, the Parliament of the erstwhile State Party (MPR), to form a single transitional Parliament that adopted the Transitional Constitutional Act. Therefore, HCR-PT was a merger, but its members continued to be called “Councillors of the Republic”.

4.6.3.3.1.3. The Judiciary

Articles 95 to 102 that dealt with the courts and tribunals were the same as under the Sovereign National Conference Constitutional Act or the Law adopted by the Harmonized Constitutional Act adopted by the National Assembly on 2 April 1993.

Article 95 provided for a judiciary that was independent from the legislative and the executive power.

4.6.3.3.1.4. Other Institutions and Important Provisions

Regional and local institutions were dealt with in Title IV. Title V concerned Public Finances and introduced a provision on the Reserve Bank of Zaire (Article 109) that did not exist in the Sovereign National Conference Act.

Title VI on treaties and international agreements was a copy of the corresponding provision of the CNS / SNC Constitutional Act. It established monism and the primacy of treaties that were regularly signed and ratified over laws enacted by Parliament.

According to Title VII (Article 116), a constitutional amendment could be initiated by half of the High Council of the Republic, the Transitional Parliament (HCR-PT), or by the Transitional Government. The required majority to pass the amendment was the three-quarters of the members of the HCR-PT.

Title VIII dealt with transitional and final provisions. Its Article 117 set the duration of the transition for 15 months following the promulgation of the Act while it was 24 months under the Sovereign National Conference Constitutional Act.

Article 119 provided that the President of the Republic remained in power until the election of a new President where Article 117 of the CNS Constitutional Act maintained him in office until the end of the period of transition.

Article 120 established the National Electoral Commission that should be autonomous, impartial or neutral, with legal personality and with an organisation and functioning to be regulated by an Act of Parliament.

4.6.3.3.1.5. Parliamentarianism

The regime established by the Constitutional Act of the Transition was essentially a parliamentary one with, however, more powers for the President than in many other parliamentary regimes.

That relates to his participation in the exercise of the governmental or legislative activity and his veto of laws adopted by Parliament, as in a presidential regime.

The impossibility for the President to dissolve Parliament also contributed to distinguish the regime from a conventional parliamentary one.

4.6.3.3.1.6. The Transitional Constitutional Act: New Act or Amendment?

The spirit and the letter of the Sovereign National Conference prevailed to such an extent that the Constitutional Act for the Transition could be considered an amendment of the Constitutional Act previously enacted by the National Conference.

The regime was almost the same. The term "Sovereign National Conference" featured six times¹³⁴⁷ where "Conclave" only appeared once.¹³⁴⁸ The title retained for the members of the HCR-PT, namely "Councillors of the Republic", was that of the members of the High Council of the Republic (HCR) elected by the Sovereign National Conference.

¹³⁴⁷ See *Exposé* of Motives of the Constitutional Act, para 2; Article 56 (a) and (b); Article 58 (4) and (5); Article 75.

¹³⁴⁸ *Exposé* of Motives para 3.

The National Assembly, besides being preceded by the epithet “old” appeared twice (Article 56 (b) and Article 63 *in fine*) in the text and “Deputy” only once (Article 56 (b)).

Moreover, part of the mission of the Transitional Parliament (HCR-PT) was the follow up, control and interpretation of the Sovereign National Conference Acts (Article 58(4) & (5)), not those of the Conclave.

As for the Government, its main duty was the enforcement of the Sovereign National Conference Acts that enjoyed more authority than all other laws of the Republic (Article 75).

One of the reasons for the prevalence of the Sovereign National Conference and the High Council for the Republic it elected as Transitional Parliament over the Conclave and National Assembly respectively was due to the role played by the President of the High Council for the Republic, namely Mgr. Monsengwo.

Mgr. Monsengwo presided over the Political Consultations and the High Council for the Republic, the Transitional Parliament, during the enactment of the Transitional Constitutional Act while Mr Anzuluni Bembe, who was the President of the National Assembly elected under the MPR rule played a minor role.

On 9 July 1995, Article 117 of the Constitutional Act was amended to extend the duration of the transition for another 24 months up to 9 July 1997.

4.6.3.3.1.7. Constitutionalism and Democracy under the Transitional Constitutional Act

The Constitutional Act provided for the separation of powers and an extensive Bill of Rights and served constitutionalism and democracy. However, Article 50 (para 2) raised serious concerns as it declared that when the state of siege or emergency was declared,

“the measures declared in violation of the present Act by the Supreme Court of Justice are only approved by a majority of two-thirds of the High Council of the Republic-Parliament of Transition.”

The question is how can Parliament approve of measures that are declared or confirmed unconstitutional by the Supreme Court of Justice without first amending the Constitutional Act? That licence to violate the Constitution was incompatible with constitutionalism and democracy.¹³⁴⁹

The majority required to adopt such measures was two-thirds. It was even less than the three-quarters prescribed to adopt a bill amending the Constitutional Act (Article 116) to decide for some important matters (Articles 69 *in fine*, Article 92 (vote of no confidence in the government), Article 93 (Impeachment of the President for high treason), and Article 94 (prosecution of the members of the government). In a more positive manner, Article 37 (para 2) provided for the sacred right and duty to defend the Nation and its territorial integrity and to oppose any person or group of persons who could seize power by force or exercise it in violation of the Constitutional Act.

4.6.3.3.2. Functioning of the Regime

Due to this Transitional Act, the constitutional and parliamentary duplication that existed since 1992 came to an end. Zaire had a single constitutional text and one Parliament accepted by all.

¹³⁴⁹ Mangu, Mbata B., *Démocratie, Régime pluraliste...* 193-194.

However, the governmental rivalry and crisis went on after the election of Mr Kengo wa Dondo as Prime Minister by the HCR-PT and his appointment by the President of the Republic, allegedly according to Article 78.

Article 78 did not provide for election, but the presentation of the Prime Minister by the political grouping¹³⁵⁰ other than that of the Head of State. Therefore, the latter could not interfere with the presentation of the Prime Minister.

The election of Mr Kengo by the HCR-PT therefore violated the spirit of the Transitional Constitutional Act.

Accordingly, USORAL, the political grouping constitutionally entitled to nominate the Prime Minister applied to the Supreme Court of Justice for an order to set aside as unconstitutional the presidential ordinances relating to the appointment of Mr Kengo wa Dondo and the members of his government.¹³⁵¹

In its judgment RA 320 of 21 August 1995, on a narrow interpretation of the Constitution and the legislation regulating its procedure and competence, the Supreme Court of Justice unfortunately dismissed the application on the ground of lack of jurisdiction.

According to Article 87 paragraphs 2 and 3 of the legislative ordinance 82-020 of 31 March 1982 relating to the Code of Judicial Organisation and Competence, the Court respected the acts of the Executive Council that fell outside its jurisdiction and did not control the legislative acts. Accordingly, judicial review of the legislation was not allowed.

¹³⁵⁰ "Political Grouping" here, meaning "Political Family" on a literal translation from French did not refer to the party led by President Mobutu, namely the MPR. It rather consisted of the MPR and its allies who had created the *Forces Politiques du Conclave* (Conclave Political Forces), FPC. The FPC as a political grouping was opposed to the *Union Sacrée de l'Opposition Radicale et Alliés* (Sacred Union of the Radical Opposition and Allies), USORAL. This other grouping consisted of the opposition leaders who were the majority grouping in the Sovereign National Conference and the High Council for the Republic.

¹³⁵¹ Presidential Ordinances No. 94-039 of 16 June and No. 94-042 of 6 July 1994.

In view of the above, the Supreme Court dismissed the application. The ruling was based on the ground that on the one hand the executive act appointing the members of the government fell outside its jurisdiction.

On the other hand, the Supreme Court ruled that it could not control the legality of the Act of the HCR-PT concerning the election of the Prime Minister. This Act was considered a legislative act.

In spite of the judgment, Mr Tshisekedi continued to consider himself Prime Minister and maintained his government *vis-à-vis* the Kengo government, which enjoyed the support of the President, the army and effectively governed the country.

In October 1996, a rebellion erupted in Eastern Zaire. Expectations were high that Mr Tshisekedi, a longtime foe of President Mobutu Sese Seko, was to be appointed again as Prime Minister.

Mr Kengo managed to survive as Prime Minister, but the people were disappointed and started supporting the rebellion in the hope that it would free them from Mr Mobutu's authoritarianism.

In late March 1997, Parliament voted a motion of no confidence in Prime Minister Leon Kengo accused of inefficiency in dealing with the rebels who had captured much of Eastern Zaire over the past seven months.

In his place, Mr Tshisekedi was once more elected, but failed to assume office. General Likulia Bolongo was then appointed, but the governmental crisis persisted.

4.6.3.3.3. The International Community and Hijacking of Change or Subversion of Democracy in Zaire

To borrow from Nzongola and Lee, one may: "Is there in the international community a genuine commitment to democracy?"¹³⁵²

Should the answer be in the affirmative, how did that commitment manifested toward Zaire under Mobutu regime?

The role of the international system in promoting anti-authoritarian political movements and in preventing or discouraging the hijacking of political change has been so far less positive and more ambiguous than commonly realised.

Autocratic leaders can and did use these contradictory and ambiguous messages to provide themselves with breathing space and room to maneuver to hijack political change in a more congenial direction.

The international community has taken a very accommodating attitude toward authoritarian leaders, who are objectively opposed to genuine democracy and do their best to slow, undermine, or even block the democratic transition.

Having so abusively identified democracy with elections, they are at times prepared to certify even openly rigged elections as satisfactory, "by African standards". The net result is to buttress a dictatorship and discourage democrats.¹³⁵³

During Mobutu's guided democracy, three Western countries, namely the USA, France and Belgium were particularly involved in Zaire's politics. These three formed what came to be known as the "Western Troika" on Zaire.

¹³⁵² Nzongola-Ntalaja, G. & Lee, M.C., "Introduction" 17.

¹³⁵³ On the negative and ambiguous role played by the external powers in promoting democratic change in Africa in general, see Clapham, C. & Wiseman, J.A., "Conclusion" 228; Gordon, D.F., "On Promoting Democracy in Africa..." 154; Nzongola-Ntalaja, G. & Lee, M.C., "Introduction..." 1, 7-8; Odhiambo-Mbai, C., "The Future Prospects..." 3; Sandbrook, R., "Liberal Democracy in Africa..." 152-153; Schatzberg, M.G., "Hijacking Change..." 123-125.

The attitude of the international community *vis-à-vis* President Mobutu and the forces for democratic change opposed to him was dictated by a formula that long shaped the US foreign policy towards Zaire: "Mobutu or Chaos".¹³⁵⁴

The Western countries continued to support President Mobutu as the best representative of Western interests against the CNS government and the democratic forces.

In Zaire, from 1990 to 1993, the US facilitated Mobutu's attempts to hijack political change by maintaining that Mobutu as President of the Republic was a legitimate part of the transition process that would lead to free and fair elections, rather than an impediment to it.¹³⁵⁵

In a number of cases, the USA and other powerful Western countries chose to follow Mobutu in not recognising decisions of the CNS as sovereign and binding on all parties and ignored them.¹³⁵⁶

4.6.4. Kabilas' Regimes, Authoritarianism, Rebellions and The Inter-Congolese Dialogue

This section covers a situation that has been going on in the DRC since the collapse of the Mobutu's regime in May 1997.

Developments are brief since despite the advent of Mr Joseph Kabila, who acceded to the presidency after the assassination of his father Laurent-Désiré Kabila on 16 January 2001, the regime remains fundamentally the same, that is an authoritarian one.

¹³⁵⁴See Schatzberg, M.G., *Mobutu or Chaos? The United States and Zaire, 1960-1990*, Lanham & Philadelphia: University Press of America and Foreign Policy Research Institute, 1991; Idem, "Hijacking Change..." 115; Weisman, S.R., *American Foreign Policy in the Congo 1960-1990*, Ithaca: Cornell University Press, 1974.

¹³⁵⁵ Schatzberg, M.G., *op.cit.* 123.

¹³⁵⁶ Nzongola Ntalaja, G., *From Zaire to the Democratic Republic of Congo* 5.

4.6.4.1. Authoritarianism, Rebellions and The International Community

4.6.4.1.1. Authoritarianism

On 27 May 1997, a few days after he proclaimed himself President following the victory of the AFDL rebellion over Mr Mobutu's army, Laurent-Désiré Kabila enacted a Constitutional Decree¹³⁵⁷ to rule the country.

Article 3 of this Decree provided for three institutions in the Republic: the President of the Republic, the Government and Courts and Tribunals. In fact, all executive, legislative and judicial powers were in the hands of the President of the Republic, Head of State and Government.

On 22 October 1997, following the example set by Mobutu when he "decreed" democracy, Laurent-Désiré Kabila created a Constitutional Commission to prepare a draft Constitution for the Third Republic.¹³⁵⁸

On 25 May 1998, the constitutional Law-Decree No. 003 of 27 May 1997 was amended to provide for the creation of a Constituent and Legislative Assembly to act both as a constituent power for the Third Republic and a legislative authority under Kabila's transition.¹³⁵⁹

The Constituent and Legislative Assembly became the fourth institution of the Republic after the President, the Government, and the Courts and Tribunals. Actually, the President of the Republic was the President of this transitional 300-member non-elected Assembly consisting of his partisans, and without real power.

¹³⁵⁷*Décret-Loi Constitutionnel No.003 du 27 Mai 1997 relatif à l'Organisation et à l'Exercice du Pouvoir en République Démocratique du Congo.*

¹³⁵⁸*Décret-Loi Constitutionnel No. 0037 du 22 Octobre 1997 portant Création de la Commission Constitutionnelle.*

¹³⁵⁹*Décret-Loi Constitutionnel No. 074 du 25 Mai 1998 portant Révision des Dispositions du Chapitre II du Décret-Loi Constitutionnel No.003 du 27 Mai 1997 relatif à l'Organisation et à l'Exercice du Pouvoir en République Démocratique du Congo, 39e Année, Numéro Spécial, Mai 1998.*

The governance of Laurent-Désiré Kabila and his son Joseph Kabila who succeeded to him was not based on the rules of constitutionalism and democracy.

4.6.4.1.2. Rebellions

As a result of Kabila Sr.'s authoritarianism, but also of a crisis within the Alliance (AFDL) that brought him to power in May 1997, the DRC was confronted with a rebellion since August 1998. The consequence was the crumbling of the DRC State into several administrations. A third of the country fell under M. Kabila's control, a third under the control of the Congolese Rally for Democracy (RCD) and almost another third under the Movement for the Liberation of Congo (MLC).

The remaining territory was administered by small rebel groupings that split off the RCD, the best known being the RCD-National (RCD-N) and the RCD-Liberation Movement (RCD-ML).

4.6.4.1.3. The International Community and Hijacking of Change by Mr. Kabila

When Laurent-Désiré Kabila on 17 May 1997 proclaimed himself President of a country he renamed DRC, the international community took notice of Mobutu's ouster and the change in the country's name. It then moved quickly to recognise the new name and the new ruler.¹³⁶⁰

The international community was also fast to recognise the RCD and MLC rebellions while there was little support for non-violent and democratic opposition against Mr Kabila.

¹³⁶⁰ Nzongola-Ntalaja, G., *From Zaire... 5*.

According to Nzongola-Ntalaja,

“The message that the world community of nations sent to the people of the Congo and Africa as a whole in these two instances is loud and clear.

Changes through democratic means and the rule of law in Africa are not as deserving of unequivocal support as changes through the barrel of a gun. The first changes are slow, somewhat confusing, and rely on universal principles of governance that some believe are not applicable to Africa. The second, on the other hand, are decisive and led by self-reliant African leaders who are likely to establish stable political orders and market economies compatible with the interests of the developed North.”¹³⁶¹

4.6.4.2. The Lusaka Agreement and the Inter-Congolese Dialogue

4.6.4.2.1. Background

The signing of the Lusaka Cease-fire Agreement in Lusaka, Zambia, took place in three times, on 10 July, on 30 July and on 31 August 1999 respectively.

The Agreement was negotiated within the framework of the Southern African Development Community (SADC) under the chairmanship of the former Zambian President Frederick F. Chiluba. Duly authorised representatives of the DRC Government, the RCD, and the MLC signed it. Foreign States directly involved in the DRC conflict, namely Angola, Namibia, Rwanda, Uganda, and Zimbabwe, were represented as observers. Zambia, SADC, the OAU and the UN witnessed the signing.

The Lusaka Cease-fire Agreement was endorsed by the UN under Article 52 of the UN Charter on regional arrangements dealing with matters relating to the maintenance of international peace and security that are appropriate for regional action.

It had a very slow pace of implementation due to President Kabila’s opposition to a number of its provisions and a dispute over its signing by the rebel groupings that subsequently divided into several sub-groups.

¹³⁶¹ Nzongola-Ntalaja, G., *From Zaïre...5*.

Sir Ketumile Masire, former Botswana President, was designated as the neutral facilitator in the DRC conflict. It took him and his team several months to build and consolidate confidence among the Congolese parties, and at some stage President Kabila denounced his facilitation.

Mr Joseph Kabila revived the process of implementation of the Lusaka Agreement and recalled the facilitator whose office in Kinshasa had been sealed off by his father.

4.6.4.2.2. Principles Supporting Constitutionalism and Democracy in the Lusaka Agreement

The Lusaka Agreement contained three major principles that were supportive of constitutionalism and democracy in the DRC and the Great Lakes Region as a whole.

The first principle was the cease-fire or cessation of hostilities.¹³⁶² In order to achieve cease-fire, the disengagement of forces was necessary. It entailed “the immediate breaking of tactical contact between the opposing Military Forces of the Parties at places where they are in direct contact by the effective date and time of the ceasefire Agreement.”¹³⁶³

In a war situation, the cease-fire and disengagement are the first steps on the road to peace without which no sustainable constitutionalism and democracy are feasible.

War is incompatible with constitutionalism and democracy, which require peace.¹³⁶⁴

¹³⁶² Article I and Chapter 1 of Annex A the Lusaka Agreement.

¹³⁶³ Article III.14, Annexe A, Chapter 2 of the Lusaka Agreement.

¹³⁶⁴ On the disastrous impact of war on the establishment and consolidation of constitutionalism and democracy, see, for instance, Friedrich, C., *Constitutional Government and Democracy*, Revised edition, 1950, 12-13; Nwabueze, B.O., *Constitutionalism...* 174.

According to Wheare,

“A first force which works against constitutional government is war. In time of war or rumours of war, the government claims full freedom of action; it does not want to be bound by limitations... Obviously government on these lines is opposed to the limited government which we call constitutional.”¹³⁶⁵

Nwabueze, however, remarked:

“Emergency powers can be accommodated with constitutionalism, if they are conceived of as an ephemeral aberration occurring once in a long while, and provided they are not so sweeping as to destroy or suspend the restraints of constitutional government completely.”¹³⁶⁶

The American-led “War against Terror” has shown in its consequences that war may be an obstacle to constitutionalism and democracy in countries at war.¹³⁶⁷

On the other hand, the internationalisation of war constitutes a global threat to constitutionalism and democracy in the world, instead of favouring them.¹³⁶⁸

Constitutionalism and democracy are unlikely to prosper in a region at war, such as the African Great Lakes Region, unless war is first terminated and roots of war or rebellion eradicated.

The second key principle, related to the above was security both internal and with neighbouring States. The Parties were requested to “immediately address the security concerns of the DRC and her neighbouring countries.”¹³⁶⁹

¹³⁶⁵ Wheare, as quoted by Nwabueze, B.O., *Constitutionalism...* 174.

¹³⁶⁶ Nwabueze, B.O., *Constitutionalism...* 174.

¹³⁶⁷ In the USA, for instance, within the context of “War against terror”, the media were muzzled and several pieces of legislation were enacted to empower the executive to deal with terrorism. Emergency powers were granted to the President and human rights of many regularly infringed.

¹³⁶⁸ Many authoritarian leaders became overnight allies and friends of the USA because of their participation in the war. Consequently, democratic countries engaged in the war decided to keep a blind eye on their authoritarian governance.

¹³⁶⁹ See Article II and Annexe A of the Lusaka Agreement, Chapter 12 on “Normalisation of the security situation along the common borders between the DRC and its neighbours”.

Addressing the security concerns of the DRC and the neighbouring countries was seen as central to the peace process.

To achieve internal security, the Parties agreed “to put an immediate halt to any assistance, collaboration or giving of sanctuary to negative forces bent on destabilising neighbouring countries.”¹³⁷⁰ On the other hand, a Security Council-mandated peacekeeping force was needed to track down all armed groups in the DRC.¹³⁷¹

The third principle was respect for the right of the Congolese people to sovereignty, territorial integrity and the inviolability of national boundaries as inherited from colonisation at independence. In the African context, these principles were protected by Article 3 of the OAU Charter, the Constitutive Act of the AU and by Resolution AHG/16/1 adopted by the OAU Assembly of Heads of State and Government in 1964 in Cairo, Egypt.¹³⁷²

As pointed out earlier, constitutionalism and democracy conflict with colonialism and foreign occupation. Sovereignty is a prerequisite for constitutionalism and democracy.

Accordingly, all Parties agreed on the orderly withdrawal of all foreign forces from the national territory of the DRC.¹³⁷³

4.6.4.2.3. The Inter-Congolese Dialogue and Future Prospects for Constitutionalism and Democracy in the DRC

The Inter-Congolese Dialogue (ICD), as the cornerstone of the Lusaka Agreement,¹³⁷⁴ was instrumental to peace, constitutionalism and democracy in the DRC.

¹³⁷⁰ Article III, 17 of the Lusaka Agreement.

¹³⁷¹ See Article III, 11, 17 and Annexe A, Chapter 9.

¹³⁷² See Preamble to the DRC Ceasefire Agreement, Paragraphs 3 and 4, Article III.15.

¹³⁷³ This withdrawal should be carried out in accordance with the Calendar in Annexe B and a withdrawal schedule to be prepared by the UN, the OUA and the JMC. (Article 3.12 and Chapter 4 of Annexe A)

¹³⁷⁴ See Chapter 5 of the DRC Ceasefire Agreement.

In August 2001, the Congolese parties met in Gaborone, Botswana, to decide on the place and the agenda of the Dialogue. Addis Ababa, Ethiopia, as the headquarters of the OAU / AU was chosen to host the Dialogue after the DRC Government expressed reservations about South Africa, which was accused of backing the RCD and their Rwandan supporters.

The Inter-Congolese Dialogue opened in Addis Ababa in October 2001, but could not finish its work due to problems of funding and dispute over the representation of parties. After the failure of the Dialogue in Addis Ababa, the Congolese Parties finally agreed to South Africa. This time all of them accepted the offer of South Africa to host the Inter-Congolese Dialogue and to bear part of the funding burden.

4.6.4.2.3.1. Organisation and Participation

The Inter-Congolese Dialogue was reopened at Sun City in the presence of the Facilitator, Sir Ketumile Masire and Presidents Mbeki, Muluzi and Mwana Lesa of South Africa, Malawi and Zambia respectively in their capacities as the presidents of the host country, SADC chairperson and president of the country where the Agreement was signed. It took time for the Dialogue to effectively start its work as some parties, especially the MLC, objected to the representation of some political parties accused of siding with the DRC President Joseph Kabila. An agreement was found to spread the number of parties' representatives from 55 to 68 and to adjust the representation of the DRC Government, the RCD and the MLC.

Five components participated in the Dialogue, namely the DRC Government, RCD, MLC, the opposition, and the *Forces Vives* (Civil Society), which were joined by the RCD-ML, RCD-N, and the Mai Mai (Congolese militia). Around 360 delegates were finally to participate in the Inter-Congolese Dialogue.

4.6.4.2.3.2. Agenda of the Dialogue and Regulations of the Proceedings

The agenda of the Inter-Congolese Dialogue was provided by the Lusaka Agreement:¹³⁷⁵

“Without prejudice to other points that may be raised by the participants, the Congolese parties shall agree on:

- (i) the timetable and the rules of procedure of the inter-Congolese political negotiations;
- (ii) the formation of a new Congolese National army whose soldiers shall originate from the Congolese Armed Forces, the armed forces of the RCD and the armed forces of the MLC;
- (iii) the new political dispensation in the DRC, in particular the institutions to be established for good governance purposes in the DRC;
- (iv) the process of free, democratic and transparent elections in the DRC, and
- (v) The draft of the Constitution which shall govern the DRC after the holding of the elections.”

The agenda of the Inter-Congolese Dialogue also included issues such as the causes of the war, reconstruction, guarantees for implementation of the resolutions of the Dialogue, elections and electoral questions, security in the Great Lakes Region and the normalisation of the security situation along the common borders of the DRC and its neighbours.

However, the key issues were those related to the establishment of a new political dispensation, national reconciliation, and the formation of a new national army, reconstruction and the re-establishment of the state administration throughout the DRC.

The work was to be done in plenary sessions, commissions or sub-commissions. All the delegates attended the plenary sessions.

There were five commissions, namely the Financial and Economic Commission, the Political and Legal Commission, the Humanitarian, Social and Cultural Commission, the Defence Commission, and the Commission on Peace and Reconciliation. An important provision of the Regulations was that resolutions taken during the ICD were to be taken by consensus of all the components and binding on all.

¹³⁷⁵ Item 5.6. of Chapter 5 of Annexe A of the Agreement.

4.6.4.2.3.3. Results of the Inter-Congolese Dialogue and the Way Forward

The Inter-Congolese Dialogue started on Monday 25 February and was adjourned on Friday 19 April 2002 after 52 days of negotiations. 37 resolutions were adopted and a few days ahead of the closing, there was no agreement on the critical issue of the establishment of a new, consensual and inclusive political dispensation for the country during the transition.

The establishment of a new political dispensation for the transition remained the main stumbling block during the Inter-Congolese Dialogue up to the last day of the talks that were to close initially on 11 April 2002.

A request by the RCD for an extension of the negotiations to close on a better note with a political agreement was considered by both the Facilitator and the South African government. The Dialogue was therefore extended for seven days, *viz.* up to 18 April 2002.

To break the deadlock on the outstanding issue related to the matter of the Transitional Government, the Congolese parties and the Facilitator, Sir Ketumile Masire, requested the President of South Africa to assist in the process of reaching an agreement. President Mbeki worked together with the Facilitator towards this end. After discussions with the component delegations, President Mbeki suggested two models of power sharing.

Mbeki's Plan I suggested a presidency to be held by Mr Joseph Kabila, a High Council of the Republic comprising the President, RCD and MLC leaders as well as the Prime Minister, to be appointed by the political opposition. The civil society was offered the presidency of Parliament, meant to act both as a legislative and a constituent assembly. A special court was to serve as the constitutional court for the transition. Besides, independent institutions such as the Human Rights Commission, Truth and Reconciliation Commission, National Electoral Commission, and High Authority to regulate broadcasting were also considered of crucial importance during the transition.

The defence, police, security and intelligence services were meant to be neutral and apolitical and the reserve bank autonomous.

The RCD and UDPS blamed Mbeki's Plan I for favouring the government of Mr Joseph Kabila and granting him more powers while the RCD, MLC and opposition leaders were given a lower status in the Republic. They kept on insisting that the transitional institutions were to be established during the Inter-Congolese Dialogue that should also determine the profile to which any person nominated for a senior position during the transition should be subjected.

Mbeki's Plan II attempted to address the criticism by putting the MLC and RCD leaders at the level of Deputy Presidents, each also holding an important ministerial portfolio. The first Deputy President would be in charge of economy and finances while the second was to be responsible for defence, home affairs and elections.

The Constitutional Act to encapsulate the proposed change was to be drafted and adopted. Considering the major principles embedded in Mbeki's plans, it was expected that they would promote human rights and rule of law. The principle of separation of powers was to be entrenched to prevent new authoritarianism and conflicts.

While all parties were busy discussing Mbeki's Plan II, the delegates were surprised that the DRC Government and the MLC had entered into an agreement. In terms of this agreement, Mr. Joseph Kabila remained President while the MLC leader, Mr. Jean-Pierre Bema, was to become Prime Minister and head of the transitional government. Other parties were requested to adhere to their agreement that reserved some positions to the RCD, the political opposition and to the *Forces Vives*.

The RCD, UDPS and some other parties rightly opposed the DRC Government-MLC agreement on the ground that it was concluded outside the Inter-Congolese Dialogue and violated both the spirit and the letter of the Lusaka Agreement, which was recognised by all the Congolese parties and the international community through SADC, OAU/AU and the UN.

By the time the Dialogue was to be adjourned, no agreement had been reached by the delegates on the matter of the Transitional Government. Sir Ketumile Masire with the backing of President Mbeki then recommended the constitution of a Follow-up Committee to deal with the outstanding and critical issue of the formation of a broad and consensual government of national unity for the transition. He proposed that the Dialogue should continue under a different format. This would reduce the number of participants from 360 to just over 30, without negatively affecting the representative and inclusive character of the Dialogue. He further proposed that each of the components participating in the Dialogue should select its delegates and leave them behind in South Africa so that the negotiations should continue without any delay.

Some of the components, namely the RCD, UDPS and a number of other parties, agreed and complied with this request. The DRC Government, the MLC and all those who adhered to the Sun City DRC Government-MLC agreement opposed.

Faced with the opposition of the DRC Government and the MLC to return to the talks, the parties that remained in South Africa at the request of the Facilitator met on 22 April 2002 in Sun City and set up the *Alliance pour la Sauvegarde du Dialogue Intercongolais* (Alliance for the Defence of the Inter-Congolese Dialogue) (ASD). Dr. Etienne Tshisekedi (UDPS), Dr. Adolphe Onusumba (RCD President), Mr. Raphael Katebe Katoto (*Dynamique pour une Transition Neutre*, DPTN) and Advocate Azarias Ruberwa (RCD General Secretary) were appointed President, Deputy Presidents and Co-coordinator of the Alliance, respectively.

According to its constitutive act, the aim of the Alliance was to undertake anything possible to bring the DRC Government and the MLC back to the negotiation table in order to achieve an inclusive and consensual agreement on a transitional government in the DRC.

For the DRC Government and the MLC, the Inter-Congolese Dialogue was over and the Lusaka Agreement had become old-fashioned. However, the Lusaka Agreement had still the favour of the international community that also considered the Inter-Congolese Dialogue a prerequisite for peace and security in the DRC and the Great Lakes Region. Accordingly, a great deal of international efforts within SADC, AU and the UN went on to help the Congolese parties return to the negotiations and to achieve an inclusive agreement on a consensual government of national unity during the transition in their country. It was expected that such agreement would pave the way for constitutionalism, democracy, development and peace in the DRC while enabling the country to play its role in the context of African Renaissance.

By the time of the completion of the study, it was still premature to predict what could happen in the DRC. Nevertheless, it is this author's view that despite its shortcomings, the Lusaka Agreement was the only framework that could assist in the settlement of the Congolese conflict. On the other hand, there is no alternative to the Inter-Congolese Dialogue whatever the form it may take.

An inclusive and sincere political dialogue resulting in power-sharing based on a constitutional act that protects and promotes human rights was and still remains the best way to address the crisis of constitutionalism and democracy in the DRC.

According to the regulations adopted by the delegates who participated in the Congolese talks, the resolutions of the Inter-Congolese Dialogue were to be binding. However, this was not the first time that the Congolese leaders participated in a dialogue, conference or round table and took resolutions allegedly binding on all.

The constitutional history since independence has been characterised by an arrogant disrespect for principles, resolutions or other principles of law.

In the settlement of the present conflict in DRC and the establishment of a new constitutional and democratic order, much will certainly depend on the Congolese people themselves.

One should not, however, dismiss the role to be played by African countries within SADC and the African Union, and the major powers within the UN and the European Union.

Building and consolidating peace, constitutionalism and democracy is much more demanding than waging war and establishing an authoritarian rule.

Therefore, the Congolese people will need unreserved support and assistance from other African countries and the international community, particularly those countries that supported the Inter-Congolese Negotiations. They should not give up once the negotiations over.

To be successful, the Inter-Congolese Dialogue should become permanent and institutionalised as a way to deal with the crisis.

4.7. Conclusion

The political history of the DRC since independence on 30 June 1960 may be summarised in a few words: mutiny, secessions, and coups d'état, violations of the Constitution and rule of law, rebellions, authoritarianism, round tables or conferences, and an irresistible search for constitutionalism and democracy.

The history of constitutionalism and democracy in the Congo has hardly been a success. Yet constitutionalism and democracy stand as an ideal for the nation, being encapsulated in the country's name. As ghosts they seem to follow the Congolese people since times immemorial.

Each breach of the rule of law, each *coup d'état*, each violation of constitutionalism and democracy has given rise to a movement aimed at restoring or promoting the rule of law, constitutionalism and democracy.

Arguably, the people of the Congo will not rest until they have laid the foundations for a constitutional and democratic state in their country. There is no alternative to constitutionalism, democracy and human rights as prerequisite for sustainable peace and development in the DRC as in the rest of the African continent.

As pointed out earlier, the prospects for constitutionalism and democracy are good. However, many challenges still lie ahead and the road is peppered with pitfalls that African and Congolese peoples have to deal with in order to build and consolidate constitutionalism and democracy.

CHAPTER 5 GENERAL FINDINGS AND CONCLUSION

5.1. Introduction

Indisputably, constitutionalism and democracy feature among the most controversial and discussed topics in political science and constitutional theory.

This is one of the most fascinating and also challenging intellectual projects to the execution of which this study intended to make some contribution.

The debate is far from over and one may even presume that it will never end, with constitutionalism and democracy generally considered a “good” thing, compared to authoritarianism and dictatorship.

African peoples were engaged in the struggle for constitutionalism and democracy since times immemorial. The struggle that intensified during colonisation led to formal independence in the 1960s. It continued after independence against African authoritarian regimes that were inherited from colonisation. Whatever the challenges and despite pitfalls and differences that exist, peoples keep on dreaming the dream, walking the walk, talking the talk and struggling the struggle, as it were.

African peoples, including those of the DRC look like immigrants who have not yet built their country.

Nights of authoritarianism and military or one-party dictatorships have just been longer than days and celebrations for constitutionalism and democracy.

Peoples have repeatedly been robbed of their victories by authoritarian leaders with the backing of the army or single party and the international community helping them “hijack” change and even the very discourse on constitutional and democratic change.

Except for a few cases, whenever they thought having entered and settled there permanently, African peoples only stayed overnight in the “promised land” of constitutionalism and democracy. On the other hand, the “terminus” if any, of the road to constitutionalism and democracy in Africa can hardly be seen.

The debate on constitutionalism and democracy is a perennial one while the struggle remains an unfinished business.

The struggle has largely been won in a few African countries, while a hard road still lies ahead for many others, including the DRC, which are still torn between authoritarianism and the transition to constitutionalism and democracy.

In the name of constitutionalism and democracy, rebellions have even been launched and wars waged against incumbent authoritarian regimes.

The struggle has gone unabated, whether it was to get out of the infernal cycle of authoritarianism, to hasten the democratisation process or to protect what was already gained in the previous battles for constitutionalism and democracy and not to revert to the authoritarian rule that preexisted.

Against this background, can one rationally and realistically provide a “final” conclusion to a study that did not pretend to constitute the “end of the history” of constitutionalism and democracy in post-colonial Africa?

The study is this author's account of the struggle for constitutionalism and democracy in post-colonial Africa and of the way independent Africa has gone "so far".

Being a personal account, it is necessarily partial and cannot claim immunity from shortcomings and criticism.

Findings and conclusions may only be partial and concern the aims and hypotheses outlined earlier.

Furthermore, since the study has not aimed to and could not address all the issues pertaining to constitutionalism and democracy in Africa, a number of questions and related issues that have been neglected or insufficiently addressed, but which require further intellectual inquiry, should once more be emphasised, as they constitute further challenges to students of constitutionalism and democracy in Africa.

5.2. Findings and Conclusions in terms of the Aims of the Study

The present study envisaged to revisit and critically discuss the concepts as well as the various discourses and voices we have heard from both inside and mostly outside the continent on constitutionalism and democracy in Africa.

It was to highlight the African struggle for constitutionalism and democracy, to stress the challenges and prospects and to contribute to the building and consolidation of constitutionalism and democracy in post-colonial Africa, including the DRC.

Dealing with the DRC as case study, it intended cutting horizontally and vertically through historical phases and experiences of post-colonial Africa with constitutionalism and democracy: establishment, breakdown, periods of democratic persistence, crises, authoritarianism, renewal, and all of the ambivalence and oscillations in between.

Chapter 2 strove to provide a theoretical analysis of constitutionalism and democracy and the related concepts, their contested content, the dialectic existing between them and the surrounding debates.

The approach to constitutionalism and democracy as understood in the study is a holistic one. Although in some pathological cases where the one may go without the other, constitutionalism and democracy are intertwined.

They are institutional, formal, procedural, negative and also substantive, positive and values-based. Key among their founding values are human rights, whether individual or collective, civil, political or socio-economic.

Constitutionalism and democracy are also both legal and political ideas. The first mainly advocates the separation of powers, either horizontal or vertical, the supremacy of the Constitution, *l'état de droit* or the rule of law, while the latter emphasises accountability and popular participation in the exercise of political power.

The development of universal and regional human rights law as well as the rising of the global village, heavily impact on constitutionalism and democracy.

Chapter 3 attempted to focus on different and somehow contradictory debates on constitutionalism and democracy and the common road taken by post-colonial Africa without the struggle being a linear, even, and an easy one.

Chapter 4 concentrated on the case study. It dealt with the particular road and the unfinished struggle of the people of the Congo for constitutionalism and democracy that are such fundamental values of the Republic that they are entrenched in the very name of the country. It explained why the Congo went from DRC to DRC, from one crisis of the Congo in the 1960s to another crisis of the Congo since the early 1990s, and why the DRC history has been rehearsing in a vicious circle of coups and counter-coups, rebellions, mutinies, roundtables, national conferences or dialogues, and authoritarian and unconstitutional regimes.

A further important objective assigned to the study was to break the culture of silence on Africa, our continent, and the DRC. Very little has been written by African, let alone Congolese, scholars on constitutionalism and democracy.

Most of the existing works were commissioned by foreign governments or agencies and designed to inform their African policies or help their public understand the African continent and its peoples.

These works were carried out by the so-called "Africanists" observing Africa and judging African peoples from their Western perspectives.

Most of non-African scholars or academics as well as some African colleagues were Afro-pessimists who alleged incapacity of African peoples to abide by the rule of law and govern themselves democratically.

Africa was held incapable to develop itself or move on its way to constitutionalism and democracy unless subjected to the West. African history continued to be written by non-Africans and outside Africa.

Yet in 1960, P.E. Lumumba predicted an era when the history of Africa and the DRC would no longer be written in New York, Paris, London, Brussels or Moscow by persons foreign to Africa, but by Africans themselves from the African soil.

As an independent work carried out by an African and Congolese student from the African soil, this study was also designed for other Africans to convey an unambiguous message that despite what has been going on in several countries since independence, constitutionalism and democracy are not foreign to African traditions.

They also belong to Africa and are feasible in post-colonial Africa. Accordingly, African peoples should be equipped to reestablish and consolidate them on the continent in general and in the DRC in particular.

This is not a work by some scholar studying Africa as a mere object of curiosity, but by an African who himself as a victim of authoritarianism has been fully participating in the struggle for constitutionalism and democracy.

Finally, the research intended to be thought provoking and to stimulate reflection on the African State in general and the DRC in particular, raising more questions than it could not directly answer. It aimed at contributing to the production and reproduction or development of knowledge in the social sciences.

It is our hope that within its scope and limitations the study achieved some of its abovementioned aims.

5.3. Findings and Conclusions in terms of Research Questions and Hypotheses

The study brought answers to a number of research questions.

First, even though the odds were against it, Africa is *en route* and has been fighting for constitutionalism and democracy since independence.

Challenges and obstacles, although enormous, are not insurmountable. Prospects are good and, as experience in some countries has demonstrated, constitutionalism and democracy may and will be established and consolidated on the continent.

The first responsibility lies with Africans themselves, but the international community should play a more positive role in the rebuilding of the African State that is a prerequisite for the establishment and consolidation of constitutionalism and democracy in Africa.

The study also confirmed a number of hypotheses stated at the start. The first is that despite the somber picture of governance in post-colonial Africa, ideas of constitutionalism and democracy are not a novelty in Africa. Nor can they be associated with the post-colonial period.

Long before independence and even colonisation, African peoples struggled for constitutionalism and democracy.

During the colonial and apartheid era, constitutionalism and democracy became the vehicle of the national liberation movement and the leaven in the fight against colonialism or racism, being associated with self-determination or independence.

As independence turned out to be confiscated by African leaders, the military and one-party regimes that took over from the colonial rulers, the struggle for constitutionalism and democracy became a struggle for the second independence.

Even if their voices went unheard or unnoticed due to the complicity between the international community, especially the former colonial powers, and the African authoritarian leaders they put or maintained in power, African people never gave up and their struggle continued unabated.

The strong commitment to constitutionalism and democracy was encapsulated in the names of some countries, such as the DRC.

The movement for democracy benefited from change within the international community and developments in international law, especially since the 1980s.

Africa has been facing a multidimensional crisis. However, the absence of constitutionalism and democracy is the major predicament of the continent. This crisis hampers African renaissance and reconstruction and aggravates other crises such as underdevelopment and the HIV pandemic. In the DRC case, for instance, the emergence of authoritarianism may be traced back to the 1960s when President Kasa-Vubu assisted by Colonel Mobutu violated the spirit of the Constitution by dismissing Prime Minister Lumumba. Since then, the country has been struggling to reconcile with constitutionalism and democracy.

The study has also demonstrated that most African constitutions failed to bring about and consolidate constitutionalism and democracy, and that Africa went a long way with constitutions without constitutionalism or democracy. The DRC is a case in point.

In forty years of independence, this African country has been governed by more than twenty legal instruments, labelled "constitutions", with an average of one "constitution" every fifteen months.

Despite such an impressive record and its own name, the DRC remains an unconstitutional and undemocratic state.

As the DRC case reveals, the road to constitutionalism and democracy in post-colonial Africa is replete with obstacles.

Obstacles or challenges to constitutionalism and democracy come not only from inside, but also from outside the continent. Once again, some of these challenges need to be highlighted.

As stressed earlier,¹³⁷⁶ African armies pose the greatest threat to constitutionalism and democracy on the continent.

¹³⁷⁶See Bratton, M. & Van de Walle, N., "Popular Protest..." 220; Gonidec, P.F., *La République du Sénégal*, Paris, Berger-Levrault, 1968, 248; Ibrahim, J., "Transition démocratique..." 137; Hutchful, E., "Military Issues in the Transition to Democracy" 599-617; idem, " Militarism and Problems of Democratic Transition", in Ottaway, M., (ed.), *Democracy in Africa...* 43-64; idem, "Military and Militarism in Africa: A Research Agenda", *CODESRIA Working Paper No.3*, 1989, Dakar: CODESRIA; Hutchful, E. & Bathily, A., "Introduction", in idems (eds.), op.cit. I-XIII; Lukham, R., "Taming the Monster: Democratisation and Demilitarisation", in Hutchful, E. & Bathily, A., (eds.), op.cit. 589-598; idem, "The Military, Militarisation and Democratisation in Africa: A Survey of the Literature", in Hutchful, E. & Bathily, A., (eds.), op.cit.1-45; Mangu, Mbata B., *Les régimes pluralistes africains...* 51; idem, "Démocratie, régime pluraliste..." 128-132, 164-166, 183-186; Mohammed, N.A.L., "Trends, Determinants and the Economic Effects of Military Expenditure in Sub-Saharan Africa", in Hutchful, E. & Bathily, A., (eds.), op.cit. 47-104; idem, "Tank-Tractor Trade-Off in Sudan", in Hutchful, E. & Bathily, A., (eds.), op.cit. 129-173; Olukoshi, A., "State, conflict, and Democracy..." 460-464; Suberu, R., "Institutions, Political Culture, and Constitutionalism in Nigeria", in Franklin, D.P. & Baun, M.J., (eds.), op.cit. 213; Wiseman, J.A., *Democracy in Black Africa...* 189-190.

The failure of constitutionalism and democracy in post-colonial Africa was primarily due to the interventionism of the military on the political scene shortly after independence. Although the military often enable return to democracy, they pose serious problems for its consolidation because of their propensity to reintervene.

Democratising regimes and societies in Africa are confronted with a number of issues in relation to the military.

These issues concern the professionalisation of the army, its role in a constitutional and democratic society, its existence, funding and size, its relationships with other state institutions and with the political society, the transformation of civil-military relations, the emergence of new forms of militarism or "warlordism", the conversion of the military, the economic effects of militarisation and their impact on development activities, and so on.

As stressed earlier, wars, rumours of wars and armed conflicts must be settled since they are forces that are against constitutionalism, democracy, human rights and development.

In many countries confronted with civil war and external threats to their security, a disciplined, national and well-equipped army is still needed for both national and regional security.

That is why the Lusaka Ceasefire Agreement to settle the Congolese crisis assigned to the Inter-Congolese Dialogue the mission to set up a new structured and integrated national army by the integration of the different armed forces of the DRC Government, the RCD, and the MLC.

The second challenge concerns the leadership that is needed politically and intellectually to sustain constitutionalism and democracy on the continent.

A number of scholars have pointed out how a political leadership has been crucial to both the establishment and consolidation of constitutionalism and democracy in world,¹³⁷⁷ especially in Asia¹³⁷⁸ and in those African countries where constitutionalism and democracy have been established.¹³⁷⁹

¹³⁷⁷ See Diamond, L., "Introduction...", in Diamond, L. *et al.*, (eds.), *op.cit.* 1-52; Huntington, S.A., *The New Wave...* 316; Krishna, S., "Constitutionalism, Democracy, and Political Culture in India", in Franklin, D.P. & Baun, M.J., (eds.), *op. cit.* 161-183; Nwabueze, B.O., *Constitutionalism...* 139, 301-302; Suberu, R., *op. cit.* 215; Wiseman, J.A., *The New Struggle...* 165-186; *idem.*, "Two Leadership Styles and Patterns of Political Liberalization", *African Studies Review*, Vol.37, No.1, April 1994, 151-174; *idem.*, "Leadership and Personal Danger in African Politics", *Journal of Modern African Studies*, Vo.31, No.4, 1993, 657-660; Clapham, C. & Wiseman, J.A., "Conclusion...", in Wiseman, J.A., (ed.), *Democracy and political Change in Sub-Saharan Africa...* 225-226.

As Huntington, for instance, emphasised,

"Democracy will spread in the world to the extent that those who exercise power in the world and in individual countries want it to spread." (Huntington, S.A., *The New Vague...* 316)

¹³⁷⁸ See Diamond, L., "Introduction" 3; Krishna, S., "Constitutionalism..." 166, 170,171.

According to Krishna,

"The relatively protected and democratic nature of the anti-imperialist movement, the gradual transfer of power ... and finally the genuine commitment to a liberal democratic policy by the first generation of leaders, especially the first Prime Minister Jawaharlal Nehru... must be regarded as the key factors in the emergence and persistence of democracy in India." (Krishna, S., *supra* 166)

In James Manor's words:

"Nehru might ... have sought a radical centralization of power in his own hands, at the expense of the party and of formal political institutions. He might have employed populist slogans and programs as a substitute... for such institutions. Plenty of other leaders in Africa and Asia did so and they and their countries often paid a heavy price for it. He chose not to and as a consequence the liberal representative order took root and acquired enough substance to endure into the 1970s and 1980s." (Manor, quoted by Krishna, S., *op.cit.* 170-171)

¹³⁷⁹ See Nwabueze, B.O., *Constitutionalism...* 139, 301-302; Suberu, R., "Institutions, Political Culture and Constitutionalism..." 215; Wiseman, J.A., *The New Struggle...* 165-166, 172-174, 186; *idem.*, "Two Leadership..." 151-174; *idem.*, "Leadership and Personal Danger..." 657-660; Clapham, C. & Wiseman, J.A., "Conclusion..." 225-226; Gordon, D.F., "On Promoting democracy in Africa: The International Dimension", in Ottaway, M., (ed.), *Democracy in Africa...* 153.

In Wiseman's view,

"Given the plasticity of the democratization process in contemporary Africa, key decisions taken by leaders at key points in the process have a great impact in enhancing or weakening the prospects of democracy." (Wiseman, J.A., *The New Struggle...* 165)

As Wiseman further puts it,

"The characteristics of individual leaders are extremely relevant in determining the political outcomes and this holds as true in relation to democratization as it does to any other political developments.... The evidence from the relatively limited number of examples of cases where democracy has survived for long periods in Africa suggests that the question of political leadership was extremely important. The role of Seretse Khama (Botswana), Dawda Jawara (The Gambia), and Sir Woosagun Rangooram (Mauritius) in sustaining democratic political systems during periods when democracy was on the wane in Africa was of a crucial importance." (Wiseman, J.A., *supra*, 186)

While some political leaders promoted change (Khama, Masire [Botswana], Rangoolam [Mauritius], De Klerk, Mandela [South Africa], Senghor, Diouf [Senegal], Touré, Konaré [Mali], Aboubakar [Nigeria]), many other African leaders have been, and remain, the major obstacles to any real effort at political reform in their countries.¹³⁸⁰

On the other hand, luck, accident and chaos unfortunately also have their say in the process, as envisaged by the “chaos theory” borrowed from James Gleick.¹³⁸¹

The eminent historian Taylor, for instance, used it to explain the origins of the First and Second World Wars.¹³⁸²

What happens to individual leaders could have a significant effect. Political leaders are subject to the misfortunes of sickness, fatal disease, and accidental death, as the rest of us.¹³⁸³

The untimely death of a popular leader who was committed to democracy could easily have severely negative consequences for a fragile new democracy.¹³⁸⁴

Experience suggests, Clapham and Wiseman, observe, that “democratic consolidation is most likely to take place when a new leadership emerges, seeking to organise politics in a different way from those adopted by discredited parties and leaders in the past, but within the context of non-violent opposition and the acceptance of basic state institutions.” (Clapham, C. & Wiseman, J.A., “Conclusion...”166)

¹³⁸⁰ Gordon, D.F., “On Promoting Democracy in Africa...” 153.

¹³⁸¹ The “chaos theory” is borrowed from theoretical physics. According to the physicist James Gleick, one of the champions of the chaos theory, “Tiny differences in input could quickly become overwhelming differences in output.” Chaos theorists refer to this as the “Butterfly Effect” which reflects the notion that a butterfly stirring the air today in Peking can transform storm systems next month in New York. The chaos theory is used to explain the role played by luck and accident in human history. (See Gleick, J., *Chaos : Making a New Science*, London: Heinemann)

¹³⁸² Taylor, A.J.P., *The Origins of the Second World War*, London, Hamish Hamilton, 1961; Idem, *The First World War*, London, Hamish Hamilton, 1963.

¹³⁸³ Wiseman, J.A., *The New Struggle...* 173.

¹³⁸⁴ Idem 132.

Wiseman imagined a purely hypothetical scenario where Mr Mandela and Mr Buthelezi were to be assassinated during the transition from apartheid to the establishment of the new and current political order in South Africa.¹³⁸⁵

Likewise, one could think of some African leaders whose departure from the scene in this manner might well lead to more positive consequences.

The same could be applied to deliberate attempts on the lives of leaders. Sometimes the assassin's bullet just misses its target and sometimes it does not.

The death or disability of some authoritarian leaders may constitute an unexpected opportunity offered by nature to end with authoritarianism by allowing the coming to power of leaders likely to promote constitutionalism and democracy. So was the death of authoritarian leaders such as Sani Abacha¹³⁸⁶ and Laurent-Désiré Kabila¹³⁸⁷ in Nigeria and the DRC respectively.

In South Africa, for instance, President PW Botha had a stroke in 1988 and 1989, which brought FW de Klerk to power.

In the real world things are always constrained by a range of factors but within those constraints leaders do have real choices to make and what they choose to do has important consequences for the political systems in which they operate.¹³⁸⁸

¹³⁸⁵ Wiseman, J.A., *The New Struggle...*, Note 23, 176-177.

¹³⁸⁶ In Nigeria, Abacha's death paved the way for the inauguration of General Aboubakar as the new President. Under President Aboubakar, the return to democratic rule became possible. The General retired from power after organising democratic elections that were won by General Obasanjo, who then became the new president. That would not have happened under General Abacha's presidency.

¹³⁸⁷ In the DRC, Laurent-Désiré Kabila was opposed to the democratisation process in his country. After signing the Lusaka Agreement that provided for the establishment of a new consensual political dispensation following the Inter-Congolese Dialogue held under a neutral facilitator, President Kabila refrained from delivering on his commitment. The office of the neutral facilitator, Sir Ketumile Masire, was shut down in Kinshasa and the Facilitator himself was asked to leave the country. Joseph Kabila, who succeeded his assassinated father, invited the Facilitator to return to Kinshasa and convene the Inter-Congolese Dialogue, as provided by the Lusaka Agreement.

¹³⁸⁸ Wiseman, J.A., *The New Struggle...* 165.

Nwabueze also relied on luck, chance or chaos to advance constitutionalism and democracy in Africa:

“There is another ground for hope... the progressive disappearance of the first generation of rulers with its authoritarian tendencies (leaders of the nationalist movement)... The generation of the elite that led the nationalist movement and succeeded to the power of the colonial government cannot be immune to the effect of the natural laws of wear and age. When their era is over, as it will be sooner or later, then their claim to the state as a personal fief will have perished and with it the myth of messianic or charismatic authority.”¹³⁸⁹

Nwabueze concluded:

“It would be a tragedy if the coming generation of rulers in the emergent nations should succumb to the temptation to resort to the methods of their predecessors... They have no ‘founder’ rights.”¹³⁹⁰

For dedicated structuralists (even lawyers) with their focus on the deterministic nature of macroeconomic and social forces, any discussion of luck or accident comes close to heresy. As a body, professional social scientists tend to be very uneasy when dealing with phenomena such as luck and accident in their attempt to analyse occurrences in human societies.¹³⁹¹

Yet, as Wiseman pointed out,

“There is nothing inherently ‘unscientific’ about suggesting that in many ways luck and accident will most likely have a role to play in shaping the success and the failure of democracy in some African states.”¹³⁹²

A strongly committed intellectual leadership is also needed to advance or consolidate constitutionalism and democracy in Africa.

A number of African social scientists, political scientists and lawyers especially, have been crucial to the widening of the political culture and the advancement and consolidation of constitutionalism and democracy on the continent.

¹³⁸⁹ Nwabueze, B.O., *Constitutionalism* ... 301-302.

¹³⁹⁰ *Idem* 303.

¹³⁹¹ Wiseman, J.A., *The New Struggle*... 172.

¹³⁹² *Idem*.

However, as stressed earlier, it would be wrong to romanticise African lawyers, political scientists or social scientists *en masse*.

There are enough examples of individual social scientists cooperating with authoritarian regimes to further their own interests or those who contributed to building and consolidating authoritarianism rather than constitutionalism and democracy.

Ibrahim stressed the critical role played by political scientists in the representative case of Nigeria when he addressed the relationship between political science and political practice under Babangida regime.¹³⁹³

As he pointed out:

“Virtually all the anti-democratic measures were devised and implemented by leading members of the political science establishment recruited from Nigerian universities...For all practical purposes, political scientists played the role of a competent technocracy that was a willing accomplice of the military in subverting the democratic struggles and aspirations of the people. Each blockage of democratic space, each device for defeating democratic forces, and every refusal to keep to the schedule of power transfer to elected candidates, was vigourously defended by a coterie of political science professors working for the military dictatorship.”¹³⁹⁴

Ibrahim’s contribution is a strong indictment of the role of intellectuals, and in this particular case, that of professional political scientists, as the architects and managers of the transition charade.

It is a cry of anger against the evident lack of deontology by eminent scholars, who obviously put their political ambitions and material interests above intellectual integrity and social responsibility.

What Ibrahim said of political scientists in Nigeria also holds true for many social scientists in other African countries and even outside Africa. In the case of the DRC, the situation was even worse.

¹³⁹³ Ibrahim, J., “Political Scientists and the Subversion of Democracy...”114-117.

¹³⁹⁴ Idem 114.

Political scientists and lawyers were certainly the first to be blamed since much more was expected of them in the fight against authoritarianism. But other social scientists and even natural scientists followed the same path of sycophancy to offer whatever they could to help build and consolidate authoritarianism.

The Nigerian novelist Chinua Achebe aptly painted the dramatic proportions taken by sycophantic activities of social scientists in his famous *Anthills of the Savannah*.¹³⁹⁵ According to him dictators are not born, but made instead. Sam, the president in the novel, did not scheme to be president.

He was open and sincere in the beginning of his rule, till the supporters got him. Dictators are partly made by their fanatics who continue to drum this into them:

“The people have spoken, their desire is manifest.
You are condemned to serve them for life.”¹³⁹⁶

So, while the dictator repeated over and over again that he did not want to rule for ever, they must be able to read his mind and appeal to him to please save humanity by agreeing to rule for ever.

Many intellectuals are engaged in an intensive competition to “achieve” the status of the “greatest sycophant.”¹³⁹⁷ However, the sycophants also end up being victims of the monster they have helped create.¹³⁹⁸

René Marchand rightly pointed out that the scholars who built the intellectual base that sustained the tyrannical regime in Burundi bear direct responsibility for the massacres subsequently carried out by the regime.¹³⁹⁹ The same should be said of those intellectuals who used their scholarship to built up and consolidate authoritarian regimes in other African states.

¹³⁹⁵ Achebe, C., *Anthills of the Savannah*, London: Heinemann, 1987; also quoted by Ibrahim, J., “Political Scientists...” 116.

¹³⁹⁶ See Achebe, C., supra 5; Ibrahim, J., supra 116.

¹³⁹⁷ Ibrahim, J., supra 116.

¹³⁹⁸ Idem.

¹³⁹⁹ Quoted by Ibrahim, J., “Political Scientists...” 123.

They were equally responsible for genocide, massive deaths, and other crimes against humanity suffered by African peoples who yet expected them to lead and help create and consolidate constitutional and democratic states.

Kwesi Prah is certainly right when he holds that African social science should take up the study of sycophancy more seriously, as many of the most intelligent members of the society had perfected the art of bootlicking.¹⁴⁰⁰

Reality in Africa is still dominated by political and intellectual vagrancy for material interests, political careerism, lack of consistency, political opportunism, and politics of the belly practised by those who choose to betray their people by coalescing with authoritarian leaders and entrenched human rights violators. Getting rid of or de-intoxicating such political operators or intellectuals, driven by power and personal interests, is another serious challenge facing African people, as they struggle to establish and consolidate constitutionalism and democracy.

It goes without saying that without strong and uncompromising political and intellectual leadership, committed to constitutionalism and democracy, the latter are unlikely to emerge or consolidate in the short run.

Constitutionalism and democracy have very little to gain from a situation where intellectual leadership is subjected to political leadership. The former must emancipate itself from the latter ideologically, economically and financially.

Nzongola-Ntalaja found weakness of subsistence of the middle class (lawyers, university professors, medical doctors, educators...) and its exploitation by the ruling group an obstacle to constitutional democracy in Africa.¹⁴⁰¹

¹⁴⁰⁰ Prah, Kwesi., "Africa's Heritage, Populism and Contemporary Democratic Process in Africa", *Paper for CODESRIA General Assembly Conference on Democratization Processes in Africa*, Dakar, 1992; also quoted by Ibrahim, J., *supra* 116.

¹⁴⁰¹ Nzongola -Ntalaja, G., "The State and Democracy..." 19-20.

Another internal challenge to constitutionalism and democracy in Africa relates to ethnicity and the national question.

Ethnicity has had a pervasive influence on African politics.¹⁴⁰² It is a political "challenge" on the continent.¹⁴⁰³ As a political factor, "the dominant factor in African politics,"¹⁴⁰⁴ ethnicity waxes and wanes.¹⁴⁰⁵

There is no single accepted definition of ethnicity. The concepts of ethnicity, tribalism and nationalism are often used interchangeably.

Yet these ideologies differ in scope, the first being of wider scope than the second is. Ethnicity would correspond to what some scholars referred to as "supertribalism".¹⁴⁰⁶

An ethnic group is much broader than a tribal one and generally consists of several tribes that share common features such as language, traditions, culture, common ancestral origin, etc.

Although ethnicity is sometimes used to mean nationalism or confused with it, ethnicity is narrower since a nation to which nationalism refers is generally made of several ethnic groups. Ethnicity has replaced tribalism, which is considered a pejorative concept in many contemporary African studies.¹⁴⁰⁷

¹⁴⁰² Ottaway, M., "Ethnic Politics in Africa..." in Joseph, R., (ed.), op.cit. 304.

¹⁴⁰³ See Rothchild, D., "Ethnic Insecurity, Peace Agreements, and State Building", in Joseph, R., (ed.), supra 320-321.

¹⁴⁰⁴ Odiambo-Mbai, C., "The Future Prospects of Multi-Party Democracy in Africa," Paper presented at the International History Workshop, University of Witwatersrand, Johannesburg, South Africa, from 12 to 15 July 1994, 21.

¹⁴⁰⁵ Ottaway, M., "Ethnic Politics ..." 316.

¹⁴⁰⁶ See Young, C., *Introduction à la politique zaïroise...* 112; Lemarchand, R., *Political Awakening in the Belgian Congo*, Berkeley, University of California Press, 1964, 99-100; Turner, T., "Batetela," "Baluba," "Basonge" : Ethnogenesis in Zaire," *Cahier d'Etudes Africaines*, No. 132, 1993, 590-593; Mangu, Mbata B., *Démocratie, régime pluraliste...* 28-44.

¹⁴⁰⁷ See Gulliver, P.H., (ed.), *Tradition and Transition in East Africa. Studies of the Tribal Element in the Modern Era*, London: Oxford University Press, 1969, 24; Sithole, Masipula, "Political Conflicts in Zimbabwe: The Dominance of Ethnicity over Class," CODESRIA Paper for the Seminar on Ethnic Conflicts in Africa, Dakar, CODESRIA, 1992, 6-7; Mwayila, T., "Résistances actuelles à la démocratisation en Afrique," *Afrique 2000*, No.14, 1993, 4; Yeye, Amoussou, D., "Relations inter-ethniques et dynamique socio-politique au Bénin (De la période coloniale à nos jours)," CODESRIA Paper

There is ethnicity, tribalism or nationalism when loyalties to one's ethnic, tribal or national group are so strong that they prevail over other loyalties.¹⁴⁰⁸ In these conditions, ethnicity or tribalism may become a threat or an obstacle to nation-building and therefore to constitutionalism and democracy.

Nationalism and tribalism, ethnism or ethnicism, although interconnected,¹⁴⁰⁹ were presented as antagonists; the former as a modern, civilised and European phenomenon, related to the nation and the latter as a primitive and African phenomenon.¹⁴¹⁰

Ronen and Rothchild deplored the neglect of ethnicity in the study of politics in Africa.

According to Ronen,

“The ethnic factor in African politics has often been dismissed, overlooked, or considered secondary by both African and non-African observers because the ethnic factor has been considered degrading...The ethnic factor is usually presented as an undertone, an auxiliary element, or a side effect of conflicts...Ethnicity is now conceived of as little more than just folklore and an exploitable tool in the hands of ambitious politicians who promise its integration into a ‘national’ body.”¹⁴¹¹

for the Seminar on Ethnic Conflicts in Africa, Dakar, CODESRIA, 1992, 32; Amselle, J.L. & Mbokolo, E., *Au coeur de l'ethnie*, Paris: La Découverte, 1985; Chauveau, J.-P. & Dozon, J.-P., « Au cœur des ethnies ivoiriennes...L'Etat », in Terray, E., (ed.), *L'Etat contemporain en Afrique*, Paris : L'Harmattan, 1987; Chrétien, J.P. & Prunier, G., *Les ethnies ont une histoire*, Paris : Karthala, 1989 ; Diamond, L., *Class, Ethnicity and Democracy in Nigeria, The Failure of the First Republic*, op.cit.; Nnoli, O., *Ethnic Politics in Nigeria*, supra; idem, *Ethnic Politics in Africa*, supra.

¹⁴⁰⁸ See Dogan, M., “Déclin des nationalismes et dynamique des générations en Europe de l'Ouest,” *Revue Internationale des Sciences Sociales*, No.136; 1993, 208-210; Nana-Sinkam, S.C., “Démocratie et Développement en Afrique : Peut-on les réussir?” *Afrique 2000*, No.14, 1993, 72; Gonnin, G., “Ethnicité, Politique et Conscience Nationale: L'Exemple de la Côte d'Ivoire,” *Paper for CODESRIA Seminar on Ethnic Conflicts in Africa*, Dakar, CODESRIA, 1992, 4; Nnoli, O., *Ethnic Politics in Nigeria*, Enugu, Fourth Dimension, 1978, 7.

¹⁴⁰⁹ Borrowing from Liah Greenfeld, Ottaway, for instance, who like a number of other scholars use “ethnic group” and “nation” interchangeably, distinguished between “ethnic nationalism” and “civic nationalism”. While “civic nationalism” would embrace all citizens of a country as members of the nation and impose national loyalty, “ethnic nationalism” would be a diminutive thereof, embracing the members of an ethnic group as part of the nation. However, the distinction between “ethnic” and “civic” is problematic since they are not necessarily opposed.

¹⁴¹⁰ Ottaway, M., “Ethnic Politics...” 300-302.

¹⁴¹¹ Ronen, D., “The State and Democracy...” 197.

The fact that the rest of the world continued to look at ethnic attachments in Africa as primitive tribalism was not indifferent to that.¹⁴¹²

Rothchild warned against such neglect:

“As long as observers cavalierly dismiss ethnicity as an irrational relic of the past, they will be unable to recognize its force and attraction in contemporary times.”¹⁴¹³

On the other hand, there are scholars such as Ronen who overemphasised the ethnic factor in Africa:

“Most conflicts in African states, whether political or armed ones, could not have reached their high intensity without the underlying ethnic factor. All these internal conflicts are basically ethnic conflicts; interests and ideologies are added factors and often no more than a thin veneer.”¹⁴¹⁴

While admitting that “Ethnic diversity is not the cause of political instability in Africa or elsewhere”, Ronen went as far as contending that

“The utilization and manipulation of ethnic identities appears to be the single most important factor in political instability. This occurs when ethnic groups are mobilized by political leaders to gain the centralized political power.”¹⁴¹⁵

It is true that ethnicity in modern times has particularly been misunderstood or overlooked in Western countries, and considered a feature of retarded peoples in other parts of the world, especially in Africa.

Ethnicity is generally presented as one of the major challenges or obstacles to the establishment and mostly the consolidation of constitutionalism and democracy in Africa.

In Busia's view,

“The tribal solidarity of the past invades the present. It sets problems of political organization for the new States of Africa. It has been a source of tensions and instability... The solidarity of the lineage and loyalty to the tribe continue to pose dilemmas for the creation of the modern State and its collective organs.”¹⁴¹⁶

¹⁴¹² See Ottaway, M., “Ethnic Politics...” 303; Ronen, D., “The State and Democracy...” 197.

¹⁴¹³ Rothchild, D., “Ethnic Insecurity, Peace Agreements...” 320.

¹⁴¹⁴ Ronen, D., “The State and Democracy...” 198.

¹⁴¹⁵ Idem, 201.

¹⁴¹⁶ Busia, K.A., *Africa in Search of Democracy* 31-32.

Wiseman suggested that "Perhaps the greatest problem African states face is their cultural heterogeneity... States without nations."¹⁴¹⁷

Related to ethnicity is citizenship. As pointed out earlier, there is no democracy or constitutionalism without citizens. In Africa the concept of citizenship has continued to be more closely associated with kinship than with territory.¹⁴¹⁸

According to Wiseman,

"The emphasis on kinship has a bearing on the problem of nation-building in Africa. Whereas the bond of union of the tribal community has been that of kinship, a modern State consists of many different tribes. How is one to achieve 'an extension of the African family spirit to the nation as a whole'? How can one shift the emphasis from kinship groups to the State? This is one of the major problems of political organization in Africa today."¹⁴¹⁹

As Busia emphasised, "One of Africa's most intractable problems is how to integrate different tribes into a modern nation within a democratic framework. All African States have this problem."¹⁴²⁰

The challenge is how to accommodate that heterogeneity.¹⁴²¹ It is about how to deal with it,¹⁴²² and about nation-building.¹⁴²³

One way to do it seems through peace agreements, a process of negotiation involving all fractions and groups leading to some agreed upon form of power sharing, that is through democratisation.¹⁴²⁴ As stressed by Ottaway, the possibility of an authoritarian solution not only appears remote, but in our view unworkable.¹⁴²⁵

¹⁴¹⁷ Wiseman, J.A., *Democracy in Black Africa*... 14.

¹⁴¹⁸ Busia, K.A., *Africa in Search*... 19.

¹⁴¹⁹ *Idem* 20.

¹⁴²⁰ *Idem* 111.

¹⁴²¹ *Idem* 17-20, 32-33.

¹⁴²² *Idem* 32-33.

¹⁴²³ *Idem* 17-20.

¹⁴²⁴ See Ottaway, M., "Ethnic Politics in Africa..." 315; Rothchild, D., "Ethnic Insecurity, Peace Agreements, and State Building" 319-337.

¹⁴²⁵ Ottaway, M., "Ethnic Politics..." 315.

Besides, one of the important conclusions arrived at by Brautigam from the examination of the "Mauritius Miracle" is that "A well-crafted political system can ensure broad representation, while providing incentives for coalition building, moderation, and compromise."¹⁴²⁶

In Ottaway's terms,

"The challenge for African countries, as for the rest of the world, is to accept the inevitability, and indeed the legitimacy of different ethnic identities and to find ways to manage the conflicts that arise, particularly when political movements manipulate these identities for political purposes."¹⁴²⁷

According to Clapham and Wiseman, "it is autocracy rather than ethnic variety that has posed the most important threat to the maintenance of African States."¹⁴²⁸

Even in a state as ethnically varied as Nigeria, so they argued, democratisation may plausibly be regarded as an integrating rather than a centrifugal force.¹⁴²⁹

Franklin and Baun also emphasised that ethnic diversity and pluralism are supportive of democratic constitutionalism in Nigeria and India, especially because no group is dominant.¹⁴³⁰ Nevertheless, one should not downplay the threat that growing ethnonationalism poses to constitutionalism and democracy in many African countries.

Once more, the point must be made that this is not a typically African phenomenon. On the other hand, it would be too simplistic to consider that all conflicts in post-colonial Africa are of ethnic character; that ideologies and mostly interests are "added factors" or "thin veneer", as Ronen emphasised.¹⁴³¹

¹⁴²⁶ Brautigam, D., "The 'Mauritius Miracle'...." 158.

¹⁴²⁷ Ottaway, M., "Ethnic Politics ..." 316.

¹⁴²⁸ Clapham, C. & Wiseman, J.A., "Conclusions: assessing the prospects for the consolidation of democracy in Africa", in Wiseman, J.A., (ed.), *op.cit.* 224.

¹⁴²⁹ *Idem*, 223.

¹⁴³⁰ Franklin, D.P. & Baun, M.J., "Conclusion", in *idem*, (eds), *Political Culture...* 229-230.

¹⁴³¹ Ronen, D., "The State and Democracy..." 198. However, in many instances, as in the case of the DRC, interests and ideologies have been important factors and not "thin veneer". The reported collapse of African states such as the DRC is not primarily imputable to ethnic factors, but to interests of the Congolese political leadership and neighbouring countries without neglecting Western interests or those of foreign policy of some big Western nations.

Negative effects for democracy of deep ethnic cleavage have, for instance, been studied in some European countries since the exclusionary sentiment of nationality is a direct contradiction of the universalistic norms of liberal constitutionalism.¹⁴³²

Negative effects also exist in Asian countries such as Malaysia, Pakistan, Indonesia, and Sri Lanka, but the conclusion that democracy was inconsistent with deep ethnic divisions was, according to Diamond, a specious one. Clearly, what matters, so he argued, was not simply the degree of ethnic division, but how it was structured and managed.¹⁴³³

The paradox is that although ethnic conflicts pose problems to the consolidation of constitutionalism and democracy, the latter are arguably the best way to deal with it by recognising rights of not only individuals, but also of peoples, groups and minorities.

As discussed earlier, poverty and underdevelopment constitute another challenge facing the establishment and consolidation of constitutionalism and democracy in post-colonial Africa.¹⁴³⁴

¹⁴³² Franklin, D.P. & Baun, M.J., "Conclusion" 228.

¹⁴³³ Diamond, L., "Introduction" 19.

¹⁴³⁴ See Ake, Cl., "Development and Democracy..." 126-128; Baker, P., "Reflections on the Economic Correlates of African Democracy" 53-60; Bangura, Y., "Authoritarian Rule..." 101-120; Brautigam, D., "The 'Mauritius Miracle'..." 131-137; Clapham, C. & Wiseman, J.A., "Conclusion" 227; Diamond, L., "Sub-Saharan Africa" 87, 107; Diamond, L., *et al.*, (eds.), *Politics in Developing Countries*... 10-14; Franklin, D.P. & Baun, M.J., "Conclusion" 227; Ilunga-Kabongo, "Democracy in Africa..." 38; Landell-Mills, P., & Serageldin, I., "Governance and the External Factor" 25-26; Marsh, R.M., "Does Democracy Hinder Economic Development in the Late-Comer Nations?" 215-248; Nyang'oro, J.E., "Introduction" X; Nzungu-Ntalaja, G., "The State and Democracy..." 19, 22; Olukoshi, A., "State, Conflict..." 460-462; Przeworski, A., & Limongi, F., "Modernization..." 177; Ronen, D., "The Challenges of Democracy..." 2-3; Sandbrook, R., "Liberal Democracy..." 140-141; Sklar, R.L., "Developmental Democracy..." 1-30; Sorensen, G., "Democracy and the Developmental State" 31-52; Van de Walle, N., "Economic Reform and The Consolidation of Democracy..." 15-42; Vengroff, R. & Kone, M., "Mali: Democracy and Political Change" 49; Weed, E., "The Impact of Democracy on Economic Growth..." 21-40; Wiseman, J.A., *Democracy in Black Africa*... 182; Young, C., "The Third Wave..." 34.

According to Clapham and Wiseman, "the relationship between economic management and the structure of democratic competition is perhaps the most basic factor affecting the success of democratic consolidation."¹⁴³⁵

According to Nicolas Van de Walle, one of the biggest threats to the consolidation of democratic regimes in Africa is the intense economic crisis facing most of the nations of the region, and the politically difficult policy reform programmes that must be implemented to overcome it.¹⁴³⁶

Sustaining democracy or a successful democratic transition requires that democratic regimes be capable of meeting people's expectations. Failure to do so can derail the transition and bring about a serious questioning of the necessity of political change.

Zambia is a case in point. Faced with mounting social problems, the regime has progressively turned to authoritarianism.¹⁴³⁷

Under poor economic conditions, it will be difficult for democracy to take root. Total economic collapse is incompatible with democracy.¹⁴³⁸ Even though the internal recognition of the need for change is an essential condition for democracy, its implementation and consolidation remain extremely difficult, especially at times of economic crisis.¹⁴³⁹

However, as the German and Japanese experience has demonstrated, "With economic system performance, the conditions for democratic constitutionalism are particularly favourable."¹⁴⁴⁰

¹⁴³⁵ Clapham, C. & Wiseman, J.A., *supra* 227.

¹⁴³⁶ Van de Walle, N., "Economic Reform..." 15.

¹⁴³⁷ Nzongola-Ntalaja, G., "The State and Democracy..." 19.

¹⁴³⁸ Wiseman, J.A., *Democracy in Black Africa*... 182.

¹⁴³⁹ Clapham, C. & Wiseman, J.A., "Conclusion..." 222.

¹⁴⁴⁰ Franklin, D.P. & Baun, M.J., "Conclusion" 227.

In much of Africa and especially in the DRC, the economic situation still remains one of the major obstacles to the establishment of constitutionalism and democracy.

Accordingly, both international and national efforts to establish and consolidate peace, constitutionalism and democracy in African countries should also aim at improving the socioeconomic situation.

In this context, NEPAD¹⁴⁴¹ is a field test for the richest, democratic and most powerful States of the "North". NEPAD, which cannot be a panacea, is bound to face increasing criticism from "anti-globalisation" militants, particularly from the civil society.

However, the commitment of the Western countries to promoting constitutionalism and democracy in Africa will be judged by their contribution to NEPAD and their support to economic, political and development programmes initiated by African themselves.

As pointed out earlier, the debate about democratisation is about the theory of the State in the Third World and at the root of the political crisis in post-colonial Africa is also the crisis of the African State that has been much discussed in the literature.¹⁴⁴²

¹⁴⁴¹ New Partnership for Africa's Development.

¹⁴⁴² See Ake, Cl., *Democracy and Development...* 132-134; Anyang' Nyong'o, P., *Popular Struggles for Democracy...*, supra; idem, (ed.), *Discourses on Democracy...*, supra; Ayoade, J., "States Without Citizens..." supra; Azarya, V. & Chazan, N., "Disengagement from the State..." 105-131; Bangura, Y., "The Pitfalls of Recolonisation..." supra; Bayart, J.F., *The State in Africa...*, supra; Bayart, J.F., & Hibou, B., *La criminalisation de l'Etat...* supra; Callagy, T., *The State-Society Struggle...*, supra; Clapham, C., *Africa and the International System...*, supra; Conac, G., *L'Etat en transition...* supra; Fatton, R., *Predatory Rule...* supra; Olukoshi, A. & Laakso, L., "The Crisis of the National State", supra; Jackson, R.H., *Quasi-States...* supra; Jackson, R.H. & Rosberg, C.G., "Why Africa Weak States Persist..." in Atul Kohli (1980), supra, 259-282; Mafeje, A., "Self-Colonisation..." supra; Mamdani, M., "Discussing the Democratic Republic of Congo", supra; Mangu, Mbata B., "Conflict Settlement..." 21-30; Migdal, J., *Strong Societies and Weak States...*, supra; Villalon, L. & Huxtable, P., (eds.), *Critical Juncture: The African State Between Disintegration and Reconfiguration...*, supra; Zartman, I.W., (ed.), *Collapsed States*, supra; Mazrui, A., "Towards a Benign Recolonisation..." supra; Herbst, J., "Responding to State Failure..." 120-144; Hyden, G., "Governance and the Reconstitution of the Political Order..." 183; Joseph, R., "Failed States in Africa", supra; idem, "The Reconfiguration of Power..." 87; idem, *Democracy and Prebendal Politics in Nigeria...* supra; Wanyonyi, P.K., "The Notion of self-Colonization" 19-21; Sangmpam, S.N., "The Over-Politicized State..." 95; Whitaker, S., "The Unfinished State of Nigeria...", Widner, J.A., "States and Statelessness..." 129-154; William, R., *Corruption and State Politics...* supra; Wunsch, J.S. & Olowu, D., *The Failure of the Centralized State...* supra; Young, G., "The Third Wave..." 24-25; idem, *The African Colonial State...* supra; idem, "Zaire, is there a State?", supra; Médard, J.F., "The Underdeveloped State..." supra; idem, "L'Etat sous-développé au Cameroun..." 35-84; idem, "l'Etat patrimonialisé..." 25-36; Ottaway, M., "Ethnic Politics..." 314-315; Quantin, P., "L'Afrique centrale dans la guerre..." 106-125; Ronen, D., "The

State reconstruction is therefore another challenge facing the establishment and consolidation of constitutionalism and democracy in Africa.¹⁴⁴³

In the so-called collapsed African States such as the DRC, constitutionalism and democracy first require state building or reconstruction since without an effective state, constitutionalism and democracy are unlikely to be established or consolidated.

The State must be reconciled with the people since there is a crisis of legitimacy in the post-colonial State, which failed to meet the people's aspirations for freedom and material well-being.¹⁴⁴⁴

The State must be restructured for the purposes of building democracy and achieving social progress.

The ultimate goal, also a tremendous challenge, is to transform the state in such a way that it becomes an ally rather than an obstacle to the democratisation process.

The State must be rebuilt on a constitution. However, as the DRC highlights, the Constitution is not a sufficient condition for sustainable democratic transition or democratic consolidation. The same goes for elections, generally considered essential to democracy or confused with it in the Western liberal discourse.

As pointed out earlier and is particularly important to the DRC where the adoption of a new Constitution is high on the political agenda, constitutional agreements will only succeed in rebuilding the State and advancing constitutionalism and democracy if they are inclusive and enjoy the support of the people, the regional and the international community.

State and Democracy in Africa..." 192; Rothchild, D. & Chazan, N., (eds.), *Prekarious Balance...*, supra; Young, C. & Turner, T., *The Crisis and Decline of the Zairean State...*, supra.

¹⁴⁴³ See Ibrahim, J., "Transition démocratique en Afrique..." 136-137; Nzongola-Ntalaja, G., "From Zaire..." 17; Olukoshi, A., "State, Conflict..." 460.

¹⁴⁴⁴ Nzongola-Ntalaja, G. & Lee, M. C., "Introduction" 1-2, 7-8.

As Franklin and Baum pointed out, political culture is an important factor affecting both the establishment and mostly the consolidation of constitutional and democratic institutions.¹⁴⁴⁵ Here again, the political leadership, the opposition, the institutions of high education, particularly African universities, and the civil society must play a role.

Those who blame lack of political culture in post-colonial Africa consider it to be static and even Western in character.

Constitutionalism and democracy bear the hallmark of human genius and are not the trade mark of a particular society.

There are no people without any political culture. On the other hand, a political culture may change and be changed, learned and positively promoted not only by individuals, but also by entire societies in which case the process may take several generations.¹⁴⁴⁶

The change or transformation of values or political culture may be favoured by a number of factors, including political or intellectual leadership and socioeconomic change.

On the other hand, popular education plays a major role in the values learning process or in building democracy and constitutionalism.¹⁴⁴⁷

¹⁴⁴⁵ See Franklin, D.P. & Baum, M.J., (eds.), "Conclusion" 225, 226, 231; Nwabueze, B.O., *Constitutionalism...* 304; Busia, K.A., *Africa in Search...* 104, 109.

¹⁴⁴⁶ Franklin, D.P. & Baum, M.J., "Conclusion" 225, 226, 231.

¹⁴⁴⁷ Onalenna, D.S., "Gender and Democracy in Botswana..." in Nzongola-Ntalaja, G. & Lee, M.C., (eds.), *The State and Democracy ...* 39.

However, who should be responsible for political education? That should be the role of the government, the civil society and the institutions of higher learning should similarly assume greater responsibility in this development.¹⁴⁴⁸

In Onalenna's words,

"If the question of voter education is placed within the wider context of the African continent, it raises issues about the role, for instance, of African universities in public education and the consolidation of democracy."¹⁴⁴⁹

He regretted that these leading institutions of higher learning have never played any significant role in the development of democracy outside their walls.

Restructuring their mandate narrowly to human resources development, mostly for the state sector, these institutions have failed to play a more active role in extending learning in one of the most crucial parts of education and political development, the empowerment of the voting masses.¹⁴⁵⁰

This is a seeping statement when one considers the role played by students and some academics in the democratisation process throughout Africa.

On the other hand, the role of African universities in public education should not be confined to the empowerment of the voting masses unless one adopts the wrong view equating democracy with elections.

One must, however, agree that African universities should have played a more positive role than the one they have played so far.

¹⁴⁴⁸ Onalenna, D.S., "Gender and Democracy..."40.

¹⁴⁴⁹ *Idem.*

¹⁴⁵⁰ *Ibidem.*

Besides the empowerment of the voting masses, political culture also requires the development of a feeling of loyalty to the state. As a matter of mind, this is a much slower and protracted process.

Franklin and Baun¹⁴⁵¹ held that an important factor of political-cultural transformation is socioeconomic change resulting from economic development and modernization, as the case was in Mexico and Turkey.

However, as Nwabueze put it, it takes other things to nurture besides economic progress. Political culture has to be nursed by teaching and by precepts diffused among children at school, among the members of various organisations and associations, and among the society generally.¹⁴⁵²

As far as the opposition is concerned, the democratic transition cannot fare well when the leaders of the democratic opposition are so preoccupied with winning political office for their own material benefits and are consequently ready to prefer deal-making behind closed doors to transparent decision-making in open democratic processes, betraying the deepest aspirations of ordinary people, whose own political immaturity manifests itself in an often uncritical support for such leaders.¹⁴⁵³

Opposition in many African countries is plagued with opportunism, divisions, political vagrancy, and ethnicity.

There is still lack a true, viable, credible and nationalist opposition committed to promoting constitutionalism and democracy and to defending popular interests instead of the material and financial interests of its members and their families.

That is particularly the case in the DRC since the political opening up under Mobutu.

¹⁴⁵¹ Franklin, D.P. & Baun, M.J., "Conclusion" 226.

¹⁴⁵² Nwabueze, B.O., *Constitutionalism...* 304.

¹⁴⁵³ Nzongola-Ntalaja, G., "The State and Democracy..." 19.

Civil society is instrumental in building constitutionalism and democracy.¹⁴⁵⁴ The organisation of the citizenry – autonomously and pluralistically from the roots – both inside and outside the formal polity is an indispensable condition for the development and maintenance of a secure democracy.¹⁴⁵⁵

As stakeholders in the democratic transition process, civil society organisations are key actors in the transformation process.¹⁴⁵⁶

However, like the political opposition, civil society is vulnerable because it can be manipulated by the State. This happens elsewhere, but Africa is particularly prone to the abuse of NGOs and the civil society for political purposes.

Building a viable, strong, autonomous, and development-oriented and constitutionalism and democracy committed civil society remains a challenge that must be overcome to win the struggle against authoritarianism in post-colonial Africa.

There are also international challenges to constitutionalism and democracy in Africa. These are mainly the lack of commitment to sustaining constitutionalism and democracy in Africa by supporting democratic movements and governments, the unbearable African debt and the neglect of the continent.

There has been a commonality of interests between authoritarian leaders and their sponsors in the international community. The international community expressly adopted a double standard and a very ambiguous attitude that helped leaders consolidate authoritarianism and reject claims of democracy. *Vis-à-vis* the DRC for instance, despite the very bad and undemocratic governance of Mr Mobutu, the USA continued to support his regime and to brand the thesis “Mobutu or Chaos”.

¹⁴⁵⁴ See Diamond, L., “Introduction...” 50; Mujaju, A.B., “Civil Society...” 42; Nzongola-Ntalaja, G. & Lee, M.C., “Introduction” 2; Nzongola-Ntalaja, G., *The Democratic Movement... 2*.

¹⁴⁵⁵ Diamond, L., “Introduction” 50.

¹⁴⁵⁶ Nzongola-Ntalaja, G. & Lee, M.C., “Introduction” 2.

On the other hand, when their assistance was crucially needed, they came in not to support change but to help the authoritarian leaders hijack it.

Among the eternal challenges to constitutionalism and democracy in Africa, sustained attention should be paid to the Janus-like phenomenon of economic globalisation and political and intellectual vigilance maintained to ensure that it promotes constitutionalism, democracy and development, as African peoples have been told and many believe.¹⁴⁵⁷

Without any favourable political, diplomatic, economic and social environment in the country and across its borders and without any support from both within and outside, a constitutional and democratic state is unlikely to emerge and consolidate in Africa. The DRC case also bears testimony to this and confirms the above hypothesis.

Finally, international law or regional law may positively impact on the establishment and consolidation of constitutionalism and democracy in African states.

For Africa, although it is still premature to judge, but considering the principles entrenched in the Act establishing the African Union and the commitment of African leaders to implement NEPAD, it is likely that the new regional organisation that replaced the OAU will play a more decisive role in promoting constitutionalism and democracy in the African region.

However, as for constitutionalism, democracy and development, the success of NEPAD will primarily depend on African themselves.

¹⁴⁵⁷ See Amin, S., "The Issue of Democracy..." 62-67; Joseph, R., "State, Conflict and Democracy..." 6-7; Idem, "The Reconfiguration..." 64; Mkandawire, T., "Crisis Management..." 119-120; Nzongola-Ntalaja, G., "The State and Democracy..." 17-18; Sandbrook, R., "Liberal Democracy in Africa..." 151; Van de Walle, N., "Globalization and African Democracy..." 95-118, 112-114.

5.4. Questions and Recommendations for Further Research and Investigation

The history of constitutionalism and democracy in post-colonial Africa remains to be written. The construction of African and Congolese politics needs to be fully documented and the silence of African constitutional lawyers is still overwhelming in comparative studies on constitutionalism and democracy in Africa.

The study did not pretend to explore all questions and make all recommendations for the establishment and consolidation of constitutionalism and democracy in post-colonial Africa. Therefore, a number of research questions that were left unanswered or were only superficially addressed, would require further research and investigation by other students of constitutionalism and democracy on the African continent.

First, empiricism and instrumentalism still dominate the intellectual discourse on constitutionalism and democracy. Academic disregard of constitutions and constitutional or legal scholars remains the rule rather than the exception.

Due to analytical and ideological reasons, constitutional law and lawyers tend to be almost irrelevant in much of the academic discussion of political and economic development in Africa. Constitutional law and legal theory are generally neglected in comparative studies on constitutionalism and democracy in Africa, which tend to prefer history, economy, politics and sociology.

There is a need for further involvement of African lawyers in the study of constitutionalism and democracy in Africa.

Lawyers are admittedly the best qualified and equipped to deal with constitutionalism and democracy that are also legal concepts.

However, law alone as part and parcel of social sciences cannot explain or provide all answers pertinent to the establishment and consolidation of constitutionalism and democracy in post-colonial Africa. Accordingly, there is crucial need for legal studies to be done within the context of *interdisciplinarity*, especially in the field of constitutionalism and democracy.

Without falling in the trap of monopolising the intellectual discourse, while fighting marginalisation and their own retreat, legal scholars should invest much more in the interdisciplinary study of constitutionalism and democracy, that is still dominated by political scientists, historians, sociologists, and economists; by their concepts and methodological approaches.

Moreover, as pointed out earlier, many existing studies on constitutionalism and democracy in Africa and the DRC are Euro-centrist, Afro-pessimist, and empiricist.

There is a predominance of the economic approach in so far as the categories of economics are used to explain the behaviour of the political actors, as well as political processes and outcomes.

As Olukoshi outlined, this trend tended to weaken the quality of analysis and obscure the crucial questions that should normally engage the attention of the academic and policy communities, but are still neglected or insufficiently addressed by students of constitutionalism and democracy in Africa.¹⁴⁵⁸

The question of the state is foundational to constitutionalism and democracy. One needs further research on how the state, which was up to now an instrument of authoritarianism and human rights abuses, may be rehabilitated, reconstructed, and managed to promote and sustain constitutionalism and democracy.

¹⁴⁵⁸ Olukoshi, A., "State, Conflict..." 460-462.

This investigation should extend to State's structures or institutions and address the critical questions of the form of the state, the Constitution, human rights protection, mechanisms to promote or support constitutionalism and democracy, division of powers between the different entities of the State, independent judiciary, local government, and so on. Related to this is the question how the state can be legitimised.

The second question concerns the role played by the international community, the influential regional players and the international and regional environment. In the context of economic globalisation and the internationalisation of law and politics, it becomes important to research the impact of these phenomena on the State, constitutionalism and democracy in Africa.

Thirdly, there is the question of the army as an important ingredient in the decay of the state and the military itself in post-colonial Africa and the DRC in particular.

As stressed earlier, the army has been a wild card in the transition process, sometimes hastening or favouring constitutional and democratic change but most of the time impeding it and opposing constitutionalism and democracy.

Since it is certainly there to stay for a relatively long time, more investigation should be conducted on how to deal with it, and how it should be organised to transform it from an instrument of oppression and authoritarianism to one that serves constitutionalism and democracy.

Studies on the military are particularly important in cases such as that of the DRC where the Lusaka Agreement provided for the formation of a single national, structured and integrated army to replace the different Congolese armed forces under the control of the government and the rebel movements.

In this context, one should research on how to unify the army, organise its command, and ensure that the new army is non-partisan, apolitical, professional, neutral, and at the service of the government of national unity and reconciliation to be established in terms of the Lusaka Agreement.

On the other hand, considering the discredited reputation of the military in many African countries, the question is how to re-legitimise the army, to reconcile it with the people, to ensure that the people through their elected representatives have their say in military affairs, and that the military is under control and accountable to avoid subversion of the government of the people.

Further research is required on all the challenges that still obscure the prospects for constitutionalism and democracy in Africa. These include issues such as political culture, ethnicity and the national question, citizenship, wars and rebellions, underdevelopment and poverty alleviation, civil society and their organisations, multipartyism and the status of the opposition, elections and electoral systems, protection of human rights including minorities' rights, political leadership and intellectual scholarship, the regional and international environment, and their impact on constitutionalism and democracy in Africa.

Moreover, constitutionalism and democracy have so far been studied mainly at the central or national level. Further research must be done on local government and institutions that should promote and sustain constitutionalism and democracy at the grass-roots since genuine constitutionalism and democracy works "bottom up" and is based at the local level. Centralisation and excessive unitarianism are inimical to constitutionalism and democracy. Institutions should be designed to achieve unity through diversity. In our multi-national societies, the promotion of constitutionalism and democracy requires that the federal principle, which does not necessarily imply the establishment of federal States throughout the continent, is taken more seriously and addressed in our constitutional designs.

Finally, very little attention has been paid in the literature to the struggle for constitutionalism and democracy in post-colonial Africa and the DRC. Yet this struggle has to be sustained by intellectuals. The present study is a modest contribution to this ongoing struggle, but much more is needed, considering the challenges facing the establishment and consolidation of constitutional and democratic states on the continent.

To sum up: the study was intended to serve both theoretical and empirical purposes.

Theoretically, it was to advance knowledge on constitutionalism and democracy while empirically providing a strong support to African struggles for the establishment and consolidation of constitutional and democratic states in post-colonial Africa in general and in the DRC in particular.

For those who really care about what has been happening in Africa, observing political change on the continent, especially in countries such as South Africa and the DRC provides an emotional roller coaster of alternating euphoria and depression.¹⁴⁵⁹

Viewed objectively this struggle can be seen as having produced a mixture of success and failure and a large ambivalent and uncertain middle ground where success and failure intermingle in, as yet, undetermined ways.¹⁴⁶⁰

Despite the challenges, setbacks, halts, occasional standstills and even retreats, there is a future for constitutionalism and democracy in Africa. The markedly increased role played by constitutionalism and democracy in African politics over the last few years is unlikely to dissipate or become atrophied in the future.

Constitutionalism and democracy are more firmly on the African political agenda than was previously the case. Constitutionalism and democracy are the wave of the future.

The ongoing campaign for constitutionalism and democracy throughout the continent gives us hope that constitutionalism and democracy will ultimately be achieved no matter how long it takes.

¹⁴⁵⁹ Wiseman, J.A., *The New Struggle for Democracy...* 174.

¹⁴⁶⁰ Idem.

Arguably, African peoples will not rest until they have established and consolidated constitutional and democratic States in their countries.

However, they should understand that as for the achievement of economic development, the establishment and consolidation of constitutionalism and democracy is first of all their own responsibility.

Even if they may claim assistance from outside the continent, constitutionalism and democracy as well as development and peace will never come to them on a golden or silver plate offered by some Father Christmas more interested in African fate and caring for Africa more than Africans themselves. Instead of just walking and dreaming, Africans have to fight and keep on fighting.

The advent of the global village and the changes occurred in Africa with the establishment of the African Union whose Constitutive Act contains a number of principles to favour constitutionalism, the rule of law, democracy and human rights, constitute a major boost and herald a new era for constitutionalism and democracy in post-colonial Africa. However, many past legal instruments and statements remained dead letters.

While we are Afro-optimist about the prospects for constitutionalism and democracy in Africa, there is no guarantee that this time African leaders will abide by the rules that they adopted themselves.

Much will depend on their commitment if, unlike the OAU that happened to be a "holy alliance" of authoritarian African leaders supporting one another, the new organisation has to become the affair of African peoples throughout the continent.

To be successful, the struggle for constitutionalism and democracy should be sustained by a strong and continued effort of thought that only derives from the work of intellectuals.

The time for ivory tower professors or intellectuals championing the *status quo* is over and there is no *grandeur* for those who choose to betray their people and selfishly “sell” their scholarship in exchange for ministerial positions or better material conditions of life for themselves and their families. African intellectuals should give up their *petits bourgeois* interests and conformism and actively participate in the struggle of their peoples.

Many have already done so, but much more needs to be done considering the challenges and the hard road ahead. What is said above may look like an overgeneralisation when one considers the noteworthy contribution of some African intellectuals and their participation in the democratic struggle.

The case study unfortunately reveals that there have been very few “organic intellectuals” of their people in the Congo and that is true of many other African countries.

Despite what has been achieved in a few African states, when the record of constitutionalism, democracy is still so gloomy on the continent as a whole, there is no way we can praise ourselves or be satisfied with the situation as it stands.

As intellectuals, our knowledge or scholarship has no value unless used in the interest of our peoples and helps create conditions for better life for all, including the establishment and consolidation of constitutionalism and democracy, without which there can hardly be dignified life, sustainable development and peace in Africa or elsewhere. Constitutionalism and democracy are a prerequisite for peace, development and African Renaissance and African Union will only succeed if African States embark on the road to constitutionalism and democracy.

BIBLIOGRAPHY

I. TEXTBOOKS

- Achebe, C., *Anthills of the Savannah*, London: Heinemann, 1987.
- Ackermann, L., *The Constitutional Court of South Africa. Upholding our Rights Without Fear or Favour*, Johannesburg: Lex Patria Publishers, 1998.
- Ake, Cl., *Democracy and Development in Africa*, Washington, DC: The Brookings Institution, 1996.
- Ake, Cl., *Social Science as Imperialism*, Ibadan, Nigeria: Ibadan University Press, 1979.
- Akindès, F., *Les mirages de la démocratie en Afrique subsaharienne francophone*, Dakar: CODESRIA, 1996.
- Amin, S., *Neo-Colonialism in West Africa*, New York: Monthly Review Press, 1973.
- Amin, S., *Delinking: Towards a Polycentric World*, London: Zed Books, 1985.
- Amselle, J.L. & Mbokolo, E., *Au Coeur de l'Ethnie*, Paris: La Découverte, 1985.
- Andrews, W.G., (ed.), *Constitutions and Constitutionalism*, 3rd Ed., D. Van Nostrand Company, inc., Princeton: New Jersey, 1968.
- Anyang' Nyong'o, P., (ed.), *Afrique: la longue marche vers la démocratie. Etat autoritaire et résistances populaires*, Paris: Publisud, 1988.
- Anyang' Nyong'o, P., (ed.), *Popular Struggles for Democracy in Africa*, London: Zed Books, 1987.
- Atul Kohli, (ed.), *The State and Development*, Princeton, N.J.: Princeton University Press, 1980.
- Bailey, F.G. *Stratagems and Spoils: A Social Anthropology of Politics*, Oxford: Basil Blackwell, 1969.
- Bakary, A.T., *La Démocratie par le Haut en Côte d'Ivoire*, Paris: L'Harmattan, 1992.

BIBLIOGRAPHY (continued)

- Bankie, B.F. *et al.*, (eds.), *Towards Creating a Sustainable Culture of Human Rights*, Gamsbery: Macmillan, 1998.
- Banock, M., *Le Processus de Démocratisation en Afrique. Le cas camerounais*. Paris: L'Harmattan, 1993.
- Barber, B. & Watson, P., *The Struggle for Democracy*, Toronto: Lester and Orpen Dennys, 1988.
- Barrington, M., *Social Origins of Dictatorship and Democracy*, Boston: Beacon Press, 1966.
- Bayart, J.F., *The State in Africa: The Politics of the Belly*, New York: Longman, 1993.
- Bayart, J.F., Eilis, S. & Hibou, B., *La criminalisation de l'Etat en Afrique*, Bruxelles: Editions Complexe, 1997.
- Beckett, P.A. & Young, C., *Dilemmas of Democracy in Nigeria*, Rochester, New York: University of Rochester Press, 1997.
- Benda, J., *La trahison des clercs*, Paris: J.J. Pauvert, 1965.
- Benot, Y., *Idéologies des indépendances africaines*, Paris: Maspero, 2 Ed., 1972.
- Boulle, et al. (eds.), *Constitutional and Administrative Law*, Johannesburg: Juta, 1989.
- Bourgi, A. & Casteran, C., *Le Printemps de l'Afrique*, Paris: Hachette, 1991.
- Bratton, M. & Hyden, G., (eds.), *Governance and Politics in Africa*, Boulder, CO: Lynne Rienner Publishers, 1992.
- Buchmann, J., *L'Afrique noire indépendante*, Paris: L.G.D.J., 1962.
- Buijtenhuijs, R. & E. Rijnierse, *Democratisation in Sub-Saharan Africa, 1989-1992: An Overview of the Literature*, Leiden: Africa – Studiecentrum, 1992.
- Buijtenhuijs, R. & Thiriot, C., *Democratisation in Sub-Saharan Africa, 1992-1995: An Overview of the Literature*, Leiden: African Studies Centre, 1995.
- Busia, K.A., *The Position of the Chief in Modern Political System of Ashanti*, Oxford: Oxford University Press, 1951.

BIBLIOGRAPHY (continued)

- Busia, K.A., *Africa in Search of Democracy*, London: Routledge & Kegan Paul, 1967.
- Caillé, A., *La démission des clercs: la crise des sciences sociales et l'oubli du politique*, Paris: La Découverte, 1993.
- Callagy, T.M., *The State-Society Struggle: Zaire in Comparative Perspective*, New York: Columbia University Press, 1984.
- Chabal, P. & Daloz, P.J., *Africa Works. Disorder as a Political Instrument*, London: James Currey, 1999.
- Chandler, R.C., Enslin, R.A. & Renstrom, P.G. *The Constitutional Law Dictionary*, Vol.1, Individual Rights, ABC-CLIO, Oxford, England, 1985.
- Chaskalson, M. et al., (eds.), *Constitutional Law of South Africa*, Juta & Co, 1996.
- Chevallier, J., *L'Etat de Droit*, Paris: Montchrestien, 1992.
- Chole, E. & Ibrahim, J., (eds.), *Processus de démocratisation en Afrique: Problèmes et Perspectives*, CODESRIA, Karthala, 1995.
- Chrétien, J.P. & Prunier, G., *Les ethnies ont une histoire*, Paris: Karthala, 1989.
- Clapham, C., *Africa and the International System: The Politics of State Survival*, New York: Cambridge University Press, 1996.
- Clapham, C., (ed.), *Private Patronage and Public Power: Political Clientelism in the Modern State*, London: Pinter, 1982.
- Claude, R.P., (ed.), *Comparative Human Rights*, The John Hopkins University Press, 1976.
- Club Nation et Développement du Sénégal*, Paris: Présence Africaine, 1972.
- CODESRIA, (ed.), *Academic Freedom in 1995 Africa*, Dakar: CODESRIA, 1997.
- Colas, D. & Emeri, Cl., (eds.), *Droit, institutions et systèmes politiques. Mélanges en hommage à Maurice Duverger*, Paris: PUF, 1987.
- Conac, G., *Les institutions constitutionnelles des Etats d'Afrique francophone et de la République malgache*, Paris: Economica, 1979.

BIBLIOGRAPHY (continued)

- Conac, G., (ed.), *L'Afrique en transition vers le pluralisme politique*, Paris: Economica, 1993.
- Conac, G., (ed.), *Dynamiques et finalités des droits africains*, Paris: Economica, 1980.
- Conrad, J., *Au Coeur des Tenèbres*, Paris: Edition Mille et Une Nuit, 1999.
- Cornia, A. & Helleiner, G., (eds.), *From Adjustment to Development in Africa: Conflict, Controversy, Consensus*, London: Macmillan, 1994.
- Coulon, C.H. & Martin, D.-C., *Les Afriques politiques*, Paris: La Découverte, 1991.
- Dahl, R., A. *Preface to Democratic Theory*, Chicago: University of Chicago Press, 1956 & 1970.
- Dahl, R.A., *Polyarchy: Participation and Opposition*, New Haven, CT: Yale University Press, 1971.
- Dahl, R.A., *Democracy and Its Critics*, New Haven & London: Yale University Press & New Delhi: Orient Longman Ltd, 1989.
- Dahl, R.A., *Dilemmas of Pluralist Democracy*, New Haven, CT: Yale University Press, 1982.
- Dahrendorf, R., *Reflections on the Revolution in Europe*, New York: Times Books, 1990.
- De Villiers, B., (ed.), *Birth of a Constitution*, Juta & Co, 1994.
- Decalo, S., *Coups and Army Rule in Africa: Studies in Military Style*, New Haven & London: Yale University Press, 1976.
- Decalo, S., *Coups and Army Rule in Africa*, 2 ed., New Haven: Yale University Press, 1990.
- Democracy and Human Rights*, Council of Europe & N.P. Engel, 1987.
- Deng, F. *et al.*, *Sovereignty as Responsibility*, Washington: Brookings Institution, 1996.
- Diamond, L., *Class, Ethnicity and Democracy in Nigeria: The Failure of the First Republic*, New York: Syracuse University Press, 1988.
- Diamond, L., Linz, J.J., & Lipset, S.M., (eds.), *Democracy in Developing Countries: Africa*, Vol.2, Boulder: Lynne Rienner, 1988.

BIBLIOGRAPHY (continued)

- Diamond, L., Linz, J.J. & Lipset, S.M., (eds.), *Democracy in Developing Countries: Asia*, Vol.3, Boulder: Lynne Rienner Publishers, 1989.
- Diamond, L., Linz, J. & Lipset, S.M., (eds.), *Politics in Developing Countries: Comparing Experiences with Democracy*, Boulder and London: Lynne Rienner Publishers, 1990.
- Diamond, L., Linz, J., & Lipset, S.M., (eds.), *Transition Without End: Nigerian Politics and Civil Society Under Babangida*, Boulder, CO: Lynne Rienner Publishers, 1997.
- Diop, C.A., *The African Origin of Civilization: Myth or Reality*, New York-Westport: Lawrence Hill & Company, 1974.
- Diop, C.A., *Civilisation ou Barbarie*, Paris: Présence Africaine, 1981.
- Du Plessis and Corder, *Understanding South Africa's Bill of Rights*, Juta & Co, 1994.
- Dugard, J., *International Law. A South African Perspective*, 2nd ed., Juta & Co, 2000.
- Dumont, R., *L'Afrique noire est mal partie*, Paris: Le Seuil, 1962.
- Dumont, R., *Démocratie pour l'Afrique*, Paris: Le Seuil, 1991.
- Dunn, J., *Democracy: The Unfinished Journey*, Oxford: Oxford University Press, 1992.
- Duverger, M., *Institutions politiques et droit constitutionnel*, Paris: PUF, 1963.
- Duverger, M., *Institutions politiques et droit constitutionnel*, Paris: PUF, 1975.
- Duverger, M., *Janus, les deux faces de l'Occident*, Paris: Fayard, 1972.
- Duverger, M., *La démocratie sans le peuple*, Paris: Armand Colin, 1976.
- Eboussi-Boulaga, F., *Les Conférences Nationales en Afrique Noire: Une Affaire à Suivre*, Paris : Karthala, 1993.
- Elster, J. & Slagstad, R., (eds.), *Constitutionalism and Democracy*, New York-New Rochelle-Melbourne-Sydney: Cambridge University Press, 1988.
- Enloe, C., *Ethnic Soldiers: State Sovereignty in Divided Societies*, Athens: University of Georgia Press, 1980.
- Evans, P., Rueschemeyer, D., & Skocpol, T., *Bringing the State Back In*, New York: Cambridge University Press, 1985.

BIBLIOGRAPHY (continued)

- Fares, Z., *Afrique et Démocratie: Espoir et Illusions*, Paris: L'Harmattan, 1992.
- Fatton Jr., R., *Predatory Rule: State and Civil Society in Africa*, Boulder, CO: Lynne Rienner Publishers, 1992.
- Fatton Jr., R., *The Making of a Liberal Democracy: Senegal's Passive Revolution 1975-1985*, Boulder and London: Lynne Rienner Publishers.
- Favre, P., *Naissance de la science politique en France 1870-1914*, Paris: Fayard, 1989.
- Finkelkraut, A., *La défaite de la pensée*, Paris: Gallimard, 1987.
- Franklin, D.P. & Baun, M.J., (eds.), *Political Culture and Constitutionalism. A Comparative Approach*, Armonk, New York, London, England: M.E. Sharpe, 1994.
- Friedrich, C.J., *Transcendent Justice: The Religious Dimension of Constitutionalism*, Durham, N.C.: Duke University Press, 1964.
- Friedrich, C.J., *Limited Government: A Comparison*, Englewood Cliffs, N.J.: Prentice-Hall, 1974.
- Friedrich, C.J., *Constitutional Government and Democracy*, Boston: Little; Brown, 1941 & 1946; Boston: Ginn, 1950; Waltham, Mass.: Blaisdell, 1968.
- Friedrich, C.J., *Constitutional Government and Politics*, New York: Harper, 1937.
- Friedrich, C.J., *Man and His Government*, New York: McGraw-Will, 1963.
- Friedrich, C.J., *Constitutional Government and Democracy: Theory and Practice in Europe and America*, 4th ed., 1968.
- Fukujama, F., *The End of History and the Last Man*, New York: Free Press, 1992.
- Gerard-Libois, J. & Verhaegen, B., *Congo 1960*, 2 Tomes, Bruxelles: CRISP.
- Gerard-Libois, J. & Verhaegen, B., *Congo 1962*, Bruxelles-Léopoldville: CRISP-INEP.
- Ghai, Y.P. & McAuslan, J.P.W.B., *Public Law and Political Change in Kenya*, Nairobi: Oxford, 1970.

BIBLIOGRAPHY (continued)

- Gibbon, P., *et al.*, (eds.), *Authoritarianism, Democracy, and Adjustment: The Politics of economic Reform in Africa*, Uppsala: Scandinavian Institute of African Studies, 1992.
- Gibbon, P. & Olukoshi, A., (eds.), *Structural Adjustment and Socio-Economic Change in Sub-Saharan Africa*, Uppsala: Scandinavian Institute of African Studies, 1996.
- Gonidec, P.F., *Les constitutions des Etats de la Communauté*, Paris: Sirey, 1959.
- Gonidec, P.F., *Institutions publiques africaines et malgaches*, Paris: Les Cours de Droit, D.E.S., 1964-1965.
- Gonidec, P.F., *La République du Sénégal*, Paris: Berger-Levrault, 1968.
- Gonidec, P.F., *Les systèmes politiques africains*, Paris: L.G.D.J., 2ème éd., 1978.
- Greenberg, D. *et al.*, (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, New York: Oxford University Press, 1993.
- Gregor, A.J., *Italian Fascism and Developmental Dictatorship*, Princeton: Princeton University Press, 1974.
- Gregor, A.J., *Democracy, Dictatorship, and Development: Economic Development in Selected Regimes of the Third World*, New York: St Martin's press, 1967.
- Gulliver, P.H., (ed.), *Tradition and Transition in East Africa. Studies of the Tribal Element in the Modern Era*, London: Oxford University Press, 1969.
- Haggard, S. & Kaufman, R., (eds.), *The Politics of Economic Adjustment: International Constraints, Distribution, and the State*, Princeton, N.J.: Princeton University Press, 1992.
- Haggard, S. & Kaufman, R., *The Political Economy of Democratic Transitions*, Princeton, N.J.: Princeton University Press, 1995.
- Hamon, L., *L'Etat de droit et son essence*, Paris: RDP, 1991.
- Harbeson, J.W., (ed.), *The Military in African Governance*, New York: Praeger, 1987.
- Henkin, L., *Constitutionalism, Democracy, and Foreign Affairs*, New York: Columbia University Press, 1990.

BIBLIOGRAPHY (continued)

- Hochschild, A., *King Leopold's Ghost. A Story of Greed, Terror and Heroism in Colonial Africa*, New York: Houghton Mifflin Company, 1998.
- Hochschild, A., *Les Fantômes du Roi Léopold II. Un holocauste oublié*, traduit de l'américain par Elsen, M.-Cl. & Straschitz, F., Paris: Belfond, 1998.
- Hoffman, J., *State, Power, and Democracy: Contentious Concepts in Practical Political Theory*, Sussex: Wheatsheaf Books, 1988.
- Hosten, W.J. *et al.*, (eds.), *Introduction to South African Law and Legal Theory*, Durban: Butterworths, 1997.
- Huntington, S.P., *The Third Wave: Democratization in the Late Twentieth Century*, Norman and London: University of Oklahoma Press, 1991.
- Huntington, S.P., *Political Order in Changing Societies*, New Haven: Yale University Press, 1969.
- Huntington, S.P. & Nelson, J., *No Easy Choice: Political Participation in Developing Societies*, Cambridge: Harvard University Press, 1976.
- Hutchful, E. & Bathily, A., (eds.), *The Military and Militarism in Africa*, Dakar: CODESRIA Book Series, 1998.
- Hyslop, J., *African Democracy in the Era of Globalisation*, Johannesburg: Witwatersrand University, 1999.
- Jackson, R.H., *Quasi-States: Sovereignty, International System, and the Third World*, Cambridge, England: Cambridge University Press, 1990.
- Jackson, R. H. & Rosberg, C.G., *Personal Rule in Black Africa: Prince, Autocrat, Prophet, Tyrant*, Berkeley: University of California Press, 1982.
- Jaglin, S. & Dubresson, A., (eds.), *Pouvoirs et cités d'Afrique noire. Décentralisations en question*, Paris: Karthala, 1993.
- Joseph, R., *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic*, New York & Cambridge, England: Cambridge University Press, 1987.

BIBLIOGRAPHY (continued)

- Joseph, R., (ed.), *State, Conflict and Democracy in Africa*, Boulder & London: Lynne Rienner Publishers, 1999.
- Kankwenda, Mbaya, (ed.), *Le Zaïre vers quelles destinées*, Dakar: CODESRIA, 1992.
- Kpundeh, S.J., *Democratisation in Africa: African Views, African Voices: Summary of Three Workshops*, Washington, D.C.: National Academy Press, 1992.
- Lapierre, D., & Collins, L., *Cette nuit la liberté*, Paris: Edition Robert Laffont, 1975.
- Lavroff, D.G., *La République du Sénégal*, Paris: L.G.D.J., 1966.
- Lavroff, D.G., *Les systèmes constitutionnels en Afrique noire. Les Etats francophones*, Paris: A.Pédone, 1976.
- Leclercq, Cl., *Institutions politiques et droit constitutionnel*, Paris: Librairie Technique, 3ème éd., 1981.
- Leleux, Cl., *La démocratie moderne. Les grandes théories*, Paris: Les Editions du Cerf, 1997.
- Lemarchand, R., *Political Awakening in the Belgian Congo*, Berkeley: University of California Press, 1964.
- Levy, M.B.H., *Eloge des Intellectuels*, Paris: Grasset, 1987.
- Licht, R.A. & De Villiers, B., (eds.), *South Africa's Crisis of Constitutional Democracy. Can the U.S. Constitution Help?* Johannesburg & Washington, D.C.: Juta & Co and The AEI Press, 1994.
- Lijphart, A., *Democracies*, New Haven & London, 1984.
- Liniger-Goumaz, M., *La démocrature, dictature camouflée, démocratie truquée*, Paris: L'Harmattan, 1992.
- Lowenthal, A.F., *Exporting Democracy: The United States and Latin America*, Pittsburgh: University of Pittsburgh Press, 1991.
- Mabileau, A. & Meyriat, J., *Décolonisation et régimes politiques en Afrique noire*, Paris: Fondation Nationale de Science Politique, Armand Colin, 1967.

BIBLIOGRAPHY (continued)

- Macfarlane, L.J., *The Theory and Practice of Human Rights*, London: Maurice Temple Smith, 1985.
- Mahiou, A., *L'avènement du parti unique en Afrique noire: l'expérience des Etats d'expression française*, Paris: L.G.D.J., T.3, 1969.
- Mamdani, M., *Citizen and Subject*, Princeton: Princeton University Press, 1996.
- Mamdani, M., et al., (eds.), *Social Movements, Social Transformation and the Struggle for Democracy in Africa*, Dakar: CODESRIA, 1988.
- Martin, W.G. & West, M.O., (eds.), *Out of One, Many Africas*, Urbana and Chicago: University of Illinois Press, 1999.
- Mbeki, Thabo, *Africa: the time has come*, Cape Town & Johannesburg: Tafelberg & Mafube Publishing (Pty), 1998.
- McIlwain, C.H., *Constitutionalism in the Changing World*, Cambridge: Cambridge University Press, 1939.
- McIlwain C.H., *Constitutionalism: Ancient and Modern*, Ithaca, New York: Cornell University Press, Revisited Edition, 1947.
- Migdal, J., *Strong Societies and Weak States: State- Society Relations and State Capabilities in the Third World*, Princeton, NJ: Princeton University Press, 1988.
- Mittelman, H., (ed.), *Globalization: Critical Reflections*, Boulder, CO: Lynne Rienner Publishers, 1996.
- Mouvance Progressiste du Congo (Zaire), *Congo (Zaire): Démocratie néo-coloniale or deuxième indépendance?* Paris: L'Harmattan, 1992.
- Mpongo, Bokako, B.E., *Institutions politiques et droit Constitutionnel*, Vol.1., Editions Universitaires Africaines, Kinshasa, 2001.
- Mudimbe, V.Y., *The Invention of Africa*, Bloomington: Indiana University Press, 1988.
- Nnoli, O., *Ethnic Politics in Nigeria*, Enugu: Fourth Dimension, 1978.
- Nnoli, O., *Ethnic Politics in Africa*, Ibadan: Vantage Publishers, 1989.

BIBLIOGRAPHY (continued)

- Nwabueze, B.O., *Constitutionalism in the Emergent States*, London: C.Hurt & CO, 1973.
- Nwabueze, B.O., *Presidentialism in Commonwealth Africa*, New York: St Martin's Press, 1974.
- Nwabueze, B.O., *Judicialism in Commonwealth Africa*, London: C. Hurst & CO, 1977.
- Nyang'oro, J.E., (ed.), *Discourses on Democracy: Africa in Comparative Perspective*, Dar-Es-Salaam: Dar-Es-Salaam University Press, 1996.
- Nzombe, S., *Democracy, Human Rights and Constitutionalism in Post-Colonial Africa*, Harare: SAPES Books, 1992.
- Nzongola-Ntalaja, G., *The Democratic Movement in Zaire 1956-1994*, Harare: AAPS, 1994.
- Nzongola-Ntalaja, G. & Lee, M., (eds.), *The State and Democracy in Africa*, Harare: AAPS Books, 1997.
- O'Donnell, G. & Schmitter, P., *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, Baltimore and London: Johns Hopkins University Press, 1986.
- Olagungu, T. & Oyovbaire, S., (eds.), *Portrait of a New Nigeria: Selected Speeches of IBB*, Vol.1, London: Precision Press, 1989.
- Olagungu, T., Jinadu, A. & Oyovbaire, S., (eds.), *Transition to Democracy in Nigeria 1985-1993*, Ibadan: Safari Books, 1993.
- Ottaway, M., (ed.), *Democracy in Africa. The Hard Road Ahead*, London: Lynne Rienner Publishers, 1997.
- Pennock, J.R. & Chapman, J.W., (eds.), *Constitutionalism*, New York: New York University Press, 1979.
- Perrot, C.H., *Les Anyi-Ndenge et le pouvoir politique aux XVIIIe et XIXe siècles*, Abidjan, CEDA & Paris: Publications de la Sorbonne, 1982.
- Przeworski, A., (ed.), *Sustainable Democracy*, Cambridge, England: Cambridge University Press, 1995.

BIBLIOGRAPHY (continued)

- Rattray, R.S., *Ashanti Law and Constitution*, Oxford: Clarendon Press, 1969.
- Rautenbach, I.M. & Malherbe, E.F.J., *Constitutional Law*, Revised 2nd Edition, Butterworths, 1997.
- Ronen, D., (ed.), *Democracy and Pluralism in Africa*, Boulder: Lynne Rienner Publishers, 1986.
- Rosenbaum, A.S., (ed.), *Constitutionalism: The Philosophical Dimension*, Greenwood Press, New York, Westport, Connecticut, London, 1988.
- Rosenfeld, M., (ed.), *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives*, Durham and London: Duke University Press, 1994.
- Rothchild, D. & Chazan, N., (eds.) *Precarious Balance: State and Civil Society in Africa*, Boulder, CO: Westview Press, 1988.
- Sartori, G., *Democratic Theory Revisited*, Chatham, NJ: Chatham House Publishers, 1987.
- Sartre, J.P., *Plaidoyer pour les intellectuels*, Paris: Gallimard, Collection Idées, 1972.
- Schatzberg, M.G., *Mobutu or Chaos? The United States and Zaire, 1960 - 1990*, Lanham and Philadelphia: University Press of America & Foreign Policy Research Institute, 1991.
- Schumpeter, J., *Capitalism, Socialism, and Democracy*, New York: Harper & Row, 1962.
- Shivji, I.G., (ed.), *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES, 1st Ed., 1991.
- Shivji, I.G., *Fight My Beloved Continent: New Democracy in Africa*, Harare: SAPES Books, 2nd Ed., 1992.
- Sindjoun, L., (ed.), *La révolution passive au Cameroun: Etat, Société et Changement*, Dakar: CODESRIA, 1999.
- Sorensen, G., *Democracy, Dictatorship and Development: Economic Development in Selected Regimes of the Third World*, New York: St Martin's, 1987.

BIBLIOGRAPHY (continued)

- Sylla, L., *Tribalisme et parti unique en Afrique noire*, Paris: Fondation Nationale de Science Politique, 1977.
- Taylor, A.J.P., *The Origins of the Second World War*, London: Hamish Hamilton, 1961.
- Taylor, A.J.P., *The First World War*, London: Hamish Hamilton, 1963.
- Terray, E., *L'Etat Contemporain en Afrique*, Paris: L'Harmattan, 1987.
- Thompson, K.W., (ed.), *Constitutionalism: Founding and Future*, Lanham, MD: University Press of America, 1989.
- Touraine, A., *Qu'est-ce la démocratie?* Paris: Fayard, 1990.
- UNHCHR, *Human Rights. A Compilation of International Instruments*, Volume II Regional Instruments, New York & Geneva, 1997.
- Van Wyk, D., (ed.), *Rights and Constitutionalism: The New South African Legal Order*, Kenwyn: Juta, 1994.
- Verhaegen, B., *Congo 1961*, Bruxelles: CRISP.
- Vile, M.J.C., *Constitutionalism and the Separation of Powers*, Oxford: Clarendon Press, 1967.
- Villalon, L. & Huxtable, P., (eds.), *Critical Juncture: The African State Between Disintegration and Reconfiguration*, Boulder, CO: Lynne Rienner Publishers, 1997.
- Weisman, S.R., *American Foreign Policy in the Congo 1960-1964*, Ithaca: Cornell University Press, 1974.
- Wesson, R., (ed.), *Democracy: A Worldwide Survey*, New York, Westport, Connecticut, London: Praeger, 1987.
- Wilks, I., *Ashanti in the Nineteenth Century, The Structure and Evolution of Political Order*, Cambridge: Cambridge University Press, 1975.
- William, G. A., *Corruption and State Politics in Sierra Leone*, Cambridge, England: Cambridge University Press, 1995.

BIBLIOGRAPHY (continued)

- Wiseman, J.A., *Democracy in Black Africa. Survival and Revival*, New York, New York: Paragon House Publishers, 1990.
- Wiseman, J.A., (ed.), *Democracy and Political Change in Sub-Saharan Africa*, London & New York: Routledge, 1995.
- Wiseman, J.A., *The New Struggle for Democracy in Africa*, Avebury: 1996.
- World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, Washington, DC: World Bank, 1987.
- Wormuth, F.D., *The Origins of Modern Constitutionalism*, New York: Harper, 1945.
- Wunsch, J.S., & Olowu, D., *The Failure of the Centralized State: Institutions and Self-Governance in Africa*, Boulder, CO: Westview Press, 1990.
- Young, C., *Politics in the Congo: Decolonization and Independence*, Princeton, N.J.: Princeton University Press, 1965.
- Young, C., *Introduction à la politique congolaise* (Translated from English by P. Duchesne), Bruxelles: C.R.I.SP, 1968.
- Young, C., *Politics of Cultural Pluralism*, Madison: University of Wisconsin Press, 1976.
- Young, C., *Introduction à la politique congolaise*, 2 Ed., Kinshasa: PUZ, 1979.
- Young, C., *The African Colonial State in Comparative Perspective*, New Haven, CT: Yale University Press, 1994.
- Young, C. & Turner, T., *The Rise and Decline of the Zairian State*, Madison: University of Wisconsin Press, 1985.
- Zartman, I.W., (ed.), *Collapsed States: The Disintegration and Restoration of Legitimate Authority*. Boulder, CO: Lynne Rienner Publishers, 1995.
- Zartman, I.W., *Collapsed States*, Boulder: Lynne Rienner Publishers, 1999.
- Zezeza, P.T., *Manufacturing African Studies and Crises*, Dakar: CODESRIA, 1997.
- Zoethout, C.M., et al., (eds.), *Constitutionalism in Africa. A quest for autochthonous principles*, Gouda Quint-Deventer, 1996.

BIBLIOGRAPHY (continued)**II. CHAPTERS IN BOOKS**

- Abrams, E., "Pluralism and Democracy", in Ronen, D., (ed.), *supra*.
- Adama, D., "Démocratie et primauté du droit", in Conac, G., (ed.), *supra*.
- Adekanye, J.B., "The Military", in Diamond, L. *et al.*, (eds.), *supra*.
- Adejumobi, S., "The Two Political Parties and the Electoral Process in Nigeria: 1989-1993", in Nzongola-Ntalaja, G. & Lee, M., (eds.), *supra*.
- Alexandre, P., "L'Afrique orientale britannique", in Mabileau, A. & Meyriat, J., *Décolonisation et régimes politiques en Afrique noire*, Paris: Fondation Nationale de Science Politique, Armand Colin, 1967.
- Amin, S., "The Issue of Democracy in the Contemporary Third World", in Nyang'oro, J.E., (ed.), *supra*.
- Amin, S., "L'Etat et la question du développement" in Anyang' Nyong'o, P., (ed.), *supra*.
- Amissah, A., "Constitutionalism and Law in Africa", in Ronen, D., (ed.), *supra*.
- Amor, Abdelfattah, "L'émergence démocratique dans les pays du Tiers-Monde: le cas des Etats africains", in Conac, G., (ed.), *supra*.
- Anyang' Nyong'o, P., "L'Etat, les Militaires et la Gauche", in Anyang' Nyong'o, P., (ed.), *supra*.
- Anyang' Nyong'o, P., "Discours sur la démocratie en Afrique", in Chole, E. & Ibrahim, J., (eds.), *supra*.
- Arato, A., "Dilemmas Arising From the Power to Create Constitutions in Eastern Europe", in Rosenfeld, M., (ed.), *supra*.
- Armour, L., "John Locke and American Constitutionalism", in Rosenbaum, A.S., (ed.), *supra*.
- Ayoade, J., "States Without Citizens: An Emerging African Phenomenon", in Rothchild and Chazan, (eds.), *supra*.

BIBLIOGRAPHY (continued)

- Ayoade, J., "The African Search for Democracy: Hopes and Reality", in Ronen, D., (ed.), *supra*.
- Badinter, R., "Quelques réflexions sur l'état de droit en Afrique", in Conac, G., (ed.), *supra*,
- Bahru Zewde, "The Military and Militarism in Africa: The Case of Ethiopia", in Hutchful, E. & A. Bathily, (eds.), *supra*.
- Baker, P.H., "Reflections on the Economic Correlates of African Democracy", in Ronen, D., (ed.), *supra*.
- Baldwin, F.N., "Constitutional Limitations on Government in Mexico, the United States and Uganda", in Claude, R.P., (ed.), *supra*.
- Bangura, Y., "Authoritarian Rule and Democracy in Africa: A Theoretical Discourse", in Nyang'oro, J.E. (ed.), *supra*.
- Bates, R.H., "The Economic Bases of Democratization", in Joseph, R., (ed.), *supra*.
- Bauer, G., "Challenges to Democratic Consolidation in Namibia", in Joseph, R., (ed.), *supra*.
- Biaya, T.K., "L'ethnicité au Coeur de l'idéologie nationaliste", in Kankwenda, Mbaya, (ed.), *supra*.
- Biaya, T.K. & Omasombo, T., "Les Classes sociales dans les Réalités zairoïses", in Kankwenda, Mbaya, (ed.), *supra*.
- Bratton, M. & Posner, D.N., "A First Look at Second Elections in Africa with Illustrations from Zambia", in Joseph, R., *supra*.
- Bratton, M. & Van de Walle, N., "Popular Protest and Political Reform in Africa", in Nyang'oro, J.E., (ed.), *supra*.
- Brautigam, D., "The 'Mauritius' Miracle': Democracy, Institutions, and Economic Policy", in Joseph, R., (ed.), *supra*.
- Carpenter, G., "Public Law: Constitutional Law", in Hosten, W.J. *et al.*, (eds.), *supra*.

BIBLIOGRAPHY (continued)

- Carpenter, G., "The importance of the limitation clause in the South African Constitution of 1996", in Carpenter, G., (ed.), *South Africa in Transition. Focus on the Bill of Rights*, UNISA: Verloren van Thematis Centre, 1996
- Chauveau, J.P. & Dozon, J.P., "Au Coeur des Ethnies Ivoiriennes...l'Etat", in Terray, E., (ed.), *supra*.
- Cheru, F., "New Social Movements: Democratic Struggles and Human Rights in Africa", in Mittelman, J.H., (ed.), *supra*.
- Clapham, C. & Wiseman, J.A. "Conclusion: assessing the prospects for the consolidation of democracy in Africa", in Wiseman, J.A., (ed.), *supra*.
- Conac, G., "Introduction", in Conac, G., (ed.), *supra*.
- Conac, G., "Les processus de démocratisation en Afrique", in Conac, G., (ed.), *supra*.
- Conac, G., "Etat de droit et démocratie", in Conac, G., (ed.), *supra*.
- Davis, D., Chaskalson, M. & De Waal, J., "Democracy and constitutionalism: the role of constitutional interpretation", in Van Wyk, D.H., *et al.*, (eds.), *supra*.
- Depelchin, J., "De quelle manière les masses du peuple pourront-elles contrôler le pouvoir qui prétendrait les servir?", in Mouvement Progressiste du Congo (Zaire), *supra*.
- Diagne, P., "Pluralism and Plurality in Africa", in Ronen, D., (ed.), *supra*.
- Diamond, L., "Sub-Saharan Africa", in Wesson, R., (ed.), *supra*.
- Diamond, L., "Introduction: Persistence, Erosion, Breakdown, and Renewal", in Diamond, L., Linz, J.J., & Lipset, S.M., (eds.), *supra*.
- Dieng, A., "Démocratie et primauté du droit", in Conac, G., (ed.), *supra*.
- Dossou, R., "Le Bénin: du monolithisme à la démocratie pluraliste, un témoignage", in Conac, G., (ed.), *supra*.
- Elazar, D.J., "Form of State: Federal, Unitary or...", in De Villiers, B., (ed.), *supra*.
- Elster, J., "Introduction", in Elster, J. & Slagstad, R., (eds.), *supra*.

BIBLIOGRAPHY (continued)

- Elster, J., "Consequences of Constitutional Choice: Reflections on Tocqueville", in Elster, J. & Slagstad, R., (eds.), *supra*.
- Erasmus, G., "Limitation and Suspension", in Van Wyk, D. *et al.*, (eds.), *supra*.
- Evans, P., "The State as Problem and Solution: Predation, Embedded Autonomy, and Structural Change", in Haggard, S. & Kaufman, R., (eds.), *supra*.
- Franklin, D.P. & Baun, M.J., "Preface", in *idem*, (eds.), *supra*.
- Franklin, D.P. & Baun, M.J., "Conclusions", in Franklin, D.P. & Baun, M.J.,(eds.), *supra*.
- Gibbon, P., "Structural Adjustment and Structural Change in Sub-Saharan Africa: Some Provisional Conclusions", in Gibbon, P. & Olukoshi, A., (eds.), *supra*.
- Glaser, D., "Discourses of Democracy in the South African Left: A Critical Commentary", in Nyang'oro, J.E., (ed.), *supra*.
- Gordon, D.F., "On Promoting Democracy in Africa: The International Dimension", in Ottaway, M., (ed.), *supra*.
- Gordon, J.S., "Introduction: Constitutionalism, Liberalism, and the Study of Politics"; in Pennock, J.R. & Chapman, J.W., (eds.), *supra*.
- Greenberg, D., "Introduction", in Greenberg, D. *et al.*, (eds.), *supra*.
- Gregor, M., "Kant's Approach to Constitutionalism", in Rosenbaum, A.S., (ed.), *supra*.
- Grey, T.C., "Constitutionalism: An Analysis Framework", in Pennock, J.R. & Chapman, J.W., (eds.), *supra*.
- Gwyn, W.B., "Political Culture and Constitutionalism in Britain", in Franklin, D.P. & Baun, M.J., (eds.), *supra*.
- Haggard, S. & Kaufman, R., "Economic Adjustment and the Prospects for Democracy", in *Idem* (eds.), *supra*.
- Harbeson, J.W., "Rethinking Democratic Transitions: Lessons from Eastern and Southern Africa", in Joseph, R., (ed.), *supra*.

BIBLIOGRAPHY (continued)

- Harbeson, J.W., "Constitutions and Constitutionalism in Africa: A Tentative Theoretical Exploration", in Ronen, D., (ed.), *supra*.
- Henkin, L., "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects", in Rosenfeld, M., (ed.), *supra*.
- Holmes, S., "Gag Rules and the Politics of Omission," in Elster, J. & Slagstad, R., (eds.), *supra*.
- Holmes, S., "Precommitment and the paradox of democracy", in Elster, J. & Slagstad, R., (eds.), *supra*.
- Hutchful, E., "Militarism and Problems of Democratic Transition", in Ottaway, M., (ed.), *supra*.
- Hutchful, E., "Military Issues in the Transition to Democracy", in Hutchful, E. & Bathily, A., (eds.), *supra*.
- Hutchful, E. & Bathily, A., "Introduction", in Hutchful, E. & Bathily, A., (eds.), *supra*.
- Hyden, G., "Governance and the Reconstitution of Political Order", in Joseph, R., (ed.), *supra*.
- Ibrahim, J., "Political Scientists and the Subversion of Democracy in Africa", in Nzongola-Ntalaja, G. & Lee, M., (eds.), *supra*.
- Ibrahim, J., "Transition démocratique en Afrique: le défi d'un nouveau programme", in Chole, E. & Ibrahim, J., (eds.), *supra*.
- Ilunga, Kabongo, "Democracy in Africa: Hopes and Prospects", in Ronen, D., (ed.), *supra*.
- Jackson, R.H., "Why Africa's Weak States Persist" in Atul Kohli, (ed.), *supra*.
- Jinadu, A., "Introduction"; in Olagungu, T., Jinadu, A. & Oyovbaire, S., (eds.), *supra*.
- Joseph, R., "Democratization Under Military Rule and Repression in Nigeria", in Beckett, P.A. & Young, C., (eds.), *supra*.

BIBLIOGRAPHY (continued)

- Joseph, R., "State, Conflict and Democracy in Africa", in Joseph, R., (ed.), *supra*.
- Joseph, R., "The Reconfiguration of Power in Late Twentieth-Century Africa", in Joseph, R., (ed.), *supra*.
- Kaba, L., "Power and Democracy in African Tradition: The case of Songhay, 1464-1591", in Ronen, D., (ed.), *supra*.
- Kalele-ka-Bila, "Les Idéologies régionalistes", in Kankwenda, Mbaya, (ed.), *supra*.
- Kamto, M., "Quelques réflexions sur la transition vers le pluralisme politique au Cameroun", in Conac, G., (ed.), *supra*.
- Klaaren, J., "Federalism", in Chaskalson, M. *et al.*, (eds.), *supra*.
- Krishna, S., "Constitutionalism, Democracy, and Political Culture in India", in Franklin, D.P. & Baun, M.J., (eds.), *supra*.
- Lafrance, G., "Montesquieu and Rousseau on Constitutional Theory", in Rosenbaum, A.S., (ed.), *supra*.
- Legum, C., "Democracy in Africa: Hope and Trends", in Ronen, D., (ed.), *supra*.
- Longandjo, Okitakekumba, "Le Pouvoir d'Etat du MPR, un Essai d'Interprétation", in Kankwenda, Mbaya, (ed.), *supra*.
- Luckham, R., "The Military, Militarisation and Democratisation in Africa: A Survey of Literature and Issues", in Hutchful, E. & A. Bathily, (eds.), *supra*.
- Luckham, R., "Taming the Monster: Democratisation and Demilitarisation", in Hutchful, E. & A. Bathily, (eds.), *supra*.
- Mafeje, A., "Théorie de la démocratie et discours africain: 'Cassons la croûte, mes compagnons de voyage'!", in Chole, E. & Ibrahim, J., (eds), *supra*.
- Magang, D., "Democracy in African Tradition: The Case of Botswana", in Ronen, D., (ed.), *supra*.

BIBLIOGRAPHY (continued)

- Mamdani, M., "Social Movements and Constitutionalism in the African Context", in Shivji, I.G., (ed.), *supra*.
- Mangu, Mbata, B., "Zaire: Another Hell for Academic Freedom", in CODESRIA, (ed.), *supra*.
- Médard, J.F., "The Underdeveloped State in Tropical Africa: Political Clientelism or Neopatrimonialism?" in Clapham, C., (ed.), *supra*.
- Mkandawire, T., "Crisis management and the Making of 'Choiceless democracies'", in Joseph, R., (ed.), *supra*.
- Mkandawire, T., "Introduction", in Kankwenda, Mbaya, (ed.), *supra*.
- Mkandawire, T., "Adjustment, Political Conditionality, and Democratization in Africa", in Cornia, A. & Helleiner, G., (eds.), *supra*.
- Mkandawire, T., "Ajustement, conditionnalités politiques et démocratisation en Afrique", in Chole, E. & Ibrahim, J., (eds.), *supra*.
- Mohamed, N.A.L., "Trends, Determinants and the Economic Effects of Military Expenditure in Sub-Saharan Africa", in Hutchful, E. & Bathily, A., (eds.), *supra*.
- Mohamed, N.A.L., "Tank Tractor Trade-Off in Sudan: The Socio-Economic Impact of Military Expenditure", in Hutchful, E. & Bathily, A., (eds.), *supra*.
- Mojekwu, C.C., "Nigerian Constitutionalism: in Pennock, J.R. & Chapman, J.W., (eds.), *supra*.
- Mujaju, Akiiki B., "Civil Society at Bay in Uganda", in Nzongola-Ntalaja, G. & Lee, M., (eds.), *supra*.
- Mulambu, Mvuluya, "Les masses populaires et les préalables d'une transition démocratique au Zaïre (1990-1992)", in Nzongola-Ntalaja, G. & Lee, M., (eds.), *supra*.
- Mulambu, Mvuluya, "L'Etat et sa Structure : Quête permanente de la Stabilité?" in Kankwenda, Mbaya, (ed.), *supra*.

BIBLIOGRAPHY (continued)

- Nicol, D., "African Pluralism and Democracy", in Ronen, D., (ed.), *supra*.
- Nyang'oro, J.E., "Discourses on Democracy in Africa: Introduction", in Nyang'oro, J.E., (ed.), *supra*.
- Nzongola-Ntalaja, G., "Le mouvement pour la seconde indépendance au Congo/Kinshasa (Zaire) 1963 – 1968", in Anyang' Nyong'o, P., (ed.), *supra*.
- Nzongola-Ntalaja, G., "The State and Democracy in Africa", in Nzongola-Ntalaja, J. & Lee, M., (eds.), *supra*.
- Nzongola-Ntalaja, G. & Lee, M., "Preface and Acknowledgements", in Nzongola-Ntalaja, J. & M. Lee, (eds.), *supra*.
- Nzongola-Ntalaja, G. & Lee, M., "Introduction", in Nzongola-Ntalaja, J. & Lee, M., (eds.), *supra*.
- Okoth-Ogendo, H.W.O., "Constitutions Without Constitutionalism: Reflections on an African Political Phenomenon", in Shivji, I.G., (ed.), *supra*.
- Okoth-Ogendo, H.W.O., "Constitutions Without Constitutionalism: Reflections on an African Paradox", in Greenberg, D. *et al.*, (eds.), *supra*.
- Okoth-Ogendo, H.W.O., "Constitutions Without Constitutionalism: Reflections on an African Paradox", in Zoethout, C.M., *et al.*, (eds.), *supra*.
- Olivier, P.J.J., "Constitutionalism in the New South Africa", in Licht, R.A. & De Villiers, B., (eds.), *supra*.
- Olowu, D., "Local Governance, Democracy, and Development", in Joseph, R., (ed.), *supra*.
- Olukoshi, A., "Extending the Frontiers of Structural Adjustment Research in Africa: Some Notes on the Objectives of Phase II of the NAI SAP Research Programme", Gibbon, P. & Olukoshi, A., (eds.), *supra*.
- Olukoshi, A., "State, Conflict, and Democracy in Africa: The Complex Process of Renewal", in Joseph, R., (ed.), *supra*.

BIBLIOGRAPHY (continued)

- Olukoshi, A., & Laakso, L., "The Crisis of the National State Project in Africa", in Olukoshi, A. & Laasko, L., (eds.), *supra*.
- Onalenna, D.G., "Gender and Democracy in Botswana: Women's Struggle for Equality and Political Participation", in Nzongola - Ntalaja, G. & Lee, M.C., (eds.), *supra*.
- Ottaway, M., "Ethnic Politics in Africa: Change and Continuity", in Joseph, R., (ed.), *supra*.
- Ottaway, M., "From Political Opening to Democratization", in Ottaway, M., (ed.), *supra*.
- Owusu, M., "Democracy and Africa: A View From the Village", in Nyang'oro, J.E., (ed.), *supra*.
- Pelletier, J., "L'Afrique en mouvement", in Conac, G., (ed.), *supra*.
- Pennock, J.R., "Epilogue", in Pennock, J.R. & Chapman, J.W., (eds.), *supra*.
- Pennock, J.R. & Chapman, J.W., "Preface", in idem, (eds.), *supra*.
- Perrot, C.H., "Le contrôle du pouvoir royal dans les Etats Akan aux XVIIIe et XIXe siècles", in Conac, G., (ed.), *supra*.
- Post, K., "The State, Civil Society, and Democracy in Africa: Some Theoretical Issues", in Nyang'oro, J.E., (ed.), *supra*.
- Romdhane, M.B., "Constitutionalism and Social Movements in Tunisia", in Shivji, I.G., (ed.), *supra*.
- Ronen, D., "The Challenge of Democracy in Africa: Some Introductory Observations", in Ronen, D., (ed.), *supra*.
- Ronen, D., "The State and Democracy in Africa", in Ronen, D., (ed.), *supra*.
- Rosenbaum, A.S., "Introduction", in Rosenbaum, A.S., (ed.), *supra*.
- Rosenfeld, M., "Modern Constitutionalism as Interplay Between Identity and Diversity", in Rosenfeld, M., (ed.), *supra*.
- Rothchild, D., "Ethnic Insecurity, Peace Agreements, and State Building", in Joseph, R., (ed.), *supra*.

BIBLIOGRAPHY (continued)

- Sandbrook, R., "Liberal Democracy in Africa: A Socialist-Revisionist Perspective", in Nyang'oro, J.E., (ed.), *supra*.
- Sangmpam, S.N., "The Over-Politicized State and Democratization: A Theoretical Model", in Nyang'oro, J.E., (ed.), *supra*.
- Schatzberg, M.G., "Hijacking Change: Zaire's 'transition' in Comparative Perspective", in Ottaway, M., (ed.), *supra*.
- Schlink, B., "German Constitutional Culture in Transition", in Rosenfeld, M., (ed.), *supra*.
- Schochet, G.J., "Introduction: Constitutionalism, Liberalism, and the Study of Politics", in Pennock, J.R. & Chapman, J.W., (eds.), *supra*.
- Sejersted, F., "Democracy and the Rule of Law: Some Historical Experiences of Contradictions in the striving for good government", in Elster, J. & Slagstad, R., (eds.), *supra*.
- Shivji, I.G., "State and Constitutionalism: A New Democratic Perspective", in Shivji, I.G., (ed.), *supra*.
- Shivji, I.G., "Contradictory Class Perspectives in the Debate on Democracy", in Shivji, I.G., (ed.), *supra*.
- Sigmund, P., "Carl Friedrich's Contribution to the Theory of Constitutionalism – Comparative Government", in Pennock, J.R. & Chapman, J.W., (eds.), *supra*.
- Simpson, D., "Afterword: The Best Hope for Now", in Ottaway, M., (ed.), *supra*.
- Sklar, R.L., "Developmental Democracy", in Nyang'oro, J.E., (ed.), *supra*.
- Sklar, R.L., "African Politics: The Next Generation", in Joseph, R., (ed.), *supra*.
- Slagstad, R., "Liberal Constitutionalism and its critics", in Elster, J. & Slagstad, R., (eds.), *supra*.
- Sorensen, G., "Democracy and the Developmental State", in Nyang'oro, J.E., (ed.), *supra*.
- Suberu, R.T., "Institutions, Political Culture, and Constitutionalism in Nigeria," in Franklin, D.P. & Baun, M.J., (eds.), *supra*.

BIBLIOGRAPHY (continued)

- Sunstein, C.R., "Constitutions and Democracies: An Epilogue", in Elster, J. & Slagstad, R., (eds.), *supra*.
- Tenekides, G., "The Relationship between Democracy and Human Rights", in Democracy and Human Rights, *supra*.
- Thompson, K.W., "Preface", in Thompson, K.W., (ed.), *supra*.
- Thompson, K.W., "Introduction", in Thompson, K.W., (ed.), *supra*.
- Tushnet, M., "Conclusion and Critical Legal Studies", in Rosenbaum, A.J., (ed.), *supra*.
- Van de Walle, N., "Globalization and African Democracy", in Joseph, R., (ed.), *supra*.
- Van de Walle, N., "Economic Reform and the Consolidation of Democracy in Africa", in Ottaway, M., (ed.), *supra*.
- Van Wyk, D.H., "Introduction to the South African Law", in Van Wyk, D.H., *et al.*, (eds), *supra*.
- Venard, J.-L., "Bailleurs de fonds et développement local", in Jaglin, S. & Dubresson, A., (eds.), *supra*.
- Vengroff, R. & Kone, M., "Mali: democracy and political change", in Wiseman, J.A., (ed.), *supra*.
- Watts, R., "Is the New South African Constitution Federal or Unitary?" in De Villiers, B., (ed.), *supra*.
- Young, C., "The Third Wave of Democratization in Africa: Ambiguities and Contradictions: in Joseph, R., (ed.), *supra*.
- Ziavula, R.E., "L'échelle locale dans l'organisation administrative du territoire congolais", in Jaglin, S. & Dubresson, H., (eds.), *supra*.
- Zoethout, C.M. & Boon, P.J., "Defining constitutionalism and democracy: An introduction", in Zoethout, C.M. *et al.*, (eds.), *supra*.

BIBLIOGRAPHY (continued)**III. ARTICLES**

- Adelman, S., "Constitutionalism, Pluralism and Democracy in Africa", *Journal of Legal Pluralism*, No.42, 1998.
- Ake, Cl., "L'Afrique vers la démocratie", *Africa Forum*, Vol.1, No.2, 1991.
- Anyang' Nyong'o, P., "Democracy and Political Instability: A Rejoinder to Comments by Thandeka Mkandawire", *Africa Development*, 1988, XIII, 3.
- Azarya, V. & Chazan, N., "Disengagement from the State in Africa: Reflections on the Experience of Ghana and Guinea," *Comparative Studies in Society and History*, 1987, Vol.29, No.1.
- Bahru, Zewde, "Historical Legacy and the Democratisation Process in Ethiopia", *Afrika Zamani*, No.2, 1996.
- Bangura, Y., "The Pitfalls of Recolonisation: A Comment on the Mazrui - Mafeje Exchange", *CODESRIA Bulletin*, No.4, 1995.
- Bayart, J.F., "La problématique de la démocratisation en Afrique noire", *Politique Africaine*, No. 43, (Octobre) 1991.
- Beckman, B., "Whose Democracy: Bourgeois versus Popular Democracy" *Review of African Political Economy* 45/46, 1989.
- Blair, L., "The Rechtsstaat Idea with the Rule of Law as a Paradigm for Protecting Rights", *SALJ*, 107, 1990.
- Botha, H., "The values and principles underlying the 1993 Constitution", *SAPL*, 1994.
- Bourgi, A., "Jacques Chirac et le sens de l'histoire", *Jeune-Afrique*, No. 1523 of 12 March 1990.
- Burley, A.-M., "Constitutionalism, Democracy, and Foreign Affairs by Louis Henkin: Book Reviews and Notes", *The American Journal of International Law*, Vol.86, 1992.

BIBLIOGRAPHY (continued)

- Busia Nana, K.A. Jr., "The Status of Human Rights in Pre-colonial Africa: Implications for Contemporary Practices", *Afrika Zamani*, No.2, 1996.
- Carpenter, G., "Internal Modifiers and Other Qualifications in Bills of Rights – Some Problems of Interpretation", *SAPL*, 1995.
- Carpenter, G. & Botha, C., "The 'Constitutional Attack on Private Law': Are the Fears Well Founded?" *THRHR*, 1996.
- Chafe, K.S., "The Problematic of African Democracy. Experiences from the Political Transition in Nigeria", *Afrika Zamani*, No.2, 1996.
- Chazan, N., "Africa's Democratic Challenge", *World Politics Journal*, Vol.9, No.2, Spring 1992.
- Clapham, C., "Democratization in Africa: Obstacles and Prospects", *Third World Quarterly*, Vol.14, No.3, 1993.
- Cooper, S.W., "Considering 'power' in separation of powers", *Standard Law Review*, 1994.
- Cowen, D.V., "African Legal Studies – A Survey of the Field and the Role of the US", *Law and Contemporary Problems*, Vol. XXVII, No.4, Autumn 1962.
- Darbon, D., "L'Etat prédateur", *Politique Africaine*, No.39, 1990.
- Davis, D., "The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles", *SAJHR*, 1992.
- Davis, D., "Democracy – Its Influence upon the Process of Constitutional Interpretation", *SAJHR*, 1994.
- De Ville, J., "Interpretation of the General Limitation Clause in the Chapter on Fundamental Rights", *SAPL*, 1994.
- De Ville, B., "The Guidelines for Judicial Review on 'division of powers' grounds", *Stell LR* 1995 (2).
- De Villiers, B., "Federalism in South Africa: implications for individual and minority protection", *SAJHR*, 1993.

BIBLIOGRAPHY (continued)

- De Villiers, B., "Regional Government in the New South Africa: the Experience of India and Nigeria", *SAPR/ PL*, 1992.
- Devenish, G.E., "The Prospects for Constitutional Litigation in Relation to the Powers of the Central and Provincial Governments as Contained in the Interim Constitution, and Related Issues", *THRHR*, 1996.
- Dogan, M., "Déclin des nationalismes et dynamique des générations en Europe de l'Ouest", *Revue Internationale des Sciences Sociales*, no.136, 1993.
- Donnelly, J., "Human Rights and Development: Complementary or Competing Concerns?" *World Politics* 35, 2 January 1984.
- Du Bois de Gaudusson, J., "Les constitutions africaines et le mimétisme", *La Création du Droit en Afrique*, 1997.
- Du Plessis, L.M. & De Ville, J., "Bill of Rights Interpretation in South African Context (3): Comparative Perspectives and Future Prospects", *Stell LR*, 1993.
- Dugard, J., "The Quest for a Liberal Democracy in South Africa", *Acta Juridica*, 1987.
- Feliciano, F.P., "The application of law: some recurring aspects of the process of judicial review and decision-making", *The American Journal of Jurisprudence* 1992.
- Fontaine, A., "Vent de l'Ouest", *Le Monde*, No. 14472, August 2, 1991
- Fyle, C.M., "Indigenous Political Culture and Democratisation in Upper Guinea", *Afrika Zamani*, No.2, 1996.
- Gerster, R., "How to Ruin a Country: The Case of Togo", Institute for Developmental Alternative, *IFDA Dossier* 71, May 1989.
- Ghali, B.B., "Les Nations Unies et l'Afrique", *Afrique 2000*, No.14, Bruxelles, Juillet-Août-Septembre, 1993.
- Gonidec, P.F., "Démocratie et développement en Afrique: Perspectives internationales ou nationales", *Afrique 2000*, No.14, 1993.

BIBLIOGRAPHY (continued)

- Gutto, S.B., "Social Revolutions, the Preconditions for Sustainable Development and People's Power in Africa. A Contribution to the Anyang' Nyong'o / Mkandawire Debate", *Africa Development*, XXX, 4.
- Herbst, J., "Responding to State Failure in Africa", *International Security*, Vol.21, 1996.
- Howard, R.E. & Donnelly, J., "Human Dignity, Human Rights and Political Regimes", *American Political Science Review*, 80, No.3, 1996.
- Huntington, S.P., "Will More Countries Become Democratic?", *Political Science Quarterly*, 99, 2, Summer, 1984.
- Huntington, SP, "Democracy's Third Wave", *Journal of Democracy*, 2, 1991.
- Hutchful, E., "Adjustment in Africa and Fifty Years of the Bretton Woods Institution: Change or Consolidation?", *Canadian Journal of Development Studies*, Vol.16, 1995.
- Ihonvbere, J.O., "Economic Crisis, Structural Adjustment, and Social Crisis in Nigeria", *World Development*, Vol.21, No.1, 1993.
- Iverson, D., "Pluralism and the Hobbesian Logic of Negative Constitutionalism", *Political Studies* (1999), XLVII.
- Jackson, R.H., & Rosberg, C.G., "Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood." *World Politics*, 1982, Vol. 35.
- Jenkins, J.C., & Kposowa, A.J., "Explaining military coups d'Etat: Black Africa, 1957-1984", *American Sociological Review*, 55, 6, 1990.
- Johnson, T.H., "Explaining African Coups d'Etat", *American Political Science Review*, 80, 1, 1986.
- Johnson, T.H., R.O. Slater & McGowan, P., "Explaining African Military Coups d'Etat 1960- 1982", *American Political Science Review* 78, 3, September 1984.

BIBLIOGRAPHY (continued)

- Kaplan, R., "The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of Our Planet." *Atlantic Monthly*, Vol. 273, No.2, 1994.
- Karl, T.L., "The Hybrid Regimes of Latin America", *Journal of Democracy* 6, No.3, July 1995.
- Karpen, U., "The Significance of a Legal Framework for Democratic Government", *Law and State*, Vol.47, 1993.
- Lenaerts, K., "Constitutionalism and the Many Faces of Federalism", *The American Journal of Comparative Law*, 1990.
- Levi, E.H., "Some aspects of separation of powers", *Columbia Law Review*, 1976, Vol.76.
- Lewis, P., "Political Transition and the Dilemma of Civil Society in Africa", *Journal of International Affairs*, Vol.46, No.1, 1992.
- Lipset, S.M., "The Social Requisites of Democracy Revisited", *American Sociological Review*, Vol.59.
- Loucou, J.N., "Le multipartisme en Côte d'Ivoire", *Afrika Zamani*, No.2, 1996.
- Mafeje, A., "Recolonisation or Self-colonisation and Malignant Minds in the Service of Imperialism", *CODESRIA Bulletin*, No.2, 1995.
- Mangu, Mbata, B., "Aujourd'hui, l'Afrique peut-elle partir?", *Echos de la Colline*, Revue des Etudiants de l'UNIKIN, No.2, 1985.
- Mangu, Mbata, B., "Conflicts Settlement in Post-Colonial Africa: Recolonisation or Decolonisation? A Reflection on the Mafeje / Mazrui Debate", *CODESRIA Bulletin*, No.1, 1996.
- Mangu, Mbata, B., "Débats sur le règlement des conflits en Afrique post-coloniale: décolonisation ou recolonisation? Une réponse à Dr Amady Dieng", *Sud Quotidien*, Dakar, Senegal, No.1003, 1996.

BIBLIOGRAPHY (continued)

- Mangu, Mbata, B., "African Renaissance Compromised on the Eve of the Third Millennium, Western Responsibility and Lessons from South African Constitutionalism", *CODESRIA Bulletin*, No.1, 1998.
- Marsh, R.M., "Does Democracy Hinder Economic Development in the Late-Comer Nations?" *Comparative Social Research* 2, 1979.
- Mazrui, A., "Towards a Benign Recolonisation of the Disintegrating States of Africa", *CODESRIA Bulletin*, Vol.2, 1995.
- Mazrui, A., "Self-Colonisation and the Search for *Pax Africana*: A Rejoinder", *CODESRIA Bulletin*, No.2, 1995.
- Mbembe, A., "Pouvoir, Violence et Accumulation", *Politique Africaine*, Vol.39, No.24, 1990.
- Mbengono, E.-E., "El negro africano y el pluralismo politico", *Diario 16*, Madrid, 14 October 1988.
- Médard, J.F., "L'Etat sous-développé au Cameroun", *Année Africaine*, 1977.
- Médard, J.F., "L'Etat patrimonialisé", *Politique Africaine*, Spécial 10e anniversaire, Karthala, No.39, 1990.
- Mkandawire, T., "Comments on Democracy and Political Instability", *Africa Development*, XIII, 3, 1988.
- Monga, C., "Civil Society and Democratization in Francophone Africa", *Journal of Modern African Studies*, Vol.33, No.3, 1995.
- Munslow, B., "Democratisation in Africa", *Parliamentary Affairs*, Vol. 46, No.4, October 1993.
- Mwayila, Tshiyembe, "Résistances actuelles à la démocratisation en Afrique: Mystification et réalités", *Afrique 2000*, No.14, 1993.
- Nana Sinkam, S.C., "Démocratie et développement en Afrique: Peut-on les réussir?" *Afrique 2000*, No.14, 1993.

BIBLIOGRAPHY (continued)

- Ndiaye, T.M., "Des Transitions Démocratiques en Afrique", *Alternative Démocratique dans le Tiers-Monde*, No.6, Juin-Décembre 1992.
- Odhiambo, Atieno E.S., "Democracy and the Emergent Present in Africa: Interrogating the Historical Assumptions", *Afrika Zamani*, No.2, 1996.
- Przeworski, A. & Limongi, F., "Modernization: Theories and Facts", *World Politics*, Vol.49, No.2, January 1997.
- Pye, L., "Political Science and the Crisis of Authoritarianism", *American Political Science Review*, Vol. 84, No.1, 1990.
- Qadir, S., Clapham, C. & G. Barry, "Democratisation in the Third World: an Introduction", *Third World Quarterly*, Vol.14, No.3, 1993.
- Quantin, P., "L'Afrique centrale dans la guerre: les Etats-fantômes ne meurent jamais", *African Journal of Political Science*, Vol.4, No.1, December 1999.
- Rabkin, J., "The Success of the Separation of Powers and Its Contemporary Failings", *Brigham Young University Law Review*, 1987.
- Raymond, G.D., "The Past, Present, and Future of Democracy", *Journal of International Affairs*, 38, 2, 1985.
- Riggs, F.W., "Fragilité des régimes du tiers-monde", *Revue Internationale des Sciences Sociales*, No.136, 1993.
- Rijnierse, E., "Democratisation in Sub-Saharan Africa? Literature Overview", *Third World Quarterly*, Vol.14, No.3, 1993.
- Sachs, A., "Towards a Bill of Rights in a Democratic South Africa", *SAJHR*, 1990.
- Sanders, D., "Collective Rights", *Human Rights Quarterly*, 1991.
- Sindjoun, L., "Politics in Central Africa: A Reflective Introduction to the Experience of States and Region", *African Journal of Political Science*, Vol.4, No.2, December 1999.

BIBLIOGRAPHY (continued)

- Sindjoun, L., "La Cour Suprême, la compétition électorale, et la continuité politique au Cameroun: la construction de la démocratisation passive", *Afrique et Développement*, Vol. XIX, No.2, 1994.
- Skalník, P., "Authority versus Power: Democracy in Africa Must Include Original African Institutions", *Journal of Legal Pluralism*, Nos.37-38, 1996.
- Stern, K., "The Genesis and Evolution of European – American Constitutionalism: Some Comments on the Fundamental Aspects", *CILSA XVIII*, 1985.
- Stourzh, G., "Constitution – Evolution des Significations du Terme depuis le début du XVIIe siècle jusqu'à la fin du XVIIIe siècle", *Droits, Revue Française de Théorie, de Philosophie et de Culture Juridiques*, No.29, 1999.
- Strayer, B.L., "Life under the Canadian Charter: Adjusting the Balance Between Legislature and Courts", *SAPL*, 1988.
- Turner, T., " 'Batetela', 'Baluba', 'Basonge': Ethnogenesis in Zaire", *Cahier d'Etudes Africaines* no.132, XXXIII-4, 1993.
- Van Blerk, A.E., "The Fate of Constitutions in Africa: Some Reflections", *De Jure*, Vol. 22, No.1, 1992.
- Van der Vyver, J.D., "Political power constraints and the American Constitution", *SALJ*, 1987.
- Van der Vyver, J.D., "The separation of powers", *SAPR/PL*, 1993.
- Van Wyk, D., "Looking at the 'New' South Africa: Thoughts About Federation and Federalism", *SAPR/PL*, 1991.
- Vunduawe, T.P., "Réflexions sur la validité de l'Acte constitutionnel de la transition au regard du Compromis politique global et de l'Arrêt R.A. 266 de la Cour Suprême de Justice", *Le Soft de Finance*, No.127, 1993.
- Wachtler, S., "Judicial Law-making", *New York University Law Review*, Vol.65, 1990.

BIBLIOGRAPHY (continued)

- Wamba-dia-Wamba, "Democracy in Africa and Democracy for Africa", *CODESRIA Bulletin*, No.2, 1994.
- Wanyonyi, P.K., "The Notion of Self-Colonization: Is it an Appropriate Solution in the 21st Century?" *CODESRIA Bulletin*, No.1, 1996.
- Weed, E., "The Impact of Democracy on Economic Growth: Some Evidence of Cross-National Analysis", *Kyklos* 36, 1, 1983.
- Welch, C.Jr. "The Single Party Phenomenon in Africa", *Transafrica Forum*, Fall 1991.
- Whitaker, S., "The Unfinished State of Nigeria", *Worldview*, Vol. 27, No.3, 1984.
- White, G., "Developmental States and Socialist Industrialization in the Third World", *Journal of Development Studies* 21, 1, October 1984.
- Widner, J.A., "States and Statelessness in Late Twentieth-Century Africa", *Daedalus*, Vol.124, No.3, 1995.
- Wiseman, J.A., "Two Leadership Styles and Patterns of Political Liberalization", *African Studies Review*, Vol.37, No.1, April 1994.
- Wiseman, J.A., "Leadership and Personal Danger in African Politics", *Journal of Modern African Studies*, Vol.31, No.4, 1993.
- Woodward, P., "Democracy and Economy in Africa: The Optimists and the Pessimists", *Democratization*, Vol.1, No.1, Spring 1994.
- Young, T., "Elections and Electoral Politics in Africa", *Africa*, Vol.63, No.3, 1993.
- Zaire-Afrique*, No. 255, 1991.
- Zaire-Afrique*, No. 269, 1992.
- Zaire- Afrique*, No. 274, 1993 (a).
- Zaire-Afrique*, No. 275, 1993 (b).
- Zaire- Afrique*, No. 277, 1993 (c).
- Zezeza, P.T., "Reflections on the Traditions of Authoritarianism and Democracy in African History", *Afrika Zamani*, No.2, 1996.

BIBLIOGRAPHY (continued)**IV. THESES & DISSERTATIONS**

- Diabaté, H., *Le Sannevin, un royaume Akan de la Côte d'Ivoire (1701-1901): Sources Orales et histoire*", Thèse d'Etat, Paris: University of Paris I, 1984.
- Mangu, Mbata, B., *Les rapports entre le gouvernement et le parlement sous la deuxième République au Zaïre*, unp. Undergraduate Dissertation, Kinshasa: Université de Kinshasa, 1984.
- Mangu, Mbata, B., *Les régimes pluralistes africains. Cas de la République du Sénégal*, unp. LLB Dissertation, Kinshasa: Université de Kinshasa, 1986.
- Mangu, Mbata, B., *Separation of Powers and Federalism in Post-colonial Africa: The South African Case*, unp. LLM Dissertation, Pretoria: University of South Africa, 1998.
- Matringe, J., *Tradition et Modernité dans la Charte Africaine des Droits de l'Homme et des Peuples*, Bruxelles: Bruylant, 1996 (Mémoire de DEA de Droit International Public, Université Panthéon-Assas (Paris II), Faculté de Droit et de Science Politique).
- Ntumba, L.L., *Rapports entre le Parti unique et l'Etat en Afrique noire: cas de la Côte d'Ivoire, de la Guinée et du Zaïre*, unp. LLB Dissertation, Kinshasa: Université Nationale du Zaïre, 1977.

BIBLIOGRAPHY (continued)

V. MONOGRAPHS, SEMINAR AND CONFERENCE ACTS, PROCEEDINGS & OTHER RESEARCH PAPERS

- Bakary, A.T., "La démocratie en Afrique: l'ère post-électorale", *Paper* presented at CODESRIA 9th General Assembly on Globalisation and Social Sciences in Africa, Dakar, Senegal, 14-18 December 1998.
- Bathily, A., "Pouvoirs et dynamiques de changement politique en Afrique: de l'ère pré-coloniale aux Indépendances", *Paper* for CODESRIA 7th General Assembly on "Processus de démocratisation en Afrique: Problèmes et Perspectives", Dakar, 10-26 February 1992.
- Ben Arrous, M., *L'Etat, ses dissidences et leurs territoires. La géographie par le bas en Afrique*, CODESRIA Working Paper, Dakar: CODESRIA, 1996.
- Boeninger, E., "Governance and Development: Issues of Governance", *Proceedings of the World Bank Annual Conference on Development Economics*, Washington, DC: World Bank, 1992.
- Bourdieu, P., "La force du droit. Eléments pour une sociologie du champ juridique", *Actes de la recherche en sciences sociales*, No.81, 86-96.
- Brinton, J.Y., *The Constitution of the Congo*, 1964, *Research Paper* for the American Society of International Law, Washington, 1965.
- Carpenter, G., (ed.), *South Africa in Transition. Focus on the Bill of Rights*, UNISA: Verloren van Themaat Centre, 1996.
- Chevallier, J., "Science du droit et science du politique: de l'opposition à la complémentarité", *Droit et Politique*, Paris: PUF/CURAPP, 1993.
- Daes, E.-I.A., *The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights*, New York: United Nations, 1983.

BIBLIOGRAPHY (continued)

- Dorandeu, P., "Les pèlerins constitutionnels. Eléments pour une sociologie des influences juridiques", *Rapport* présenté au 4e Congrès de l'Association française de science politique, 23-26 septembre 1992.
- Ela, J.M., "Les sciences sociales à l'épreuve de l'Afrique: les enjeux épistémologiques de la mondialisation", *Paper* presented at CODESRIA 9th General Assembly on Globalisation and Social Sciences in Africa, Dakar, Senegal, 14-18 December 1998.
- Gonnin, G., "Ethnicité, Politique et Conscience Nationale: L'Exemple de la Côte d'Ivoire", *Seminar Paper* on Ethnic Conflicts in African, Dakar, CODESRIA, 1992.
- Heyns, C., *Where is the Voice of Africa in Our Constitution?* Pretoria: University of Pretoria, The Centre for Human Rights, 1996.
- Hinden, R. *Africa and Democracy*, Encounter, Pamphlet No.8, 1963.
- HURISA, (ed.), *Theories and Practices. A Selection of Summaries of Lectures* (compiled by Titus, A.), Updated Ed., Johannesburg: HURISA, 2001.
- Hutchful, E., *Military and Militarism in Africa. A Research Agenda*, CODESRIA Working Paper 3/89, Dakar: CODESRIA, 1989.
- Ihonvbere, J., *Towards a New Constitutionalism in Africa*, London: CDD Occasional Papers Series No.4, 2000.
- International Commission of Jurists (ICJ), *Proceedings of the African Conference on the Rule of Law*, Geneva, 1961.
- Iyeleza, M.M. et al., *Recueil des Textes Constitutionnels de la République du Zaïre*, Kinshasa: Editions se-Consult, 1995.
- Joseph, R., "Failed States in Africa" *Paper* presented to the Joint Seminar on Political Development, Harvard and MIT, November 1993.
- Kidana, M., "Dilemmas Globalisation Poses on Africa", *Paper* presented at CODESRIA 9th General Assembly on Globalisation and Social Sciences in Africa, Dakar, Senegal, 14 - 18 December 1998.

BIBLIOGRAPHY (continued)

- Landell-Mills, P. & Serageldin, I., "Governance and the External Factor", *Paper* for World Bank's Annual Conference on Development Economics, Washington, D.C.: World Bank, 1991.
- Mamdani, M., "Discussing the Democratic Republic of Congo", *Paper* presented at CODESRIA's 9th General Assembly on 'Globalisation and Social Sciences in Africa', Dakar, 4-8 December 1998.
- Mamdani, M., *Preliminary Notes on Equatorial Africa*, Paper presented at 'International Symposium on Globalisation and Social Sciences in Africa', Johannesburg, CODESRIA / HSRC, 14-18 September 1998.
- Mangu, Mbata, B., "*Crise de la démocratisation au Zaïre: Eloge des Intellectuels ou Trahison des Clercs?*" unpubl. Conference Paper, Université Libre de Kinshasa, 1995.
- Mangu, Mbata, B., *Démocratie, régime pluraliste et tribalisme au Zaïre*, unpubl. Monograph for CODESRIA Summer Institute 1994, Dakar: CODESRIA, 1996.
- Mangu, Mbata, B., "Armée, tribalisme et transition vers la démocratie en Afrique: le cas du Congo-Zaïre", *Monograph and Paper* presented at CODESRIA 9th General Assembly on 'Globalisation and Social Sciences in Africa' within the framework of The Multinational Working Group on 'Ethnicity and Democratisation in Africa', Dakar, Senegal, 5-8 December 1998.
- Mangu, Mbata, B., *The Impact of the Constitutional Court on Human Rights in South Africa*, unpubl. Monograph, Johannesburg: HURISA, 1999.
- Mangu, Mbata, B., "International Human Rights Law and African Constitutionalism in Congo and the Republic of South Africa", unpubl. Paper for UNITAR Fellowship Programme in International Law, The Hague, The Netherlands, July 1999.
- Mangu, Mbata, B., "Domestication of International Human Rights Law in African Legal Systems", *Paper* for HURISA, African Human Rights Camp Arusha, Tanzania, 1999.

BIBLIOGRAPHY (continued)

- Mangu, Mbata, B., "Advancing African Jurisprudence: The Contribution of South Africa's Constitutional Court", *Paper* for HURISA, 1999, *supra*.
- Mangu, Mbata, B., "Maintenance and Restoration of Peace in the Great Lakes Region: A Reflection on the Crisis in the Democratic Republic of Congo", *Paper* presented at the 12th Annual Conference of the African Society of International and Comparative Law, Accra, Ghana, August 2000.
- Mangu, Mbata, B., "International Human Rights Law: Application in African Legal Systems", in HURISA, (ed.), *Theories and Practices. A Selection of Summaries of Lectures* (compiled by Titus, A.), Updated Ed., Johannesburg: HURISA, 2001.
- Mangu, Mbata, B., "Enforcement of Human Rights Law: Development of African Jurisprudence", in HURISA, (ed.), *supra*.
- Mbembe, A., "Une Economie de Prédation: les Rapports entre la rareté matérielle et la démocratie en Afrique sub-saharienne", *Foi et Développement* (Paris: Centre Lebert), 1996.
- Memel-Fote, H., "L'héritage africain et les processus démocratiques contemporains", *Paper* for CODESRIA 7th General Assembly on *Les Processus de Démocratisation en Afrique : Problèmes et Perspectives*, Dakar, 10 – 14 février 1992.
- Nzongola-Ntalaja, G., *From Zaire to the Democratic Republic of the Congo*, Nordiska Africainstitutet 1998.
- Odhiambo-Mbai, C., "The Future Prospects of Multi-Party Democracy in Africa", *Paper* presented at the International History Workshop, University of Witwatersrand, Johannesburg, South Africa, from 12th – 15th July 1994.
- Poimeur, Y., "Thèmes et débats autour du constitutionnalisme", *Droit et Politique*, Paris: PUF/CURAPP, 1993.
- Poimeur, Y. & Bernard, A., "Présentation", *La doctrine juridique*, Paris: PUF/CURAPP, 1993.

BIBLIOGRAPHY (concluded)

- Prah, Kwesi, "Africa's Heritage, Populism and the Contemporary Democratic Process in Africa", *Paper* for CODESRIA General Assembly Conference on Democratisation Processes in Africa, Dakar, 1992.
- Shafer, D.M., "The Perverse Paradox of Peace and the Predatory State", *Paper* read at the American Political Science Association Annual Meeting, Washington, D.C., 2-5 September 1995.
- Sindjoun, L., *La formation du patrimoine commun des sociétés politiques. Eléments pour une théorie de la civilisation politique internationale*, Série des monographies 2/97, CODESRIA: Dakar, 1997.
- Sithole, Masipula, "Political Conflicts in Zimbabwe: the Dominance of Ethnicity over Class", *Paper* for the Seminar on Ethnic Conflicts in Africa, Dakar: CODESRIA, 1992.
- Sono, Themba, *Comments on Democracy & Its Relevancy in Africa*, African Perspectives: Selected Works, No.3, 1992.
- The Council of Europe, *Activities & achievements*, Public Relations Service, 1998.
- Yeye, Amoussou, D., "Relations inter-ethniques et dynamique socio-politique au Bénin (De la période coloniale à nos jours)", *Paper* for the Seminar on Ethnic Conflicts in Africa, Dakar, CODESRIA, 1992.
- Young, C., *The Congo: Background to Independence*, Johannesburg: University of the Witwatersrand, 1966.
- Young, C., *Post-independence Politics of the Congo*, Johannesburg: University of the Witwatersrand, 1965.
- Young, C., "Zaire, is there a state?" unpubl. *Paper* for the Annual Conference of the Canadian Association of African Studies, Quebec, 1983.

LEGAL INSTRUMENTS AND CASE LAW

I. African Constitutions

Nigeria

The Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999, Decree No.24 of 1999, with the Constitution of the Federal Republic of Nigeria 1999 set out in the Schedule to this Decree.

Senegal

The Constitution of the Republic of Senegal (Constitutional Act no. 63-22 of 7 March 1963, as amended by Constitutional Acts nos. 67-32 of 20 June 1967, 68-04 of 14 March 1968, 70-15 of 26 February 1970, 76-01 of 19 March 1976, 76-27 of 6 April 1976, 78-60 of 28 December 1978, 81-16 of 6 May 1981, and 83-55 of 1st May 1983.

South Africa

The Constitution of the Republic of South Africa, Act 200 of 1993.

The Constitution of the Republic of South Africa, Act 108 of 1996.

Togo

The Constitution of the Republic of Togo of 1992

Democratic Republic of Congo (Constitutions)

La Loi Fondamentale du 19 mai 1960 relative aux structures du Congo.

La Loi Fondamentale du 17 juin 1960 relative aux enquêtes parlementaires.

La Loi Fondamentale du 17 juin 1960 relative aux libertés publiques.

Décret-loi constitutionnel du 29 septembre 1960 relatif à l'exercice des pouvoirs législatif et exécutif à l'échelon central.

Décret-loi constitutionnel du 7 janvier 1961 relatif au pouvoir judiciaire.

LEGAL INSTRUMENTS AND CASE LAW (continued)**Democratic Republic of Congo (Constitutions, continued)**

Décret-loi constitutionnel du 9 février 1961 relatif à l'exercice des pouvoirs législatif et exécutif à l'échelon central.

Proclamation du Haut Commandement de l'Armée Nationale Congolaise du 24 Novembre 1960

Ordonnance-loi no. 7 du 30 Novembre 1965 accordant des pouvoirs spéciaux au Président de la République.

Ordonnance-loi no. 66-92 bis du 7 mars 1966 relative aux pouvoirs du Président de la République.

Constitution du 24 juin 1967

Ordonnance-loi No. 70-025 du 17 avril 1970 portant modification des dispositions de l'alinéa 1er de l'article II du Titre IX de la Constitution du 24 juin 1967.

Loi No. 70-001 du 23 décembre 1970 portant révision de la Constitution.

Loi No. 71-006 du 29 octobre 1971 portant révision de la Constitution.

Loi No. 71-007 du 19 novembre 1971 portant révision de la Constitution.

Loi No. 71-008 du 31 décembre 1971 portant révision de la Constitution.

Loi No. 72-003 du 5 janvier 1972 portant révision de la Constitution.

Loi No. 72-008 du 3 juillet 1972 portant révision de la Constitution.

Loi No. 73-014 du 5 janvier 1973 portant harmonisation de la Constitution ainsi que celle de tous les textes législatifs et réglementaires en rapport avec les nouvelles appellations intervenues dans les structures politico-administratives du pays et modifiant l'article 46 de la Constitution.

Loi No. 74-020 du 15 août 1974 portant révision de la Constitution du 24 juin 1967.

Loi No. 78-010 du 15 février 1978 portant révision de la Constitution.

Loi No. 80-007 du 19 février 1980 modifiant et complétant quelques dispositions de la Constitution.

LEGAL INSTRUMENTS AND CASE LAW (continued)**Democratic Republic of Congo (Constitutions, continued)**

Loi No. 80-012 du 15 novembre 1980 modifiant et complétant quelques dispositions de la Constitution.

Loi No. 82-004 du 31 décembre 1982 portant modification de certaines dispositions de la Constitution.

Loi No. 88-004 du 29 janvier 1988 portant révision de certaines dispositions de la Constitution.

Loi No. 88-009 du 27 juin 1988 portant révision de l'article 2 de la Constitution.

Loi No. 90-002 du 5 juillet 1990 portant révision de certaines dispositions de la Constitution.

Loi No. 90-008 du 25 novembre 1990 portant révision d'une disposition de la Constitution.

Acte portant dispositions constitutionnelles relatives à la période de transition.

Loi No. 93-001 du 02 Avril 1993 portant Acte Constitutionnel harmonisé de la période de Transition, Journal Officiel de la République du Zaïre, 34eme Année, Numéro Spécial, Avril 1993.

Acte Constitutionnel de Transition, Journal Officiel de la République du Zaïre, 35 ème Année, Numéro Spécial, Avril 1994.

Constitution de la République Fédérale du Congo, Conférence Nationale Souveraine, Kinshasa, Palais du Peuple, Novembre 1992.

Décret-Loi Constitutionnel No. 003 du 27 Mai 1997 relatif à l'Organisation et à l' Exercice du Pouvoir en République du Zaïre

Décret-Loi Constitutionnel No.0037 du 22 Octobre 1997 portant Création de la Commission Constitutionnelle.

LEGAL INSTRUMENTS AND CASE LAW (continued)**Democratic Republic of Congo** (Constitutions, concluded, and other important Act)

Décret-Loi Constitutionnel No. 074 du 25 Mai 1998 portant Révision des Dispositions du Chapitre II du Décret-Loi Constitutionnel No. 003 du 27 Mai 1997 relatif à l'Organisation et à l'Exercice du Pouvoir en République Démocratique du Congo, Journal Officiel de la République Démocratique du Congo, 39^e Année, Numéro Spécial, Mai 1998.

Lusaka Ceasefire Agreement of 10 July 1999.

II. International Instruments**United Nations Instruments**

United Nations Charter, United Nations, 1945.

Universal Declaration of Human Rights, United Nations, 1948.

International Covenant on Civil and Political Rights, United Nations, 1966.

International Covenant on Economic, Social and Cultural Rights, United Nations, 1966.

Declaration on the Granting of Independence to Colonial Countries and peoples of 1960 (General Assembly Resolution 1514 XV)

African Instruments

African Charter for Popular Participation in Development and Transformation, 1990

Charter of the Organisation of African Unity, OAU, 1963.

African Charter on Human and Peoples' Rights, OAU, 1982.

Treaty of the Southern African Development Community (SADC), 1993.

LEGAL INSTRUMENTS AND CASE LAW (continued)**African Instruments** (concluded)

*Additional Protocol to the African Charter on Human and Peoples' Rights
establishing an African Court on Human and Peoples' Rights, OUA, 1999.*

African Charter on the Rights and Welfare of the Child

Constitutive Act of the African Union, OAU, 2000.

American Instruments

American Convention on Human Rights, Organisation of American States, 1970.

European Instruments

Treaty of the European Union.

*European Convention for the Protection of Human Rights and Fundamental
Freedoms, European Economic Community.*

III. Case Law**Senegal**

*Ministère Public & François Soudan versus Habré and Arrêt No. 135 of 4 July
2000*

South Africa

*Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR
1253 (CC)*

*Certification of the Amended Text of the Constitution of South Africa 1997 (1)
BCLR 1 (CC)*

*Government of the Republic of South Africa and Others v Grootboom 2001 (1) SA
46*

S v Makwanyane and Another 1995 (6) BCLR 665 (CC).

LEGAL INSTRUMENTS AND CASE LAW (concluded)**Case Law****Democratic Republic of Congo (Zaire)**

- *L'Association Sans But Lucratif Les Témoins de Jéhovah contre la République du Zaire et Arrêt R.A. 266* of 8 January 1993.
- *L'USOR & Alliés contre la République du Zaire et Arrêt R.A. 320* of 21 August 1995

USA

Bradwell v Illinois 83 US (16 Wall) 130 1876

Marbury v Madison 5 US 137, 2 LED (60) 1803

Albert Gore, Jr., and Joseph I. Lieberman, Appellants, v Katherine Harris, as Secretary, etc., et al., Appellees, 772 So.2d 1243, 2000 Fla. LEXIS 2373, 25 Fla. Law W. S 1112, S 1117-8.

Albert Gore, Jr., and Joseph I. Lieberman, Appellants, v Katherine Harris, as Secretary, etc., et al., Appellees, No. SC00-2431, 773 So.2d 524, 2000 Fla. LEXIS 2474, 26 Fla. Law W.

George W. Bush, and Richard Cheney, Petitioners, v Albert Gore, Jr., et al., No. 00949, 531 U.S. 98, 2000 U.S. LEXIS 8430, 148 L. Ed. 388, 121 S.Ct. 525.