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Creating African Futures in an Era of Global Transformations:

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بعث أفريقيا الغد في سياق التحولات المعولمة :
رهانات و آفاق

Constitutionalism and democracy in Africa: Do constitutions and elections still matter in Francophone Africa?

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1. Introduction

Constitutionalism and democracy are different but closely related concepts that are also associated with constitutions and elections respectively. Moreover, it is evident from the preambles to African constitutions and from the objectives and principles of the founding instruments of the African Union (AU) such as its Constitutive Act and its Charter of Democracy, Elections and Governance that the establishment and consolidation of constitutionalism and democracy constitute the most important political project on the African continent.

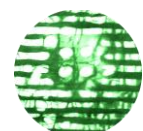
Basically, constitutionalism entails a set of values and principles of government in a free society. Limitation of powers, respect for the rule of law that presupposes the existence of a constitution and the protection and promotion of human rights generally enshrined in domestic and international legal instruments are the hallmarks of modern constitutionalism (). As for democracy, it generally refers to political system where human rights are protected, where the people are sovereign and freely govern themselves directly or indirectly through referendum or through their representatives whom they elect at regular periods determined by the Constitution and the law to serve their interests and who remain accountable to them ().

Constitutionalism and democracy are complementary, mutually enriching or reinforcing concepts as they need one another to prosper (). The same goes for constitutions and elections.

While constitutionalism requires the existence of a constitution, which is generally written and supreme, and modern democracy demands regular elections, it may happen, however, that constitutions fail to promote constitutionalism and elections do not result in the establishment or the consolidation of a democracy. Okoth-Ogendo rightly stressed the phenomenon of “constitutions without constitutionalism” that he considered an “African paradox” (). Accordingly, constitutionalism cannot be reduced to the mere fact of having a constitution.

On the other hand, elections and democracy have become virtually synonymous in Western political thought and analysis (Joseph 1999: 9-11; Bratton & Posner 1999: 378; Haberson 1999: 39; Mangu 2002: 196). In the liberal conception, ‘elections are the defining institution of democracy’ (Bratton & Posner 1999: 378). Yet, democracy and elections are distinct but interrelated concepts (Mangu & Budeli 2008, pp 103-109, 112-113). As Bratton and Posner pointed out, formal procedures for elections do not create a democracy (Bratton & Posner (1999: 378-379). They may only lead to what Barack Obama termed as an “electocracy” (Obama:) and Liniger-Goumaz labelled “democrature” (Liniger-Goumaz 1992:).

Scholars like Ake, Mkandawire, and Nzongola-Ntalaja also lamented over elections that amounted to “voting without choosing” and resulting into a “cosmetic democracy” (Ake 1996: ; Mkandawire 1996: ; Nzongola-Ntalaja :) instead of promoting a substantive democracy or the “government of the people, by the people and for the people” following the words once used by Abraham Lincoln in his famous Gettysburg Address, which have become the most popular definition of democracy (), and are considered the “principle of government” in many African constitutions, especially in Francophone Africa (). Ake (1996: 130) remarked that in the race to globalise it after the 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.





Constitutionalism and democracy in Africa: do constitutions and elections still matter in Francophone Africa?

In many parts of the world, experience has shown that elections can co-exist with systematic abuses of human rights, disenfranchisement of large segments of the population, and constant violations of the constitutions or blatant disrespect for the rule of law (Conac 1993b: 492).

This is unfortunately what has happened in many African countries despite the celebration and veneration of constitutionalism and multiparty democracy since the early 1990s.

The adoption of new constitutions, generally by referendum, the establishment of constitutional courts to uphold these constitutions as well as the creation of electoral independent commissions to promote democracy through the organisation of regular, free and fair elections as provided for by the constitutions, the condemnation of unconstitutional change of governments by the African Union and the adoption of several AU instruments aimed at promoting constitutionalism, democracy, good governance and credible elections have not prevented African leaders from violating the constitutions and engaging in electoral manipulations in order to cling to power and transform their countries in de facto “presidential monarchies”, especially in Francophone Africa with a few exceptions.

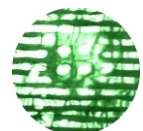
Respect for the constitution and the rule of law and vote-rigging by incumbent rulers have been the rule of political game rather than an exception. Elections have failed to bring any significant change in the governance as the situation remains the same before the same ruler who considers himself a providential man –hardly a and cannot afford to lose an election as this recently happened in Algeria and Mauritania and previously in Chad, Burundi, Burkina Faso, Congo, Rwanda and the Democratic Republic of Congo. Ahead of new elections, political crises are looming in these countries where incumbent leaders whose mandate is drawing to an end are now engaged in changing the constitutions and other rules of the political game in order to stand again for elections they are convinced to win with the contribution of allegedly independent electoral commissions and constitutional courts, one if the critical questions of political governance that arises is whether, under the conditions above, constitutions and elections still matter.

Admittedly, the question is not new among constitutional scholars and political scientists since constitutional manipulations and vote-rigging in the interest of the incumbent heads of state and their parties and government have been going on since independence and the organisation of first multiparty elections in the 1960s.

With regards to constitutional violations, Guy and Auslan asked in the 1970s whether the constitutions mattered and why constitutional lawyers should waste their times studying the constitutions in Africa when a country like Zaïre was able to produce one constitution every 12 months and when a constitution under consideration was no longer in force by the time the study was completed ()

However, what is new and still makes the question relevant and worthy of interest, is the new political domestic, regional and international environment in which numerous instruments adopted and commitments made by African presidents could make us believe that disregard for the constitution and the rule of law and electoral frauds to rule for life as in monarchy were same thing of the past.

Accordingly, this paper will reflect on the importance of constitutions and elections in Africa against the background of recent developments characterised by the tendency of African leaders at the end of their constitutional terms of office to change the constitutions, remove the limitations in the presidential terms of office for them to stand and get elected indefinitely in a system that will





transform into a “presidential monarchy” and also by the holding of elections that are regularly rigged in the favour of the incumbent and do not bring any change in the governance of the country.

The focus will be on Francophone Africa and particularly on the DRC that held its last elections on 28 November 2011 and where President Joseph Kabila has embarked on a dangerous process of changing the Constitution to run again in 2016 despite the prohibition of a third term by this Constitution that was approved by popular referendum held on 18-19 December 2005 and promulgated by the President on 18 February 2006. Other African presidents like Denis Sassou Nguesso of the Republic of Congo, Blaise Compaore of Burkina Faso, Paul Kagame of Rwanda, and Pierre Nkurunziza of Burundi, whose elections were hardly credible, free and fair and whose mandate is also coming to an end are engaged in the same process as President Paul Biya of Cameroun and President Bouteflika of Algeria earlier.

The paper will deal with constitutions and elections to find out whether they still matter, why they should matter and what should be done to promote respect for the constitution and credible, free and fair elections in order for constitutionalism and democracy to prosper in Africa in general and in Francophone Africa as a prerequisite for sustainable peace and development on the continent. It will consist of three main sections that provide the limitation of its scope. The first section deals with an important aspect of constitutionalism, which is the limitation of the presidential terms of office, the third term syndrome and the making of “presidential monarchies” as well as with their own constitutional limitations. The second section deals with African elections, using the DRC elections of 28 November 2011 as a case study. The last section is the conclusion that will stress the importance of the constitutions and elections in Africa and address some challenges that need to be overcome for the development of constitutionalism and democracy that are undermined by constitutional violations, the making of “presidential monarchies”, and the institutionalisation of electoral frauds.

2. Constitutions, presidential terms of office, the making of “presidential monarchies” and its limitations in Francophone Africa

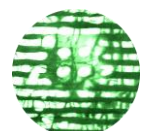
Each and every African country is governed by a constitution. The constitution is the supreme law of the land and is binding on all natural or juristic, private or public persons in the country.

The constituent power is generally the people who are sovereign and decide by referendum. Several African constitutions were directly adopted by the people as the original constituent power¹. However, most constitutions were adopted indirectly by the people, which is through their duly elected representatives in Parliament also known as the derivative constituent power.

The Constitution enshrines the founding values of the state. It protects human rights. It provides for the organisation and functioning of different state organs and limits their powers. It is in this sense that the powers and the terms of office of the president are also limited by the Constitution.

Like the US Constitution, several African Constitutions adopted after the 1990s contain limitations on the duration and the number of presidential terms of office as well as on the republican form of the government. The provisions on these limitations can be amendable or intangibles.

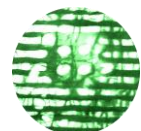
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In some African countries, especially in Francophone Africa, the constitutions provide that the President may be re-elected indefinitely and even rule for life. However, some others limit the duration and the number of presidential mandates which may be renewable or not. The mandate is always renewable. It is renewable once in countries such as South Africa, Botswana, Burundi, Congo, Ghana, Guinea, Eritrea, Ethiopia, Guinea-Bissau, Kenya, Liberia, Malawi, Mali, Mauritania, Mozambique, Namibia, Niger, Nigeria, DRC, Rwanda, Seychelles, Sierra Leone, Sudan, Tanzania, and Zambia (Mangu 2014: 56). The mandate is renewable indefinitely in Algeria, Angola, Cameroon, Chad, Djibouti, Gabon, Gambia, Togo, Uganda and Zimbabwe.

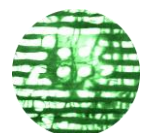
As for the duration of the presidential mandate, it varies between four and seven years. The president is elected for four years in Comoros, Ghana, and Nigeria. He is elected for five years in South Africa, Algeria, Angola, Benin, Burkina Faso, Burundi, Eritrea, Gambia, Guinea, Kenya, Malawi, Mali, Mozambique, Namibia, Niger, Uganda, DRC, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Sudan, Tanzania, Chad, Togo, Tunisia, and Zambia. The president is elected for six years in Djibouti, Equatorial Guinea, Ethiopia, and Liberia and seven years in Congo, Cameroon, Gabon, Rwanda and Senegal.

No	Country	Term limits or duration of the mandate	Relevant constitutional provisions	Incumbent President	Date of last presidential election
01	Algeria			Bouteflika	
02	Angola				
03	Benin	5 renewable once	Art 42	Boni Yayi	13 March 2011
04	Botswana				
05	Burkina Faso	Idem	Art 37	Blaise Compaore	21 November 2010
06	Burundi	Idem	Art 96	Pierre Nkurunziza	28 June 2010
07	Cameroon			Paul Biya	
08	Cape Verde				
09	Chad				
10	Congo	5 years renewable once	Art 57	Denis Sassou Nguesso	12 July 2009
11	Cote d'Ivoire	5 years renewable once	Art 35	Allasane Ouattara	28 November 2010
12	Democratic Republic of Congo	5 years renewable once	Art 70	Joseph Kabila	28 November 2011
13	Equatorial Guinea	7 years renewable once	Art 36	Teodoro Obiang Nguema	29 November 2009
14	Gabon			Bongo	
15	Ghana	5 years renewable once			



16	Guinea	5 years renewable once	Art 27		7 November 2010
17	Kenya	5 years			
18	Liberia	6 years renewable once	Art 50	Mme Ellen Johnson Sirleaf	October 2012
19	Madagascar				
20	Malawi				
21	Mali				
22	Mauritania				
23	Mozambique	5 years renewable once	Art 147	Armando Guebuza	November 2012
24	Namibia	5 years renewable once,	Art 29	Hifikepunye Lucas Pohamba	October 2009
25	Niger				
26	Nigeria	5 years renewable once.		Good luck Jonathan	2000
27	Rwanda	7 years renewable once	Art 101		9 August 2010
28	Senegal			Macky Sall	
29	Sierra Leone	5 years renewable once	Art 46	Ernest Bai Koroma	November 2012
30	South Africa	4 years renewable once			
31	Tanzania	5 years renewable once	Arts 40 and 42	Jakaya Kikwete	December 2005
32	Togo			Faure Nyassingbe	
33	Zambia	5 years renewable once			

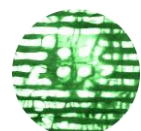
In African countries such as Benin, Botswana, South Africa, Ghana, Mozambique, Tanzania and Zambia, incumbent presidents abide by the Constitution and retire at the end of their constitutional mandate. Most of these countries are located in Anglophone Africa, with the exception of Benin. The influence of France, which is the former colonial ruler, and the impact of its foreign policy may help explain this but research still needs to be undertaken to explain why African Anglophone countries tend to perform better than the Francophone ones in terms of constitutionalism and democracy and compliance with the constitutional provisions regarding the terms of office of the president is rather an exception than the rule in Francophone Africa. Accordingly, as the table below demonstrates, there are more retired presidents in Anglophone than in Francophone Africa.



List of African countries where the presidents retired at the end of their constitutional mandate and other former presidents alive

No	Country	Former Presidents
01	Benin	1. Matthieu Kerekou 2. Nicephore Soglo
02	Botswana	1. Quette Masire 2. Festus Mogae
03	Burundi	Pierre Buyoya
04	Ghana	1. Jerry Rawlings 2. John Kufuor
05	Kenya	1. Daniel Arap Moi 2. Mwai Kibaki
06	Malawi	Bakili Muluzi
07	Mali	1. Alpha Omar Konare 2. Amadou Toumani Toure
08	Mozambique	Joaquim Chissano
09	Namibia	Sam Nujoma
10	Nigeria	1. Yakubu Gowon 2. Abdulsalami Aboubakar 3. Ibrahim Babangida 4. Olesegun Obasanjo
	Senegal	1. Abdou Diouf 2. Abdoulaye Wade
11.	South Africa	1. Frederik de Clerck 2. Thabo Mbeki 3. Kgalema Motlante
12	Tanzania	1. Ali Hassan Mwinyi 2. Benjamin Nkapa
13	Zambia	1. Kenneth Kaunda 2. Rupiah Banda

In Francophone Africa, the tendency is to establish or consolidate a presidency for life or a “presidential monarchy” through constitutional and electoral manipulations since most constitutions prohibit a third presidential term. The constitutions of most African French and Portuguese speaking countries are modelled on the Constitution of the French 5th Republic and also provide that the republican form of government cannot be amended. This is the case of, for instance, the Constitutions of the 3rd Republic of Gabon of 12 January 2011 (Article 117), the Constitution of the Republic of Guinea Bissau of 13 November 2011 (Article 104), the Constitution of the Republic of Mozambique (Article 292), the Constitution of the Republic of Burkina Faso (Article 165), the Constitution of Republic of Benin (Article 156), the Constitution of Togo of 1992 (Article 145), the Constitution of the Republic of Cote d’Ivoire (Article 127), the Constitution of the Republic of Senegal (Article 103),



the Constitution of the Republic of Angola (Article 236), the Constitution of the Republic of Cape Verde (Article 313), the Constitution of the Republic of Cameroon (Article 64), the Constitution of the Republic of Chad (Article 223), the Constitution of the Republic of Congo (Article 185), the Constitution of the Republic of Guinea (Article 154), and the Constitution of the DRC (Article 220) (Mangu 2013: 59-61). All these provisions aim at preventing the establishment and consolidation of a presidency for life or a “presidential monarchy”.

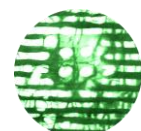
A monarchy is generally defined as a political system whereby accession to power is hereditary within the ruling family. Except in the case of resignation or death, the king or queen rules for life unlike in a republic where the president is in principle elected for a specific period determined by the Constitution. With the exception of Morocco, Lesotho and Swaziland, all African states are republics.

The concept of “presidential monarchy” refers to a political regime that is a Republic but through constitutional manipulations and repeated vote-rigging ends up functioning as a monarchy and even an absolute monarchy. There is no longer any separation or limitation of powers, but a concentration of executive, legislative and judicial powers in the hands of the President. The power becomes a familial affair. Parents, sisters, brothers, uncles, aunts, cousins and nephews may not state officials. They are considered members of the “royal family”. They even take precedence on the members of the government. They have their own services and bodyguards paid on the national budget. They also enjoy immunities despite the fact that no text provides for them.

The presidential power is considered a property of the family. In case of the death, incapacity or resignation of the president, he is succeeded by one of the closest family member as in a monarchy. This already happened in Togo, Gabon and the DRC where Presidents Nyassingbe Eyadema, Omar Bongo and Laurent-Desire Kabila were replaced with their sons Faure Eyadema, Omar Bongo, and Joseph Kabila successively. The succession is prepared when the President is still in power as we have seen in Libya, Chad and Egypt.

The concept of “presidential monarchy” is derived from the concept of “republican monarchy” once used by Duverger to refer to the reinforcement of presidential powers in some Western democracies like France where the President ceased to be a ceremonial president to become an executive one (Duverger :).

The DRC is a case in point. The Constitution of Independent Congo had been drafted by the Belgian government, adopted by the Belgian parliament and promulgated by the King of the Belgians. It was therefore actually a Belgian constitution for the people of the Congo. The political system was also a parliamentary one as the Belgian one. On his election as DRC president on 29 June 1960, on the eve of independence, the foreign head of state that Joseph Kasavubu knew the best was probably the King of Belgium. However, he understood his power to be that of an absolute monarch, not a constitutional one. In September 1960, he dismissed Prime Minister Lumumba in violation of the Constitution. Later, in 1964, he appointed Mr Evariste Kimba Prime Minister instead of Moise Tshombe who was the leader of the majority in Parliament. In November 1965, he was overthrown in a *coup d’Etat* led by General Mobutu. Like King Leopold the 2nd, Mobutu considered the Congo as a personal property. He renamed the country from DRC to Zaire in 1970. The privatisation of the country and the personalisation of power were achieved through constitutional change. The Constitution adopted by referendum on 24 June 1967 was amended more than 20 times. Zaire had a constitution almost every 18 months. Constitutional amendments like that of 15 August 1974 in terms





of which the Popular Movement of the Revolution (MPR) became a party state, *Mobutism* its ideology and Mobutu its founding-father, the supreme institution was actually a new constitution. Mobutu was the King of Zaire for almost three decades. When Mobutu was toppled in 1997, Laurent-Desire Kabila who replaced him became the new king.

The country was renamed from Zaire to DRC. He imposed a new constitution that gave him all executive, legislative and judicial powers in the country. The Kabila's dynasty had succeeded the Mobutu one. When Laurent-Desire Kabila was assassinated, as in any monarchy, he was replaced with his Joseph Kabila who was sent earlier for military training to become the new king. This explains that despite his election later on a constitution that gives him two mandates, he now needs a presidency for life that can only be achieved through constitutional manipulations.

Since 2013, the president has requested his party to start campaigning for the amendment of Article 220 of the Constitution that prevents him from running for a their term or for a replacement of this constitution with another that would allow him to remain in power after his second and last term ends in 2016. And yet, according to the Constitution, Article 220 is intangible and cannot be amended. Getting it changed by a referendum would also be inconsistent with the Constitution.

Like Denis Sassou Nguesso of the Republic of Congo, Paul Kagame of the Republic of Rwanda, Pierre Nkurunziza of the Republic of Burundi, and Blaise Compaore of the Republic of Burkina Faso, President Joseph Kabila has embarked on the process of constitutional change to secure a presidency for life or a "presidential monarchy". Several reasons are provided to undermine and make a mockery of the constitution which is yet the supreme law of the land and should be respected by all. Not only the constitution, but elections have also lost any credibility as the 2011 elections can demonstrate.

3. Elections and democracy in Africa

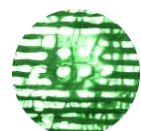
Since the 1990s, elections are regularly conducted in Africa. The DRC elections of 2011 can be used here as a case study.

The choice of the DRC is particularly interesting given the similarities with Nigeria. These two are probably the richest African countries in terms of their natural resources. They are also among the largest and the most densely populated. The DRC is to Central Africa what Nigeria is to West Africa. The two countries are expected to play a critical role in propelling African renaissance and development. Unfortunately, since independence *circa* 1960s, they have gone through the same dramatic history of *coups d'Etat*, military rule, bad governance, bad governance, democratic revival, rebellions, armed conflicts and several secession attempts.

Much of the trajectory of the Congolese state resembles the trajectory of most 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.

As Mkandawire (1992: IX-X) also put it:

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 caricature of the historical astounding waste of African potential.

The 2011 elections were the second presidential and parliamentary elections held under the 2006 Constitution. Article 1er of this Constitution provides that the DRC is an independent sovereign, united, indivisible social, democratic, and secular state based on the rule of law. In terms of Article 2, the DRC is divided into 25 provinces plus the capital city of Kinshasa, around 10 million people. The provinces and the capital are divided into autonomous territorial entities that constitute the local government.

Article 5 states that the people are sovereign. All power derives from the people who exercise it directly by referendum or elections and indirectly through their elected representatives. The suffrage is universal, equal, and secret. It may be direct or indirect. Only adult citizens, at least 18 year old male or female citizens are entitled to vote and can be elected during an election.

Article 6 guarantees political pluralism. Political parties are allowed. In terms of Article 7, the institution of a one party system in one form or another on the national territory or part thereof is outlawed and constitutes a crime of high treason. Political opposition is recognised (Article 8). As of 9 June 2014, 457 parties were registered in the DRC, making this country the biggest democratic country on the planet if democracy had to be defined by the number of political parties.

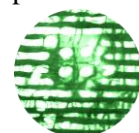
A comprehensive and enforceable Bill of Rights is entrenched in Title II of the Constitution. The DRC Bill of Rights borrows extensively from the African Charter on Human and Peoples' Rights and protects all the tree generations of rights, namely civil and political, socio-economic and cultural as well as collective and peoples' rights.

These rights include the right to freedom of expression (Article 23), the right to information (Article 24), the right to peacefully assemble (Article 25), the right to demonstrate (Article 26) and petition (Article 27) which are critical for the organisation of credible, free and fair elections.

Article 14 of the Constitution is the equality clause and provides that women are entitled to fair representation in all national, provincial and local elections. It also provides for the parity between men and women in the composition of these institutions. However, the enforcement of the parity was to be provided for by an organic law.

Title III of the Constitution provides for four national institutions in the Republic, namely the President, Parliament, the government and the judiciary (Article 68). The President is elected by direct adult universal suffrage for five years renewable once (Article 70). To be elected, a candidate was required to win an absolute majority of voters, which is at least 51%. This means that a second round could be organised if no candidate had achieved such majority during the first. Article 71 of the Constitution was amended on 20 January 2011, ahead of the 2011 elections, to provide for a single round as the incumbent President had learned from Laurent Gbagbo's experience during the presidential election in Cote d'Ivoire to prevent the opposition from uniting behind a single candidate who could easily win the second round of the election. The new article 71 provides that a simple majority, not an absolute one, is enough for a candidate to win the presidency.

The DRC Parliament is bicameral (Article 100). It consists of the National assembly and the Senate. The members of the National Assembly are called "Deputies". They are elected by universal direct suffrage in the different constituencies according to the electoral Act (Article 101). They are 500. As for the Senate, its members do not represent the people directly. They rather represent the



provinces and are elected by the provincial assemblies (Article 104). In the DRC, national elections relate to the election of the President and the members of the National Assembly while provincial elections refer to the election of governors, vice-governors and the provincial assemblies. At the provincial level, the executive power is held by a provincial government under the leadership of the governors assisted by a vice-governor. The legislative power is vested in the provincial assembly.

The members of the provincial assemblies are directly elected by the people in the same conditions as the members of the National Assembly. However, they elect the governors and the vice- governors as well as the Senators to represent their provinces in the national legislature.

This is critically important to understand the electoral system, which is mainly characterised by proportional representation for parliamentary elections at the national and provincial levels. It is also the lists systems. The candidates are mainly presented on the lists of the parties registered with the NIEC which is mandated to manage the electoral process.

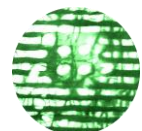
The NIEC is the constitutional body mandated to organise the elections and the referendum (Title V). It is responsible for the identification and registration of voters as well as parties and their candidates. It must elaborate and publish their lists. National and foreign observers, witnesses of candidates and parties competing for an election are also accredited with the NIEC. The organisation and the supervision of the voting and counting at polls stations also fall within its responsibilities. It must maintain the national and provincial electoral registers and proclaim the results of the election or the referendum. The final results are proclaimed by the Constitutional Court which therefore also plays an important role in the electoral process since its decisions are binding on all parties and state organs, including the NIEC. The NIEC must ensure that elections are credible, free and fair. It is an independent institution. It enjoys financial autonomy. Its resources derive from the national budget and also from foreign donors. This has serious consequences since those who fund the process are also likely to determine the outcome.

The DRC 2006 elections were organised by the NIEC according to the Law no 10/013 of 28 July 2010. It was presided over by Pastor Ngoy Mulunda.

Campaigning took place over a 30-day period, ending one day before Election Day on 28 November. The campaign period was marked by a number of problems and controversies, with the first relating to the presidential election and the constitutional amendment of 20 January 2011. The 2006 Constitution provided that the president would be elected by an absolute majority (more than 50%) of the total number of votes. If no candidate obtained such a majority a second round would be organised, with the candidates being the two who obtained the highest number of votes in the first round (DRC Constitution 2006, Art 71).

President Kabila's party and supporters anticipated that their candidate would hardly get through the first round and was likely to lose to a common opposition candidate, as had happened to President Laurent Gbagbo, who lost to Alassane Dramane Ouattara in Côte d'Ivoire. To play it safe, the possibility of a second round had to be ruled out by an amendment to Art 71. The amendment, which the opposition contended was undemocratic, was adopted by Parliament, where President Kabila had a strong majority, paving the way for his re-election since an absolute majority was no longer required and the opposition failed to unite behind a single candidate.

The second controversy related to voter registration and the publication of the voters' roll. According to Articles 6 and 8 of the Electoral Act, the NIEC had to publish the national voters' roll



and the list of registered voters by province and constituency at least 30 days before the electoral campaign began. In each voting station the lists of registered voters, including their names, places and dates of birth, sex, domicile or habitual residence had also to be published at least 30 days before Election Day. This never happened.

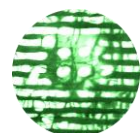
There were also complaints during voter the voter registration period that the corrupt voters' roll that had been used for the 2006 elections had not been cleaned up. The names of several hundred thousand people who had died or been displaced since then still inflated the number of voters, particularly in the five provinces (Eastern Province, Katanga, Maniema, North Kivu, and South Kivu) which were biased in favour of President Kabila. There were innumerable cases of multiple registrations as one voter could register in many places without this being discovered. Moreover, members of the police and the Congolese army who were excluded by the Electoral Act from voting but favoured Kabila were allowed to register. The NIEC and President Kabila's political coalition rejected all attempts by the opposition to audit the voters' roll.

Controversy also surrounded the logistics and the equipment (laptops and computers) used to save the data. Despite the fact that the the equipment was supplied by impartial providers such as the Chinese, Belgians and South Africans, these countries were accused of backing President Kabila's re-election as was the United Nations Stabilisation Mission in the DRC (MONUSCO), which secured the transport of electoral personnel and material around the DRC.

The equipment was said to have been corrupted in advance to produce figures that would contribute to President Kabila's re-election.

The NIEC and the government refused to allow the opposition to gain access to the equipment or to audit the data recorded. The printing of the ballot papers was another source of controversy. The total number of voters was classified information for the incumbent president and his supporters in the NIEC. Nobody apart from them knew the exact quantity and cost of the electoral material or who was providing it. The suppliers were based in countries that supported the incumbent president. In exchange for lucrative commissions to be paid to the members of the NIEC, a private Johannesburg-based company was contracted to produce ballot papers. Millions of these ballot papers were dispatched to the DRC in private planes and trucks that first landed or arrived in the Eastern DRC, especially in President Kabila's native province of Katanga.

Disputes during the pre-electoral period also related to the timing of electoral operations and to Election Day, both of which were unilaterally determined by the NIEC and the ruling coalition in violation of the Constitution. According to Article 73 of the Constitution, the presidential election should be held at least 90 days (three months) before the end of the term of the incumbent president. The opposition complained that this provision was violated by the NIEC's decision to hold the elections on 28 November, which was only 7 days before the end of the president's 5-year term that started on 6 December 2006. The opposition also complained that, in violation of Articles 149 and 161 of the Constitution, an independent Constitutional Court had not been inaugurated to serve as the final judge of the electoral process to ensure that the elections were credible, transparent, free and fair. The president had not promulgated the relevant legislation despite the fact that it had long been adopted by Parliament and still kept in office the Supreme Court of Justice, whose members were appointed and could be dismissed at will by him. The opposition therefore held that it was imperative to establish the Constitutional Court if the elections were to be credible, transparent, free and fair.



All the opposition's challenges to these violations failed. In the meanwhile, several human rights violations, most of them aimed at securing Kabila's re-election by weakening his opposition were reported around the country, as were incidents of violence and murder perpetrated by the armed forces and security services.

The police, the armed forces and the administration, which, in terms of the Constitution, were expected to be apolitical and impartial (Constitution 2006, Arts 183, 188, and 193) were biased in favour of Kabila and the ruling party and, among the rights that were violated were the constitutional right to freedom of thought and conscience, the right to freedom of expression, the right to information, the right to assemble and the right to demonstrate peacefully and unarmed (Constitution 2006, Arts 22- 26). Despite the establishment of the High Authority of the Media, which was constitutionally mandated to guarantee the impartiality of the media (Constitution 2006, Art 212) and the constitutional obligation for the public media to be accessible equally to all political parties and social forces, public radio and television were hijacked by the ruling coalition.

As a minority, the opposition was unable to prevent the electoral process being run by the NIEC and the Supreme Court of Justice in the service of Kabila and his ruling coalition. In September 2011 the NIEC published the provisional list of candidates for the presidency and the National Assembly. The Supreme Court of Justice confirmed the lists, retaining all 11 presidential candidates proclaimed by the NIEC. Some of these were independent candidates, but the overwhelming majority represented political parties. Attempts by the opposition to rally around a single presidential candidate to oppose the president failed.

The number of candidates registered for the National Assembly elections totalled 18 478 candidates (only 2 244 of them women) (www.ceni.gouv.cd). Most of the candidates were nominated by the 423 political parties then registered in the DRC.

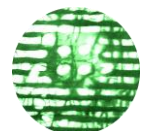
3.3.2 Election and the proclamation of the results

The political climate remained tense on Election Day and during the wait for results to be proclaimed and tensions escalated after the proclamation. While both the presidential and National Assembly elections were held on 28 November they neither started nor ended at the same time. In some constituencies, where the electoral material was received early and voting stations opened as required, they were peaceful but in others there were acts of violence or intimidation of voters, insufficient ballot papers and officers and material arrived late or not at all.

In some of these stations voters were allowed to cast their votes after polling was due to close and some even voted the next day.

According the Electoral Act, voting stations had to transform into counting stations immediately after voting ended and counting had to take place in the presence of all the electoral officers and the candidates' witnesses. No other person was allowed to participate in the counting. There was no provision made for the presence of members of the police, the army, the security services, the administration, the government or the parties in the counting stations.

Once the counting was over, minutes of the results had to be signed by all the parties to the count and posted for the public, the candidates and the political parties to see, to allow for contestation before the competent authorities, namely the NIEC and the Supreme Court of Justice. The candidates



and their parties were entitled to receive copies of the results. In many cases, candidates or parties' witnesses, generally those from the opposition, were intimidated and prevented from participating in the counting.

The original documents were to be secured and sent immediately to the compilation centre of the constituency in which the count was done and the winners proclaimed according to the number of the seats allocated by the Electoral Act to the constituency. Communication problems in the DRC are so huge that it generally took several days, sometimes even weeks, for the results to reach the compilation centres. Some parcels did not arrive at all. In other cases when they arrived they had been opened and the results falsified. In still others, they arrived after the centres had announced the results. It was not possible for the ballots to be recounted because innumerable ballot papers were missing or had been destroyed. Despite all the irregularities, the compilation centres published the results and communicated them directly to the NIEC bureau, which announced them, subject to confirmation by the Supreme Court of Justice. The court proclaimed the final results after dealing with the disputes emanating from candidates and parties contesting the provisional results.

As the NIEC planned the presidential election results were announced before those of the parliamentary elections to avoid any crisis of legitimacy in the highest office in the republic. The day after the election many opposition leaders and independent observers proclaimed that opposition leader Etienne Tshisekedi had won. The battle had begun.

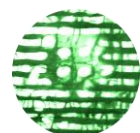
Despite several reports of massive electoral irregularities in many areas, the NIEC provisionally announced the results on Friday 9 December 2011. It came as no surprise to most that Kabila was declared the winner, with 48.95% of the vote. He was followed by opposition candidates Tshisekedi (32.33%), Vital Kamerhe (7.74%), and Léon Kengo wa Dondo (4.95%). The remaining candidates won less than 2%.

Table 1
Provisional results of the presidential election

No	Name	Votes	Percentage
01	Kabila, Joseph	8 880 944	48.95%
02	Tshisekedi wa Mulumba, Etienne	5 864 775	32.33%
03	Kamerhe Lwa Kanyinginyi, Vital	1 403 372	7.74%
04	Kengo wa Dondo, Léon	898 362	4.95%
05	Mbusa Nyamuisi, Antipas	311 787	1.72%
06	Mobutu Nzanga Ngbagawe, François Joseph	285 273	1.57%
07	Andeka Djamba, Jean	128 820	0.71%
08	Bombole Intole, Adam	126 623	0.70%
09	Kakese Malela, François Nicefort	92 737	0.51%
10	Mukendi Kamana, Josué Alex	78 151	0.43%
11	Kashala Lukumwena, Oscar	72 260	0.40%

www.ceni.gouv.cd

The NIEC's decision was referred to the Constitutional Court for confirmation and candidates who had objections were urged to lodge their complaints with the highest court. On the basis of reports from his party's witnesses and several independent observers, including those of the Catholic Church,





Tshisekedi rejected the results and declared himself president. He declined to challenge the results in the Supreme Court of Justice, which the opposition accused of lacking independence and being subject to President Kabila.

The only legal challenge came from Vital Kamerhe, who also rejected Kabila's election and congratulated Tshisekedi on his victory. Kamerhe's party, the UNC, launched the challenge in terms of the Electoral Act on 12 December.

The Supreme Court of Justice unanimously and unreservedly dismissed the UNC's application on 16 December 2011 (*UNC v Kabila Kabange*) and confirmed the NIEC's decision, proclaiming Joseph Kabila the winner. Kabila was sworn in on 19 December.

A week later Tshisekedi addressed the people from his residence in Kinshasa-Limete during his own official swearing in as the 'DRC's legitimate president'. Since then, the DRC has had two presidents.

Accusations of vote rigging, corruption among the members of the NIEC, subornation of witnesses, falsification of results, violence, destruction of ballot papers in areas favourable to the opposition and their multiplication in those favourable to Kabila, his party and his coalition, which were aired before the announcement of the results of the presidential election intensified while the nation awaited the results of the National Assembly election. These fraud allegations were confirmed by the overwhelming majority of independent observers, including those from the Carter Center and the European Union (EU) and contributed to discrediting further the electoral process and the NIEC. At one point President Kabila himself acknowledged that there had been a number of irregularities but said these would have no impact on his election. The situation worsened when the NIEC delayed the announcement of the results in violation of the Electoral Act and its own guidelines.

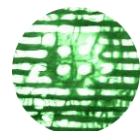
A team of American and British independent observers was invited to help the NIEC retain some credibility but they were prevented from working by the government and quickly left the country. The NIEC, fearing that the findings of the group might reinforce or corroborate the accusations of fraud, denied having invited them. This prompted (self-proclaimed) President Tshisekedi to 'nullify' the parliamentary elections.

The NIEC went on to announce the provisional results. The PPRD (President Kabila's party) and the Presidential Majority (MP, Kabila's coalition) were proclaimed winners of the parliamentary elections, with a more than two-thirds majority in the National Assembly. UDPS, Tshisekedi's party, came second.

Tshisekedi ordered the elected members of his party to resign from the National Assembly or face expulsion. The majority of them decided to keep their seats and were expelled from the UDPS for participating in an 'illegitimate parliament' dissolved by the 'president'. This crisis continues to have negative consequences on Congolese politics.

There were different responses to the irregularities from Congolese political leaders. The Congolese responses mainly came from political leaders, independent observers, the NIEC and the Supreme Court of Justice. The winners, President Joseph Kabila, his party (PPRD) and his coalition (MP) accepted the results, while their opponents rejected them on the grounds that the election was not free and fair.

Despite the fact that both sides agreed that the elections had been fraudulent and Kabila was among the first to concede that there were irregularities, he was quick to add that they were not of such





magnitude as to render the elections, particularly the presidential election, non-credible. In September 2012 his government requested Parliament to adopt a new legislation amending the composition and functioning of the NIEC.

Among the political leaders and parties supporting the president there were mutual accusations of frauds which were brought to the Supreme Court of Justice. The majority of disputes emanated from the members of the ruling coalition (MP). They too admitted that the 28 November 2011 elections were not free and fair and failed to comply with norms and principles governing democratic elections.

The overwhelming majority of observers concurred that the electoral process had not been credible and that the elections had been marred by numerous irregularities and could hardly be considered free and fair according to international and domestic standards. Despite all these reports the NIEC went on to announce the results.

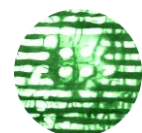
The NIEC Bureau also indirectly acknowledged its wrongdoing in running the elections when it presented its annual report to the National Assembly on 14 June 2012. Responding to critics on behalf of the bureau, Djoli maintained that the quality of the elections reflected that of the political leadership. He added that no elections were perfect and the NIEC was not the only institution to be blamed for the failure. He also charged the National Assembly with passing the Electoral Act and inaugurating the NIEC late and not providing the commission with adequate financial resources. More than 500 disputes were brought before the Supreme Court of Justice in relation to the parliamentary elections. In April 2012 the Court invalidated 32 members of the National Assembly, fuelling further criticism of the NIEC.

The court aggravated an already problematic situation by proclaiming as winners some members of the presidential coalition who had neither been named by the NIEC nor had appealed against the NIEC's decision. The Supreme Court of Justice was also blamed for corruption and unconfirmed reports alleged that the Court had been ordered to dismiss as many applications from the opposition as possible and to ensure that the president received a majority in the National Assembly to enable his government to apply his programme of action.

The NIEC bureau also criticised the Supreme Court of Justice for affirming candidates in constituencies where the NIEC had proposed that elections be nullified because of irregularities. This resulted in a conflict between the two institutions and confirmed that the elections had not been democratic. The NIEC had nevertheless to accept the court's decisions because, in terms of the electoral legislation, they were final and binding.

On 2 October 2012, almost 11 months after the elections and following the judgment of the Supreme Court of Justice, the NIEC announced the results of the parliamentary elections in the Masisi constituency, where it had had to organise a new election due to gross irregularities.

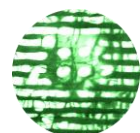
The attitude of the Supreme Court of Justice gave rise to the question whether and why the rule of law requires respect for unjust decisions made by the highest court in the land. Instead of condemning the DRC's non-compliance with international norms and principles governing democratic elections, after a false moment of suspense, the international community, led by some Western 'democratic' leaders and governments, welcomed the results and congratulated President Kabila and his government on successful and exemplary elections, disappointing millions of democrats worldwide.



As for the ACDEG, it is the most important regional instrument containing norms, principles and standards governing democratic elections. State parties committed to promoting democratic elections based on respect for the rule of law, human rights and good political, economic and social governance.

For a variety of reasons the 2011 elections were chaotic and characterised by many irregularities (MNO 2011; *Ligue des Electeurs* 2012; Carter Center; EUEOM 2011). Among these were:

- The lack of independence of the Supreme Court of Justice and the NIEC despite them being proclaimed ‘independent’ by the Constitution. These institutions remained subject to the incumbent president and to the ruling coalition. The majority of the members of the NIEC bureau were nominated by the president, who also appointed the judges of the Supreme Court of Justice from among his supporters in the judiciary, without any proper consultation with the High Council of the Magistracy (Judicial Commission) as provided by the Constitution. This appointment also took place *in tempore suspecto*, just before the electoral campaign and the judges were sworn in by a president who was no longer entitled to do so, as he was, at that point, one of several presidential candidates. Such judges were aware that they had a debt to him and were therefore accountable to the president and to the ruling majority. They could not afford to ‘betray’ them and the only way to pay them back was to announce their victory.
- The NIEC violated Articles 6 and 8 of the Electoral Act by failing to publish the lists of registered voters by province and by constituency at least 30 days before the beginning of the electoral campaign. In each voting station the lists of registered voters, including their names, places and dates of birth, sex, domiciles or habitual residences had to be published at least 30 days before the election day;
- Intimidation of voters and electoral officers as well as destruction of electoral material by some candidates and their parties;
- Late opening of the voting stations on the election day;
- Unavailability of some voting stations where voters were expected to cast their votes and unannounced change of venue of some voting stations. As a result, many registered voters were disoriented and could not cast their votes despite the fact that Article 47 of the Electoral Act provided that the NIEC had to publish the list of voting stations and their addresses 30 days before the election. This did not allow candidates and parties to accredit their witnesses in all the voting stations and in time;
- Insufficient ballot papers for the number of registered voters in many voting stations favourable to opposition candidates, in violation of Article 56 of the Electoral Act. However, in areas favourable to Joseph Kabila, the number of ballot papers largely exceeded that of registered voters;
- Possession of unregistered ballot papers by some candidates and unauthorised persons. These papers were later introduced into the system and benefited some candidates and their parties, especially those of the ruling coalition;
- At a number of voting stations thousands of ballot papers were already marked in favour of presidential candidate no 3 (Kabila) and candidates for his party or the majority;

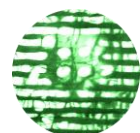


- In some voting stations in his province of origin (Katanga), Kabila obtained 100% of the vote while the 10 other candidates won 0%. In *UNC v Kabila Kabange*, the Supreme Court of Justice, acting as the Constitutional Court, dismissed Vital Kamerhe's complaint on the ground that the Constitution did not prevent any candidate from winning 100% of the vote;
- Some candidates were allowed to campaign after the deadline and around the voting stations, in violation of the Electoral Act;
- The minutes of the vote counting in some areas were not signed by competent electoral officers and by the witnesses of the candidates or parties, in violation of Article 38 of the Electoral Act;
- Witnesses of the candidates and parties were prevented from entering some voting and counting stations. The aim was to facilitate fraud;
- Falsification of ballot papers and election results in many areas;
- Reception of many parcels containing the ballot papers and the results several days after the election and manipulation or falsification of the results during their transfer to the counting stations, in violation of the Electoral Act;
- Non-publication of the results in the voting stations, as provided by law;
- Lack of independence and professionalism of public servants in the administration and security services (army, police, and intelligence services), who felt duty bound to work for the re-election of the outgoing president, the ruling party or the majority;
- Lack of independence and impartiality of the state media, which campaigned for the outgoing president, his party and coalition while closing their doors to the opposition, in violation of the Constitution and the Electoral Act;
- Utilisation of state material, financial resources and personnel in the campaign of the outgoing president and the candidates of his party or coalition in violation of the Constitution and Article 36 of the Electoral Act. This could lead to their invalidation by the NIEC, which it did not;
- Posting of campaign messages on public buildings, in violation of Article 30 of the Electoral Act;
- Destruction of many ballot papers, especially in areas suspected of favouring the opposition;
- Discordance between the results published by the NIEC and confirmed by the Supreme Court of Justice and those published at the voting stations in order to favour the outgoing president, the ruling party or coalition and their candidates;
- The presence in the voting stations of non-authorised persons such as local heads of the administration and members of the security services;
- Corruption of electoral officers or their collusion with some candidates, particularly those of the ruling party or coalition.

Against this backdrop, the 2011 elections in the DRC were neither credible nor democratic. Not only did the elections not comply with regional and sub-regional principles, norms, standards and guidelines they also failed to comply fully with domestic electoral norms, principles, and guidelines.

3. Conclusion and recommendations

Fifty years after independence, it must, unfortunately, be stressed that despite the number of instruments adopted and statements generally made for popular and Western consumption, many African leaders and organisations have provided little evidence of their commitment to democratic governance through the organisation of credible, transparent, free and fair elections.



African people need genuine democratic change and elections instead of a ‘cosmetic’ and ‘choiceless’ democracy (Ake 1996: 130, 132, 137; Mkandawire 1999: 119-135). They are fed up with ‘voting without choosing’ (Mkandawire 1999: 119-135). They are not interested in simply having elections but want elections that are credible and bring about positive change in their living conditions and in the governance of their countries.

They are interested in truly democratic, transparent, free and fair elections that allow them to elect legitimate leaders who serve their interests and also remain accountable to them.

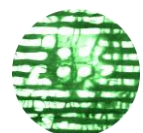
The post-colonial experience has shown that authoritarianism is not sustainable. Nor does it favour peace and development that Africa needs to achieve an African renaissance in the 21st century. The question is not whether elections matter or not, but what to do to make them democratic, credible, free and fair and ensure that they contribute to change. This is probably one of the greatest challenges confronting many African states since the demise of one-party rule.

Elections without change or fraudulent elections have resulted in some components of the people resolving to voting with their feet, with AK47s and with machetes in countries such as Burundi, Côte d’Ivoire, Egypt, Liberia, Libya, Kenya, Mali, Rwanda, Sierra Leone, Sudan, Tunisia, and Uganda, to name but a few. The DRC is one of the countries whose people tend to resort to rebellions and wars to make political change happen since violence seems to be the language that most African authoritarian leaders and even some prominent members of the international community understand.

The 2011 elections constituted a terrible setback, a fiasco, compared to elections organised in several other African countries and even to the first elections held in the DRC under the current Constitution in July 2006 (Mangu & Budeli 2008: 93-103, 109-112).

The DRC elections have eight lessons for African people as they head for their own election:

- While modern democracy cannot prosper without credible, transparent, free and fair elections, these require respect for the rule of law and for human rights. Non-credible elections, electoral frauds, vote rigging and corruption cannot lead to democratic consolidation in Africa or elsewhere.
- Voter education and a democratic culture among the electorate and mainly among political leaders, who should be prepared to win or lose an election and accept the results peacefully, are also needed for democratic consolidation.
- Democratic elections require the existence of credible, apolitical and non-partisan institutions such as public media, the police, the army, the security services, the electoral commission, and the judiciary.
- Democratic elections are costly, but each country should be able to fund its own instead of relying on foreign governments and institutions. If this is not possible countries should not be surprised that those who fund their elections also decide who should govern.
- Elections that were considered to be a solution to the problem of legitimacy of political institutions and leaders in a number of African countries, including the DRC, have turned out to be a major political problem which has a negative impact on development, peace and security. Instead of resolving problems, rigged elections may end up creating more problems, as has happened in the DRC, which has been confronted by a multifaceted rebellion since the 2011 elections.
- Elections are not a panacea for Africa’s problems of insecurity, wars, armed conflict, poverty, diseases and underdevelopment. However, after several decades of ‘dictatorships of



underdevelopment', sponsored by Western leaders and international financial institutions like the World Bank and the International Monetary Fund, democratic elections are the most probable means of bringing about peace, security and economic development in Africa. There is no alternative. Africa's peoples should therefore continue to struggle for democracy as one of their fundamental rights. Once democratic institutions have been established, the struggle should continue for their consolidation. In his famous Gettysburg Address, delivered in 1863, then US President Abraham Lincoln described democracy as the government 'of the people, by the people for the people'. Therefore, no one will ever champion and be interested in democracy, free and fair elections, and respect for human rights and the rule of law more than the people themselves.

- The AU and the African sub-regional organisations that have already adopted several benchmarks for democratic elections should ensure that member states actually and fully comply with these benchmarks or face sanctions, instead of condoning or encouraging electoral fraud and applauding leaders who use elections to impose themselves on their people or allow themselves to be imposed or tolerated by external political, economic, social, or religious forces to serve their own interests.

Finally, in Africa as elsewhere, democratic consolidation and credible elections are unlikely if parties, candidates, citizens and the Electoral Commission cannot freely campaign, vote and operate across the country due to armed conflicts. However, bringing peace is the main responsibility of the government and not of the electoral commissions. A very important lesson from the DRC 2011 elections is that credible, free and fair elections cannot be held without a truly independent, well-funded and equipped Electoral Commission which also enjoys the confidence of the electorate, the ruling party and the opposition. This is probably one of the biggest challenges confronting most African election monitoring bodies. This is also an area where the INEC seems to have performed well and in which it will need to assist sister institutions in other African countries like the DRC, which is expected to hold its next presidential and parliamentary elections after Nigeria in 2016.

Be it as it may, it would be wrong to suggest that constitutionalism can go without constitutions and elections do not matter for democracy. In our modern era, it is difficult, if not impossible, to consider that constitutionalism can go without a constitution and democracy can do without elections and without the rule of law (Bratton & Posner 1999: 379; Conac 1993a: 5; Conac 1993b: 492; Glaser 1996: 249-250; Mangu 2002: 199; Nzongola-Ntalaja 1997: 15; Pelletier 1993: 477).

As for modern constitutionalism, it cannot be promoted without a supreme and enforceable Constitution that provides for the limitation of powers of the government and protects the rights of the people, including their right to freely elect their representatives who will govern in the names and interests and remain accountable to them ().

