



CONSTITUTIONAL REFORMS IN FRANCE AND THEIR IMPLICATIONS FOR CONSTITUTIONALISM IN FRANCOPHONE AFRICA

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Introduction

One of the forces unleashed by the so-called “third wave” of democratisation¹ that hit the African continent in the late 1980s and early 1990s was an epidemic of constitution-making or revision. Under pressure from both within and without, African governments sought to re-establish their credibility with external donors and assuage popular internal pressure by tinkering or radically changing their constitutions. No African country has remained untouched by the fever of constitutional reforms, though the pace and intensity of the process has varied considerably from country to country. The new or revised constitutions have revolved around the two main Western models that were received during the colonial and post-colonial period: the Westminster parliamentary model widely adopted in Anglophone Africa and the French Fifth Republic Gaullist model widely adopted in Francophone Africa.

In a recent study analysing the prospects for constitutionalism in Africa’s post-1990 constitutions,² and the extent to which constitutions recognise and protect fundamental rights, provide for the separation of powers, guarantee judicial independence, limit the ability to amend the constitution and deal with control of the constitutionality of laws, it was shown that far more progress was made in Anglophone Africa than in Francophone Africa. The main reason why the prospects for constitutionalism have been far better under the constitutions of Anglophone African countries rather than those of Francophone African countries is that whilst reforms in all these countries have drawn a lot from their colonial legal heritage, the Anglophone African countries have approached these reforms with more openness and have looked far beyond England for inspiration and guidance. Members of constitutional reform commissions have travelled to Europe, North America, Asia, notably India, in order to learn more about modern constitutional developments. Many Francophone African constitutional draftsmen by contrast have continued to seek inspiration from and rely almost slavishly on what they perceive as the most reliable and unassailable constitutional model: the Gaullist Fifth Republic constitution and the timid amendments that have been made to it in the last fifty years.

Constitutions, like laws, should and do reflect the history and culture of any group of people at any given moment. The French Fifth Republic Constitution of 1958 was drafted at a momentous time of French history. There was a threat of a coup d’état caused by the Algerian crisis, a simultaneous

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¹ Samuel Huntington coined the expression in *The Third Wave: Democratization in the Late Twentieth Century* (1991). He defines a “wave of democratization” simply as “a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly out-number transitions in the opposite direction during that period.” *Id.* at 15 He identifies two previous waves of democratization: a long, slow wave from 1828–1926, and a second wave from 1943–1962. *Id.* at 16. Most writers consider the “third wave” to have started in the 1970s, although it only reached African shores in the late 1980s and early 1990s, in what Larry Diamond and others such as Julius Ihonvbere and Terisa Turner call “second liberation” or “second revolution”. See Larry Diamond, *Developing democracy in Africa: African and international perspectives*, paper presented at the workshop on democracy in Africa in comparative perspective, at Stanford University 2 (Apr. 27, 2001). (last visited on 7 September 2006)

² See Charles Manga Fombad, “Post-1990 constitutional reforms in Africa : A preliminary assessment of the prospects for constitutional governance and constitutionalism,” in Alfred Nhema & Paul Zeleza (eds.), *The Resolution of African Conflicts*, OSSREA, Addis Ababa & James Currey, Oxford (2008), pp.179-199.

economic crisis and the legacy of parliamentary logjams, deadlocks and futile coalitions that had led to twenty-three governments in twelve years. The French parliament in desperation called upon De Gaulle who virtually drew up a constitution on his own terms. It exalted the executive and severely constrained the legislature and subordinated the judiciary to the executive.³ This highly controversial constitution was widely copied in Francophone Africa and only tinkered with in the post-1990 constitutional reform processes to the extent to which reforms had been carried out in France.

When in July 2007, President Sarkozy created the “Commission to consider and make proposals on the modernisation and rebalancing of the relationship between the institutions of the Vth Republic,” otherwise known as the Balladur commission, it was the first time in fifty years that any serious attempt was being made to revise the French Constitution. On 29 October, the commission delivered its report entitled “A more Democratic Vth Republic,” to the president after three months of debate and hearings. Amidst fears that French political institutions were becoming increasingly outdated and dysfunctional, resulting in a stagnant and undemocratic society, the commission has recommended 77 key reforms which may entail the revision or addition of 41 articles to the present Constitution.

Having noted above that Francophone African constitutional engineers have essentially limited their focus and perspective on constitutional change and development to the fate 5th Republic Constitution, the Balladur proposals are therefore of enormous potential importance to Africa.⁴ It is contended here that the prospects for deepening constitutionalism in Francophone Africa today will largely depend on the extent to which these reforms enhance the prospects for constitutionalism. Constitutionalism can be briefly defined to encompass the idea that the constitution provides for a government that is not only limited in way that protects its citizens from arbitrary rule but also that such a government can operate efficiently and can be effectively compelled to operate within the limitations.⁵ Because of the vastness of the topic of constitutionalism, the discussion will be limited to three issues that can be considered amongst the cardinal sins of the Gaullist constitutional model viz, the “imperial” presidency, the strangled judiciary and the inaccessibility to individual citizens of constitutional rights protection.

The “imperial presidency”

Excessive executive powers vis-à-vis the other two branches of government is unfortunately a common feature of most modern constitutional models; but is particularly acute and entrenched in the 1958 French Fifth Republic Constitution and has been reinforced in African constitutions. Under a typical Francophone constitution, the president as head of the executive towers over and dominates the other two branches. He has extensive powers to appoint and dismiss at his pleasure, the prime minister, cabinet ministers, judges, generals and other senior officials. He can also veto newly enacted laws and declare a state of emergency.

One of the expectations of the Balladur proposals was that it would dramatically reduce the considerable powers wielded by the French president. One of the proposals recommends a revision of article 5 to state that the president “defines” the policy of the nation rather than that he “determines”

³ See further, S. E. Finer, Vernon Bogdanor & Bernard Rudden, *Comparing Constitutions*, Clarendon Press, Oxford (1995), pp.8-9.

⁴ Some of the quite significant changes that have taken place in the content of the constitutions of Francophone African countries is however not to be ignored. Perhaps one of the most fundamental of these changes is the inclusion in most of these constitutions of a bill of rights whereas the French Fifth Republic Constitution does not expressly set out a Bill of Rights but instead deals with this matter by incorporating those human rights proclaimed by the 1789 Declaration of the Rights of Man and the Citizen with the additions laid down in the preamble to the 1946 Constitution of the Fourth Republic. A noteworthy departure to the new pattern of express constitutional recognition and protection of human rights in Francophone African constitutions is Cameroon where human rights are only dealt with in a rather obscure and rhetorical manner in the preamble to the 1996 amendment to the constitution.

⁵ See Charles Manga Fombad, “Post-1990 constitutional reforms in Africa:,” *op. cit.*

it. It is not immediately obvious what difference other than semantic this makes. Apart from this symbolic change, article 5, which underscores the all-powerful nature of the presidency, remains intact. It states that the president has the duty to “ensure respect for the Constitution,” and “through his arbitration, ensure the proper functioning of public institutions,” and to “act as guarantor of the independence of the nation.” The impression given is that of the president being a person above party politics, a neutral power who reigns but does not govern and is exclusively preoccupied with the superior interests of the state. How can a president who has been elected on a party political platform suddenly be expected to distance himself from his political base and become apolitical?

The only possible significant inroads into presidential powers are the proposals to modify article 13 in order to subject some presidential appointments to the advice and consent of parliament; the revision of article 16 to limit the president’s powers in declaring a state of emergency; and the change to article 17 that subjects the president’s right to grant pardon to the advice of the Supreme Council on the Magistracy. A proposed revision to article 18 would allow the president to address both houses of parliament and also allow them to debate -- but not vote -- on the address.

These reforms do not go far enough to dismantle the enormous powers of the president, nor do they make him accountable to the people’s representative in the way that heads of government are accountable in the Westminster constitutional model.

A little more success was achieved in the proposals designed to increase the powers and influence of parliament vis-à-vis the executive which in many respects will enhance its ability to manage its own timetable and boost its oversight of the executive. The changes proposed include measures that aim to ensure that enough parliamentary time is reserved for parliament to exercise its legislative and supervisory functions and that there are enough committees to discharge these functions. Nevertheless, legislative functions still give a great deal of scope for the executive to adopt laws that have “un caractère réglementaire”, under article 37; while the legislature is responsible for primary legislation (les lois), under article 34. Thus, although the proposals show the beginnings of a greater separation between the executive and legislative function and the creation of some steps towards checks and balances between the two, the pendulum is still weighted in favour of the executive.

The emasculated judiciary

A formal constitutionally entrenched independent judiciary is absolutely essential and a necessary precondition to functional and substantive judicial independence. Although there is no consensus amongst scholars on exactly what this means, an independent judiciary can be defined as one that is free to render justice on all issues of substantial legal and constitutional importance, fairly, impartially, in accordance with the law and without threat, fear of reprisal, intimidation or any other undue influence or consideration.⁶ Many of the important determinants of judicial independence, such as vesting the judicial functions exclusively in the judiciary, qualifications for prospective judges, the independence of the appointment process, the independence of the judicial service commission, security of tenure, judicial remuneration and financial autonomy, disciplinary processes and judicial immunity are found in the new or revised constitutions of African countries.

The approach followed in Francophone African constitutions has however been significantly influenced by the Gallic obsessive fear of the threat of legal dictatorship through a “government of judges,” that can be traced back to pre-revolutionary France. Because of the bad reputation of royal courts or *parlements* before the French revolution, one of the first steps taken by the revolutionaries was to break the powers of these courts by subordinating them to the complete control by the executive.

⁶ See generally, Charles Manga Fombad, “A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions,” 2 *Public Law* (2007), pp.233-157.

Strangely, the Balladur Commission has recommended that the first part of article 64 of the 1958 Constitution, which states that, “the President of the Republic is the guardian of the independence of the judiciary” and has been widely copied in Francophone African constitutions, be retained intact. By expressly stating that the President of the Republic, the head of one of the three arms of government, is the guardian of one of the other branches, the judiciary, the constitution clearly suggests that the two branches are not on the same par and that the judiciary is below the executive. Perhaps one of the most significant recommendations, however, is the removal of the sentence in article 64 which provides that the president will be assisted in guaranteeing the independence of the judiciary by the Higher Council of Magistracy. There are also new proposals in article 65, establishing the Higher Council of Magistracy, suggesting that it should no longer be presided over by the President and assisted by the Minister of Justice, but rather by an independent person with links neither to the legislature nor the judiciary. Nonetheless, this person would be appointed by the President.

On the whole, the new proposals for the first time since the revolution of 1789 go a long way to remove the judiciary from the stranglehold of the executive by ensuring that the Higher Council of Magistracy -- usually responsible for the appointment, promotion, transfer and dismissal of judges and other senior judicial personnel -- is reasonably independent of the executive. The new proposals, if copied by Francophone constitutional engineers, could considerably reduce the present executive emasculation of the judiciary.

The individualisation of constitutional rights

A constitution is only as good as the mechanism provided within it for ensuring that its provisions are properly implemented and that any violations of it are promptly sanctioned. An important bulwark of constitutionalism is therefore the existence of an efficient and credible mechanism for controlling and compelling compliance with the letter and spirit of the constitution. Recognising the importance of controlling constitutional compliance, post-1990 African constitutions either followed the American system of judicial review that dates back to the famous judgment of Chief Justice Marshall in *Marbury v Madison*,⁷ the Gaullist system of quasi-administrative/quasi-judicial review before the Constitutional Council, or a mix of the two. The French model, which was widely adopted with slight changes in many Francophone African constitutions after independence, appears to have been abandoned in most recent constitutions. Studies have shown that the French Constitutional Council is today able to address some of the violations of the French Constitution by default rather than by design and that De Gaulle when he created this body as the handmaiden of a strong and dominant executive did not really expect it to be an arbiter of fundamental rights.⁸

A number of fundamental flaws in the design of the Constitutional Council ensured that it operated rather to block than to facilitate challenges to laws that violated the constitutions, especially at an individual level. It was essentially a quasi-administrative/quasi-judicial, rather than a judicial body, composed of persons who are not necessarily judges. The Council members are appointed almost exclusively by politicians, who are also the only persons who have the power to seize it. The manner of choosing the members of this body, which has been referred to as the “original sin” and “congenital defect” of this model, already compromises the chances of an effective review of constitutionality. The nature of the control and supervision the Council can exercise -- essentially by way of abstract pre-promulgation review of legislation -- then made the whole system irrelevant and unreal.⁹

⁷ 1 Cranch 137.

⁸ See discussion of this in Charles Manga Fombad, “The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?” 42 *Journal of African Law* (1998), pp. 172-186 and the same author in, “Protecting constitutional values in Africa: A comparison of Botswana and Cameroon,” 36 *CILSA* (2003), pp.83-105.

⁹ See, Charles Manga Fombad, “Protecting constitutional values in Africa: A comparison of Botswana and Cameroon,” *op. cit.* at p. 98 notes 58 and 59.

With the exception of Cameroon, which retained this model in its crudest form in its 1996 Constitution, most Francophone African post-1990 Constitutions have instead adopted constitutional courts with far more elements of the American system of judicial review. At the same time they have retained some of the advantages of the Constitutional Council model, such as the pre-promulgation review of constitutionality. Among these countries are Benin,¹⁰ Niger and Gabon.

The Balladur Commission's proposed new article 61-1 is a major breakthrough. For the first time, this article provides for an individual citizen to be able to challenge the constitutionality of any law that violates the constitutional provisions dealing with fundamental rights and liberty.¹¹ If the proposals are implemented, the system of control of constitutionality of laws should no longer depend entirely on the goodwill of the lawmaker or executive.

What is surprising here is that it has taken French constitutional experts all this while to recognise and deal with the deficiencies of the Constitutional Court model -- and then even in doing so they have not gone as far in recognising and protecting the individual citizen's constitutional rights as the constitutions of some Francophone African countries, including Niger, Benin and Gabon.

Conclusion

The Balladur proposals can hardly be termed revolutionary or radical. He had no mandate to be either revolutionary or radical for President Sarkozy when addressing the commission on 12 July 2007 had declared, "Je ne tournerai pas la page de la V^e République."¹² Apart from chauvinism and an almost macho attachment to Gaullism, it is difficult to see what is so special about the 5th Republic Constitution that it should be retained at all cost, even if only in name. It is clear that Sarkozy, like other French leaders, is too Gaullist at heart to see too great a diminution of presidential powers even if he is anxious to introduce the changes necessary to end governmental inertia and inefficiency.

In Francophone Africa, in spite of changing attitudes here and there, the spell of the Gaullist model is so powerful that legal reforms and their rationalisation are not judged in terms of what is right, just or suitable in a given situation, but rather whether it conforms to the French example. Perhaps the significance of the Balladur proposals, even if they do not eventually see the light of day, is to finally indicate to African constitutional engineers that the Gaullist model is not irreproachable and immutable.

In this era of globalisation, a cross fertilization of legal ideas is not only imperative but necessary. The South African Constitution proves this beyond any doubt: for example, it combines with tremendous advantages, the Gaullist pattern of pre-promulgation review of constitutionality with the American system of post-promulgation of legislation judicial review. The French constitutional reforms, especially when implemented, will certainly start a new phase of constitutional revision in Francophone Africa in a way that could open up new vistas for constitutionalism.

¹⁰ Gilles Badet has shown how the extensive powers given the Constitutional Court in Benin have enabled it to intervene in a very short while in more than 33 cases whereas many of the post-independence Constitutional Councils stood idle for decades and hardly ever handled any disputes. "La Cour constitutionnelle du Bénin en fait-elle trop ? Bilan et perspectives jurisprudentielles," (unpublished paper) presented at a conference on "Fostering constitutionalism in Africa," held in Nairobi from 18-20 April 2007,

¹¹ Many Francophone African countries had introduced this in the 1990s, for example in article 86 of the Gabonese Constitution of 26 March 1991 and article 113-115 of the Constitution of Niger of 18 July 1999.

¹² Literally, I will not turn the page on the 5th Republic, or I will not make the 5th Republic Constitution be a thing of the past.