

The 2006 CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF CONGO

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I. Origins and Historical Development of the Constitution

A. Historical background

During the 1884-85 Berlin Conference at which major European powers negotiated and formalised their claims to territory in Africa – a process generally known as the ‘scramble for Africa’ – the territory now known as the Democratic Republic of Congo (DRC) was allotted to Leopold II, the Belgian King who earlier had sent several exploration missions to the basin of the Congo River and established the *Comité d’Etudes du Congo* to prepare for the exploitation of his Congolese domain.

Despite the transformation of the *Comité d’Etudes du Congo* into the ‘International Association of Congo’ that subsequently became the ‘Congo Free State’ or the ‘Independent State of the Congo’ after the Berlin Conference, the Congo was neither an independent state nor a state at all. It was, rather, a personal domain of the Belgian King, who owned everything including the land, subsoil, and even the people of the Congo.

As the Belgian historian Jean Stengers rightly stressed, ‘To the King, the Congo Free State was just a going concern as Standard Oil was to John Rockefeller’.¹ However, the administration of such an immense domain was not an easy task. On 15 November 1908, the Independent State of the Congo became a Belgian colony under the name of the Belgian Congo. The struggle for independence subsequently began and intensified in the 1950s.

From 20 January to 20 February 1960, the Belgian government convened a Political Round Table Conference in Brussels. Three main issues were discussed during this conference. The first 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 was the nature of the political system or regime to be established, and the third related to the division of power between the central government and the provinces, or the form of the state.

On 27 January 1960, Belgium announced that independence would be granted on 30 June 1960. The first problem was therefore settled. The other two issues were to be addressed in the Constitution or the Fundamental Law. The political system had to be a parliamentary one and modelled on the political system in Belgium. As for the form of the state, this was the issue most discussed among the Congolese leaders.

According to Crawford Young, this was ‘the most dangerous issue’ during the conference and afterwards. The debate opposed the ‘Federalists’ and the ‘Anti-federalists’.²

¹ G Nzongola Ntalaja, *From Zaire to the Democratic Republic of the Congo* (Nordiska Africainstitutet, 1998) 6-7.

² C Young, *Introduction à la politique congolaise* (Translated from English by P. Duchesne) (CRISP, 1968) 304.

On 19 May 1960, Baudouin I, the Belgian King, promulgated the Fundamental Law on the Structures of the Congo. It was drafted by the Belgian government, adopted by the Belgian Parliament, and later published in the *Belgian Monitor* like any other Belgian law. This Fundamental Law was the first DRC constitution. It established a parliamentary system and a federal state despite the fact that this expression was never used.

The DRC is one of the largest African countries. In terms of its natural resources, it is one of the richest countries in the world. Strategically located in the heart of the continent, it is bordered by Angola, Burundi, Rwanda, the Central African Republic (CAR), the Republic of Congo, South Sudan, Uganda, Tanzania, and Zambia. Frantz-Fanon is reported to have said 'Africa is shaped like a gun, and Congo is the trigger. If that explosive trigger bursts, it is the whole [of] Africa that will explode'.³ Accordingly, anyone who holds power over or in the DRC is likely to control a major part of the continent. This has for a long time shaped the foreign policy of several powerful nations, especially the United States, France, and Belgium, the former colonial power. This also explains the fate of constitutionalism and democracy in the DRC and why it has been the theatre of so many conflicts since independence.

Between July and October 1960, less than four months after independence, the DRC was confronted by two major political crises. The first crisis was the secession of the province of Katanga on 11 July, which was followed by that of the South Kasai on 8 August 1960. It is no secret that the secessionist leaders Moise Tshombe and Albert Kalonji were encouraged by Belgium and its Western allies. They also played an important role in the second crisis that derived from President Joseph Kasa-Vubu's unconstitutional dismissal of Prime Minister Patrice-Emery Lumumba on 5 September 1960.

The Fundamental Law was an interim constitution, as it provided that it was to be replaced with a constitution enacted and adopted by the Congolese Parliament acting as the Constitutional Assembly.⁴ A constitutional commission mandated to draft the new constitution was appointed by President Joseph Kasa-Vubu in 1963. The commission was placed under the chairmanship of former Prime Minister Ileo. It started its work on 10 January 1964 in Luluabourg; hence the name 'Luluabourg Constitution' was given to this Constitution that was presented to the government on 15 April 1964, submitted to popular referendum from 25 June to 10 July 1964, and promulgated by the President on 1 August 1964. The political system provided for by the DRC's 1964 Constitution had both parliamentary and presidential features, while the state remained a federal one.

A new Parliament was elected in 1964 and Moise Tshombe was appointed Prime Minister on 10 July 1964. As he did on 5 September 1960 when he dismissed Prime Minister Lumumba, President Kasa-Vubu dismissed Prime Minister Tshombe. Although Parliament opposed Evariste Kimba's appointment on 18 October 1965, the President still refused to reappoint Tshombe as Prime Minister. The country was facing another political crisis that prompted the intervention of the army under the command of Lieutenant-General Mobutu, its chief of staff. Following a *coup d'état* perpetrated in the night of 23 – 24 November 1965, General Mobutu became the new leader of the country. Military rule was established and the 1964 Constitution was suspended.

³ C Young, 'Contextualizing the Congo Conflicts: Order and Disorder in Postcolonial Africa', in Clark JF (ed.) *The African Stakes of the Congo War* (Palgrave Macmillan, 2002) 14.

⁴ The Fundamental Law in the Structures of the Congo of 19 May 1960, Arts 98-105.

A new constitution was adopted by referendum held from 4 to 24 June 1967 and became the 'Constitution of the Second Republic'. This Constitution established a presidential system and a unitary state. By constitutional amendment of 29 October 1971 the country's name was changed from DRC to 'Zaire'. The 1967 Constitution was amended or changed around twenty times until the Mobutu regime was overthrown in May 1997, after 32 years of rule, by a rebellion led by Laurent-Desire Kabila.

On 17 May 1997 Laurent-Désiré Kabila proclaimed himself President of the country that he renamed 'DRC'. He signed into law a decree that gave him all executive and legislative powers. A conflict between him and President Yoweri Museveni of Uganda and Paul Kagame of Rwanda, who had been instrumental in bringing him to power, resulted in a multifaceted rebellion against his regime in 1998.

As a result of this rebellion, the DRC was divided into several administrations. President Laurent-Desire Kabila controlled a third of the country, a third fell under the *Rassemblement Congolais pour la Démocratie* (Congolese Rally for Democracy) (RCD), and another third under the Movement for the Liberation of Congo (MLC). The remaining territory was administered by small rebel groupings that split off from the RCD, the best known being the RCD – National (RCD-N) and the RCD – Liberation Movement (RCD-ML) that were also backed by Rwanda and Uganda. The DRC was actually invaded by these two neighbouring countries.

During the period from July to August 1999, internal and international efforts made in order to end the conflict in the DRC culminated in the signing of the Lusaka Cease-Fire Agreement under the aegis of the Southern African Development Community (SADC), the Organization of African Unity (AU) (now superseded by the Africa Union (AU)), and the United Nations (UN). The Lusaka Agreement provided for the cessation of hostilities and the organisation of an Inter-Congolese Dialogue (ICD) to reunite the country under a single government of national unity and establish the rule of law as a prerequisite for sustainable peace and democracy.

B. Birth of the Constitution

In January 2001, President Laurent-Desire Kabila was assassinated. He was succeeded by his son Joseph Kabila as the new DRC President. The ICD opened in Addis Ababa, Ethiopia, in October 2001, but could not finish its work due to problems of funding and a dispute over the representation of parties. On 25 February 2002 it reopened at Sun City, South Africa, under the facilitation of Sir Ketumile Masire, the former president of Botswana. It was adjourned on 19 April 2002 after 52 days of negotiations. Thirty-seven resolutions were adopted and a few days ahead of the closing, there was no agreement on the critical issue of the establishment of a consensual and inclusive political dispensation of the country during the transition.

On 17 December 2002 an all-inclusive agreement was reached in Pretoria under the leadership of South Africa's President Thabo Mbeki, who succeeded President Masire as facilitator in the Congolese crisis. This allowed for the ICD to be reconvened in Sun City on 31 March 2003. The Pretoria Agreement inspired the Interim Constitution, which was drafted by the representatives of all the Congolese parties around President Thabo Mbeki. This Constitution was adopted during the ICD on 31 March 2003 and promulgated by President Joseph Kabila on 4 April 2003.

The Pretoria Agreement provided for the formation of an interim government of national unity. Together with the Interim Constitution, to which it was annexed, it became the basic law during the transition.

According to the Interim Constitution, the Senate was tasked with the responsibility to draft a 'final' constitution. The process lasted from 23 December 2003 to 17 March 2005. During its plenary session held on 23 December 2003, the Senate resolved to consult with various political and civil society organisations. The campaign was launched in April 2003. It included the organisation of two workshops and a retreat for the drafting committee, which consisted of 16 members, who were mainly Congolese experts from public institutions and civil society organisations. The Constitutional Commission of the Senate adopted the report of the drafting committee on 24 February 2005. On 17 March 2005, the Senate adopted the draft constitution presented by its Constitutional Commission. The draft constitution of the Senate was tabled before the National Assembly on 29 March 2005. It was discussed by the Political, Administrative and Legal Commission of the National Assembly. The National Assembly adopted it on 16 May 2005. As required by the Interim Constitution, the draft constitution adopted by the National Assembly was published through the gazette. It was approved by popular referendum held from 18 to 19 December 2005. According to the provisional results of the referendum announced by the National Electoral Independent Commission on 11 January 2006, the constitution was approved by 84.31 per cent of the Congolese people. The Supreme Court of Justice, acting in lieu and place of the Constitutional Court, which had not yet been inaugurated, upheld these results on 3 February 2006.⁵

President Kabila promulgated the Constitution into law on 18 February 2006⁶ and it entered into operation on the same day.⁷ Also called the 'Constitution of the Third Republic', the 2006 Constitution, which was amended on 20 January 2011, is the third Congolese constitution adopted by referendum after the Constitutions of 1 August 1964 and 24 June 1967.

II. Fundamental Principles of the Constitution

The Preamble and Title I on 'General Provisions' help ascertain the fundamental principles of the 2006 Constitution. Under the 2006 Constitution,⁸ the DRC is:

- An independent and sovereign state

The DRC exercises permanent sovereignty over its soil, sub-soil, waters, and airspace.⁹ It is independent from any other entity. National sovereignty is vested in the people. All power derives from the people, who exercise this sovereignty directly by referendum or elections and indirectly through their representatives. No one person or group of people can claim this sovereignty.¹⁰

⁵ On the birth of the 1996 and 2006 DRC Constitutions, see J Djoli Eseng'Ekeli, *Droit constitutionnel. L'expérience congolaise (RDC)* (L'Harmattan, 2013) 183-186; JL Esambo Kangashe, *La Constitution congolaise du 18 février 2006 à l'épreuve du constitutionnalisme* (Bruylant-Academia, 2012) 44-51, 70, 84-96.

⁶ Art. 1.

⁷ Art. 229.

⁸ Art. 1.

⁹ Art. 9.

¹⁰ Art. 5.

- A state based on the rule of law

After decades of authoritarian and personal rule, the 2006 Constitution establishes a state based on the rule of law, which is a state where each person and institution is subject to the law. The judiciary is independent from the legislature and the executive. It is the watchdog of the Constitution and the guarantor of human rights and fundamental freedoms.¹¹

- A united state

Following nearly a decade during which the country was divided under several administrations, the 2006 Constitution aims at establishing a state united under a single national administration.

- An indivisible state

Since independence from Belgium in 1960, the DRC has had to deal with several threats of secession. In July 1960, a few days after independence, the Province of Katanga under Moïse Tshombe's leadership proclaimed its independence from Patrice-Emery Lumumba's central government in Kinshasa. This was followed by the Province of South Kasai, which was led by Isaac Kalonji in August 1960. The 2006 Constitution aims at securing the indivisibility of the state.

- A social state

The 2006 Constitution provides for a welfare state that cares for the well-being of its people, including the elderly, women, children, and disabled persons, and is committed to addressing their basic needs.

- A democratic state

For more than four decades the DRC was under authoritarian rule, which was a military or a single party regime. Accordingly, the 2006 Constitution provides for the sovereignty of the people¹² and the organisation of regular, free, and fair elections by the National Independent Electoral Commission.¹³ It also protects human rights and fundamental freedoms.¹⁴ The institution of a single party is unconstitutional¹⁵ and political opposition is recognised.¹⁶

- A secular state

There is no state religion. The DRC is a secular state that respects all forms of thought and beliefs. The right to freedom of thought, conscience, and religion is guaranteed. A law determines the conditions for the creation of religious associations.¹⁷

- A state based on the principle of the separation of powers

The 2006 Constitution provides for a horizontal and a vertical separation of powers. At the central level, four national institutions are vested with specific powers, namely the President of the Republic and the government, which form the executive; Parliament, which constitutes the legislature; and the courts and tribunals that form the judiciary.

¹¹ Arts 149-151.

¹² Art. 5.

¹³ Arts 5 and 211.

¹⁴ Arts 11-61.

¹⁵ Art. 7.

¹⁶ Art. 8.

¹⁷ Arts 22 and 37.

Powers are also separated vertically between the state, the provinces, and the territorial decentralised entities that are the cities, municipalities, sectors, and chieftainships.¹⁸

- A state that respects human rights

The 2006 Constitution contains an extensive Bill of Rights that protects civil, political, economic, social, cultural, and collective rights.¹⁹

- A state founded upon an entrenched constitution

The 2006 Constitution is the most entrenched constitution in the history of the DRC and the African continent. Its amendment is subject to stringent conditions, and can only be initiated by the President of the Republic, the government, Parliament, and a petition of at least 100,000 people. Parliament must then decide whether the initiative is well-founded. If so, the draft constitutional amendment is submitted to popular referendum for approval. Referendum is excluded when the draft amendment is approved by four-fifths of Parliament.

The Constitution contains a number of values and principles that cannot be amended. These especially protected constitutional values and principles are the following:

- the republican form of the state;
- the principle of universal suffrage;
- the representative form of the government;
- the number and duration of the terms of office of the President of the Republic;
- the independence of the judiciary; and
- political and trade union pluralism.²⁰

Any constitutional amendment that aims to or would result in the reduction of individual rights and freedoms or the prerogatives of the provinces is strictly forbidden. Some constitutional provisions are particularly important for the democratic rule of law to be established and consolidated in the DRC.²¹ Article 7 outlaws the establishment of a single party system on the entire or part of the national territory and makes it an imprescriptible crime of high treason punishable by law. Furthermore, Article 64 makes it a constitutional duty for each Congolese citizen to oppose any individual or group of individuals who seize power by force or exercise it in violation of the Constitution. Any attempt to overthrow a constitutional regime is also an imprescriptible crime against the nation and the state. It is punished by law.

III. Fundamental Rights Protection

Title II is the Bill of Rights. This Bill of Rights is modelled on the African Charter on Human and Peoples' Rights, which protects all the so-called three generations of rights and also provides for the duties of the citizens and the state. The rights protected are civil, political, economic, social, cultural, and collective rights.

¹⁸ Arts 2-4, 122-125, 195-206.

¹⁹ Title II, Arts 11-61.

²⁰ Art. 220.

²¹ Arts 7 and 64.

A. Civil and political rights²²

Civil and political rights or freedoms enshrined in the 2006 Constitution include the following:

- the right to freedom and equality;²³
- equality before the law and the right to equal protection and benefit of the law;²⁴
- the right to non-discrimination;²⁵
- the right to life, physical integrity, and free development of personality, the right not to be held in slavery or similar conditions, and not to be subjected to cruel, inhuman, and degrading treatment;²⁶
- the right to freedom and security of the person;²⁷
- the right to access to justice and to free trial;²⁸
- freedom of thought, conscience, and religion;²⁹
- freedom of speech ;³⁰
- the right to information;³¹
- freedom to peacefully assemble, demonstrate, and present petitions;³²
- the inviolability of domicile;³³
- the right to freedom of residence and movement;³⁴
- the right to privacy of life, correspondence, telecommunication, or any other form of communication;³⁵
- the rights of foreigners;³⁶ and
- the right to asylum.³⁷

Unlike civil rights, political rights only accrue to citizens. In terms of the 2006 Constitution, political rights and some rights that are considered civil rights under other constitutions are reserved for citizens only. These include the right to equality before the law and to equal protection and benefit of the law,³⁸ the right to non-discrimination in the field of education and access to public functions,³⁹ the right to present individual and collective petitions,⁴⁰ the right not to be expelled from the country, the right to asylum, and the right not to be compelled to live outside one's habitual residence.⁴¹

²² Arts 11-33.

²³ Art. 11.

²⁴ Art. 12.

²⁵ Arts 13-14.

²⁶ Art. 16.

²⁷ Arts 17 and 18.

²⁸ Arts 19-21.

²⁹ Art. 22.

³⁰ Art. 23.

³¹ Art. 24.

³² Arts 25-27.

³³ Art. 29.

³⁴ Art. 30.

³⁵ Art. 31.

³⁶ Art. 32.

³⁷ Art. 33.

³⁸ Art. 12.

³⁹ Art. 13.

⁴⁰ Art. 27.

⁴¹ Art. 30.

It is worth stressing that the right to vote or stand for election and the right to form and join a political party,⁴² which are political rights, are not provided under the civil and political rights in the Bill of Rights, but under the General Provisions.⁴³ The right to asylum can only be enjoyed by foreigners.⁴⁴

An interesting provision in the 2006 Constitution is the introduction of a new right to non-discrimination between men and women and their equal representation in national, provincial, and local institutions. This is known in the DRC as the 'right to parity'.⁴⁵

B. Economic, social and cultural rights⁴⁶

As for civil and political rights, the DRC Constitution deals with economic, social, and cultural rights without distinguishing clearly between them. Economic, social, and cultural rights in the 2006 Constitution include the following:

- the right to private property;⁴⁷
- the right to private initiative;⁴⁸
- the right to work;⁴⁹
- the right to freedom of association;⁵⁰
- the right to form or join a trade union;⁵¹
- the right to strike;⁵²
- the right to marriage;⁵³
- children's rights;⁵⁴
- the right to education;⁵⁵
- the right to culture, freedom of intellectual and artistic creation, and scientific and technological research;⁵⁶
- the right to health care and food security;⁵⁷
- the right to have access to adequate housing;⁵⁸ and
- the rights of the elderly and disabled people.⁵⁹

Interestingly, economic, social, and cultural rights, such as the right to work⁶⁰ and the right to form or join a trade union,⁶¹ are reserved for citizens only.

⁴² Arts 5 and 6.

⁴³ Title I.

⁴⁴ Art. 33.

⁴⁵ Art. 14.

⁴⁶ Arts 34-49.

⁴⁷ Art. 37.

⁴⁸ Art. 35.

⁴⁹ Art. 36.

⁵⁰ Art. 37.

⁵¹ Art. 38.

⁵² Art. 39.

⁵³ Art. 40.

⁵⁴ Art. 41.

⁵⁵ Arts 43, 44, 45.

⁵⁶ Art. 46.

⁵⁷ Art. 47.

⁵⁸ Art. 48.

⁵⁹ Art. 49.

⁶⁰ Art. 36.

⁶¹ Art. 38.

C. Collective rights⁶²

Collective rights include community rights to peaceful existence and the right of ethnic groups to harmonious existence with others,⁶³ the right to national and international peace and security,⁶⁴ the right to a safe environment,⁶⁵ the people's right to enjoy national resources,⁶⁶ and the right to the common inheritance of humanity.⁶⁷

Apart from the rights that are enshrined in the Constitution, the Congolese people and foreigners in the DRC are also entitled to the rights protected by universal and regional instruments that have been duly concluded. This is the case of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and, at the regional level, the African Charter on Human and Peoples' Rights and other African instruments.

D. Duties of citizens⁶⁸

One of the features of the 2006 Constitution is that it not only protects rights but also provides for the duties of citizens.

The constitutional duties of citizens include the following:

- the duty to respect the Constitution and the laws of the Republic;⁶⁹
- the duty to defend its territorial integrity;⁷⁰
- the duty to protect the Constitution and oppose any person or group of persons who come to power by the use of force or exercise it in violation of the Constitution;⁷¹
- the duty to pay taxes;⁷²
- the duty to promote national solidarity;⁷³ and
- the duty to respect community goods.⁷⁴

E. Application, enforcement of the Bill of Rights, and remedies for human rights violations

The judiciary is the protector or guarantor of human rights and individual freedoms.⁷⁵ Unfortunately, the case law under the 2006 Constitution does not contain any single instance where the judiciary has granted appropriate relief, including a declaration of rights, for human rights infringements.

⁶² Arts 50-59.

⁶³ Art. 51.

⁶⁴ Art. 52.

⁶⁵ Arts 53-55.

⁶⁶ Art. 58.

⁶⁷ Art. 59.

⁶⁸ Arts 62-67.

⁶⁹ Art. 62.

⁷⁰ Art. 63.

⁷¹ Art. 64.

⁷² Art. 65.

⁷³ Art. 66.

⁷⁴ Art. 67.

⁷⁵ Art. 150.

The Congolese judiciary is still to decide on the application of the Bill of Rights and the remedies for human rights violations. On the other hand, the people have not taken their constitutional rights seriously by approaching the courts for appropriate relief or remedies for their infringement.

F. Limitation of rights

The 2006 Constitution does not contain a general limitation clause. However, it provides a list of rights and fundamental principles that can never be derogated from, limited, or suspended. These rights and principles are the following:

- the right to life;
- the right not to be subjected to torture and cruel, inhuman, or degrading treatment;
- the right not to be subjected to slavery, servitude, or forced labour;
- the principle of the legality of crimes and punishments;
- the rights of arrested, detained, and accused persons to fair trial and to appeal;
- the prohibition of imprisonment for debts; and
- freedom of thought, conscience, and religion.⁷⁶

G. Constitutional status of human rights guaranteed in international treaties

The DRC is a state party to several universal and regional human rights treaties. The constitutional status of the human rights guaranteed in these treaties, as well as that of these treaties themselves, is determined by the Constitution, which provides that treaties and international agreements that have been lawfully concluded prevail over the law on their publication, subject to their application by the other parties.⁷⁷ These human rights therefore have the same status as constitutional rights. Unfortunately, as for the constitutional rights, the judiciary is still to decide on their application, enforcement, and remedies in the event that they are threatened or infringed.

IV. Separation of Powers

The 2006 Constitution is based on the separation of powers. It provides that the institutions of the republic are the President of the Republic; Parliament; the government; and the courts and tribunals.⁷⁸

The President and the government, or the Cabinet, exercise the executive authority of the Republic, while the legislative authority is vested in Parliament and judicial authority in the courts and tribunals.

⁷⁶ Art. 61.

⁷⁷ Art. 215.

⁷⁸ Art. 68.

A. The President of the Republic⁷⁹

The President is the head of state and represents the nation. He or she is the symbol of national unity and the guarantor of national independence, territorial integrity, sovereignty, and respect for the Constitution, treaties, and other international agreements.⁸⁰

The President is directly elected by adult universal suffrage for a five-year term renewable only once.⁸¹ In terms of a constitutional amendment passed on 20 January 2011, a simple majority of votes is now required to be elected President. This amendment was carried out in conformity with the Constitution. However, as will be stressed later, its provisions regarding the judiciary and the provinces did not pass constitutional muster.

The original Article 69 of the 2006 Constitution required an absolute majority, which could lead to a second round of election between the top two presidential contenders. A run-up presidential election is no longer necessary. To be elected President of the Republic, a person should be a Congolese citizen by birth; at least 30 years old; enjoy all civil and political rights; and not be excluded by the electoral law.

The National Electoral Independent Commission must call for a presidential election within 90 days before the expiration of the term of the incumbent President⁸² or between 60 and 90 days when the Constitutional Court has declared a vacancy in the office of the President.⁸³

The President appoints the Prime Minister within and after consultation with the majority party or coalition in Parliament. The other members of the Cabinet are appointed by the President from a list presented by the Prime Minister. They may be dismissed in the same manner.⁸⁴ The President appoints the members of the judiciary and can also dismiss them on the proposition of the High Council of the Magistracy.⁸⁵ The President is the commander in chief of the armed and security forces. He presides over the High Council of Defence.⁸⁶

When serious circumstances threaten directly the independence or the territorial integrity of the Republic or result in the interruption of the normal functioning of its institutions, the President may proclaim a state of emergency or a state of siege after consulting with the Prime Minister and the Presidents of the two Chambers of Parliament. He must then address the nation.⁸⁷

⁷⁹ Arts 69-89.

⁸⁰ Art. 69.

⁸¹ Art. 70.

⁸² Art. 73.

⁸³ Art. 76.

⁸⁴ Art. 78.

⁸⁵ Art. 82.

⁸⁶ Art. 83.

⁸⁷ Arts 85, 144 and 145.

During a state of emergency the President enjoys exceptional powers, as he or she is entitled to take, by ordinances deliberated by the Council of Ministers, all the necessary measures to deal with the situation.⁸⁸ This provision was drawn from Article 16 of the 1958 Constitution of France, or the Constitution of the 5th Republic, which grants the President all powers during the state of emergency or the state of siege. However, it has not yet been invoked under the 2006 Constitution. In the same circumstances, the President may declare war following advice of the High Council of Defence and authorisation by the National Assembly and the Senate. The nation is also informed by a message.⁸⁹

The rights and duties of citizens can be modified by an Act of Parliament during war or foreign aggression towards the territory of the Republic.⁹⁰ However, as pointed out earlier, rights and fundamental principles such as the right to life, the prohibition of torture and cruel, inhuman, or degrading punishments or treatments, the prohibition of slavery and servitude, the principle of the legality of crimes and punishments, the rights of defence (fair trial) and the right to appeal before the courts or tribunals, the prohibition of imprisonment for debts, and freedom of thought, conscience, and religion, can never be limited, suspended, or derogated from.⁹¹

The President also exercises some law-making powers. The President promulgates Acts of Parliament into law.⁹² He or she may request a second deliberation of an Act of Parliament (veto)⁹³ or approach the Constitutional Court to review the constitutionality of an Act of Parliament prior to its promulgation.⁹⁴ He or she is entitled to initiate a constitutional amendment or take it to a referendum.⁹⁵ The President can also request a special sitting of the National Assembly or the Senate.⁹⁶

After consulting with the Prime Minister and the Presidents of both the National Assembly and the Senate, the President may dissolve the National Assembly when there is a persistent crisis between the government and the Assembly. The National Assembly cannot be dissolved during the year following the election of its members, during a state of emergency, a state of siege, or under an interim President of the Republic. The National Electoral Independent Commission has to organise a new election of the National Assembly within 60 days.⁹⁷ On the other hand, when there is a severe political crisis that threatens the regular functioning of the provincial institutions, the President can dissolve a provincial assembly by ordinance deliberated during the Council of Ministers and after consulting with the presiding officers (Bureaux) of the National Assembly and the Senate.

⁸⁸ Art. 145.

⁸⁹ Arts 86 and 143.

⁹⁰ Art. 143.

⁹¹ Art. 197.

⁹² Arts 136, 137 and 140.

⁹³ Art. 137.

⁹⁴ Art. 139.

⁹⁵ Art. 218.

⁹⁶ Art. 116.

⁹⁷ Art. 148.

An election of the new Provincial Assembly is organised by the National Electoral Independent Commission within a minimum of 60 days and a maximum of 120 days after the dissolution.⁹⁸

In the same circumstances and following the same procedure, the President may dismiss the Governor of a province, who presides over the provincial government. The National Electoral Independent Commission must organise a new election within 30 days.⁹⁹

The President can be impeached by Parliament in the case of high treason or intentional violation of the Constitution.¹⁰⁰ The Constitutional Court is competent to try the President and the Prime Minister for high treason, intentional violation of the Constitution, or serious violations of human rights.¹⁰¹ The President or Prime Minister must resign when they are found guilty by the Constitutional Court.¹⁰²

When there is a vacancy in the office of the President because the President has died, has resigned, or is impeached, the vacancy is declared by the Constitutional Court. The President of the Senate then becomes the Interim President of the Republic. He or she is not entitled to appoint or dismiss the Prime Minister and other members of the Cabinet, ambassadors and special envoys, senior officers of the army and the police and other high ranking officials in the administration and public services. Nor may he or she appoint or dismiss members of the judiciary.¹⁰³ His or her main duty is to ensure that the election of a new President is held within 60 to 90 days after the declaration of the vacancy or the final ruling on the impeachment. The new President is elected for a five-year period, renewable once.¹⁰⁴

B. The Government¹⁰⁵

The national government consists of the Prime Minister, Ministers, and Vice-ministers. It may include Vice-Prime Ministers and State or Delegated Ministers.¹⁰⁶ The Prime Minister is the head of the government or the Cabinet. As stressed earlier, the Prime Minister is appointed by the President of the Republic from the majority party or coalition in Parliament.

⁹⁸ Art 197.

⁹⁹ Art. 198.

¹⁰⁰ Art. 166.

¹⁰¹ Arts 163 and 164.

¹⁰² Art. 167.

¹⁰³ Art. 75.

¹⁰⁴ Art. 76.

¹⁰⁵ Art. 90-95.

¹⁰⁶ Art. 90.

The remaining members of the Cabinet are appointed and can be dismissed by the President on the proposal of the Prime Minister.¹⁰⁷

The government determines the policies of the nation after consulting with the President. Public servants, members of the defence forces, and police and security services are under the authority of the government, although the President and the government should co-operate in the areas of defence, security, and foreign affairs.¹⁰⁸

The members of the Cabinet can initiate legislation and amendment to legislation, including that concerning the national budget.¹⁰⁹ The government can also initiate a constitutional amendment.¹¹⁰ The government can also exercise delegated legislative authority. The Constitution requires that for an urgent implementation of its programme of action, the government can request the authorisation of the National Assembly or the Senate to pass ordinances or laws for a limited period and on some specified legislative matters. These ordinances can only be modified by an Act of Parliament. They cease to be valid when the period for which they were authorised has expired without the passing of the enabling law or when the latter has been repealed by Parliament.¹¹¹

The government is accountable to the National Assembly.¹¹² After its appointment by the President and prior to the commencement of its functions, the Prime Minister presents the programme of the government to the National Assembly to request its confidence. The government is invested and starts its work once the programme has been approved by the National Assembly.¹¹³

The members of the government remain accountable to the National Assembly during the exercise of their mandate. The Prime Minister may request a vote of confidence on any question of national interest. On the other hand, the National Assembly can hold the government accountable through the vote of a no-confidence motion. The vote of such a motion can result in the resignation of the entire government or that of its members concerned by the motion.¹¹⁴ Although the government is also accountable to the Senate as the second Chamber of Parliament,¹¹⁵ the National Assembly alone can vote for a motion of no-confidence in the government. However, both Chambers may impeach the President, the Prime Minister, or any other member of the government.¹¹⁶

¹⁰⁷ Art. 78.

¹⁰⁸ Art. 91.

¹⁰⁹ Arts 130-133.

¹¹⁰ Art. 218.

¹¹¹ Art.129.

¹¹² Arts 91 and 100.

¹¹³ Art. 90.

¹¹⁴ Arts 146-147.

¹¹⁵ Art. 100.

¹¹⁶ Arts 165-166.

C. Parliament

Parliament is bicameral. It consists of two Chambers: the National Assembly and the Senate. Both Chambers enjoy administrative and financial autonomy. Each Chamber elects its presiding officers or its Bureau and is governed by its Rules.¹¹⁷

Members of Parliament enjoy rights, including immunities.¹¹⁸ They cannot be prosecuted, arrested, detained, or judged for their opinions or votes expressed during the exercise of their functions. During the sitting of Parliament, except for the case of flagrant crime, they can only be prosecuted or arrested with the authorisation of the Chamber to which they belong. When the Chamber is not sitting, the authorisation of its presiding officers or its Bureau is required. The detention or prosecution of a Member of Parliament can be suspended at the request of the Chamber to which he or she belongs.¹¹⁹

According to the separation of powers principle, the functions of a Member of Parliament are incompatible with several other functions, such as the functions of a member of the government, a judge or a magistrate, a public servant, a member of an institution supporting democracy, a member of the defence forces, the police and security services, or any other public function.¹²⁰ A Member of Parliament, a deputy, or a senator who resigns from the political party or grouping that nominated him or her during the elections automatically ceases to be a Member of Parliament.¹²¹

Parliament is competent to enact and amend laws. It also controls the government, public entities, and services.¹²² The instruments at the disposal of Parliament to control the government, public entities, and services include parliamentary questions and hearings, confidence votes, and enquiry commissions.¹²³

The two Chambers of Parliament sit separately when at least the majority of their members are present.¹²⁴ They hold two annual ordinary meetings, the first from 15 March to 15 June, and the second from 15 September to 15 December. The maximum period for each meeting is three months.¹²⁵ Each Chamber can also hold an extraordinary meeting for a period not exceeding 30 days and on a specific agenda at the request of its Bureau, the President of the Republic, the government, or half of its members.¹²⁶

¹¹⁷ Arts 111-121.

¹¹⁸ Arts 107 and 111.

¹¹⁹ Art. 107.

¹²⁰ Art. 108.

¹²¹ Art. 110.

¹²² Art. 100.

¹²³ Art. 138.

¹²⁴ Art. 118.

¹²⁵ Art. 115.

¹²⁶ Art. 116.

The two Chambers of Parliament can also hold a joint session, known as the ‘Congress’,¹²⁷ in the following cases:

- amendment of the Constitution;
- the proclamation of a state of emergency or a state of siege or the declaration of war by the President of the Republic;
- audition of the presidential address on the State of the Nation;
- nomination of three members of the Constitutional Court; and
- impeachment of the President and the Prime Minister.

The two Chambers of Parliament differ in some instances.

1. The National Assembly¹²⁸

The members of the National Assembly are called ‘national deputies’. They represent the nation.¹²⁹ Accordingly, they cannot be dictated to by their parties or by the electorate during the exercise of their parliamentary functions.¹³⁰ National deputies are elected by a direct and universal adult suffrage for a five-year term. Unlike the President of the Republic, who can be re-elected once only, the members of the National Assembly can be re-elected indefinitely.¹³¹

As stressed earlier, the government is accountable to the National Assembly, which alone is empowered to approve the programme of action of the government as the requirement for it to commence its functions, and which may adopt a no-confidence vote resulting in the resignation of the government or one of its members.¹³²

While both Chambers of Parliament can impeach the President and the Prime Minister, the National Assembly alone can impeach other members of the government.¹³³ Both Chambers are empowered to pass and amend laws.¹³⁴ However, the government can only table the annual finances or budget bill before the National Assembly.¹³⁵

To be elected as a Member of the National Assembly, the candidate must qualify as a Congolese citizen, not necessarily by birth (as required for the President of the Republic); be at least 25 years old (unlike candidates for President, who must be 30 years of age); enjoy full civil and political rights; and not be excluded by the electoral law.¹³⁶

¹²⁷ Arts 119 and 176.

¹²⁸ Arts 101-103.

¹²⁹ Art. 101.

¹³⁰ Art. 101.

¹³¹ Art. 103.

¹³² Arts 90, 91, 100, 146-147.

¹³³ Art. 166.

¹³⁴ Arts 100, 130, 135.

¹³⁵ Art. 126.

¹³⁶ Art. 106.

When there is a disagreement between both Chambers of Parliament, the National Assembly will prevail over the Senate.¹³⁷ The Constitution provides for the dissolution of the National Assembly by the President.¹³⁸

Finally, Parliament may, by a no-confidence vote, impeach the President of the Republic and remove the Prime Minister and the members of his government, or some of them. The National Assembly may also be dissolved by the President after consulting the Prime Minister and the presidents of both the National Assembly and the Senate when there is a persisting crisis between the National Assembly and the government.

2. The Senate¹³⁹

The members of the Senate are called 'senators'. Unlike their colleagues of the National Assembly, who represent the nation, senators represent the provinces, although their mandate is also a national one. Former Presidents of the Republic are *ex officio* senators for life.¹⁴⁰ They are elected by the provincial assemblies for a five-year term.¹⁴¹ The requirements for election as a senator¹⁴² are the same as for a national deputy, except for the minimum age of 30 years (as for the President of the Republic), while it is 25 years for a national deputy.

The powers of the Senate are almost the same as those of the National Assembly. With regard to its legislative authority and its relationships with the government, the Senate is less powerful than the National Assembly. First, the National Assembly prevails over the Senate when there is disagreement between the two Chambers on any question which requires an identical view.¹⁴³ Second, when the two Chambers of Parliament sit together as Congress, the Bureau is that of the National Assembly.¹⁴⁴ Third, the government is accountable to the National Assembly¹⁴⁵ and not to the Senate. Accordingly, the Senate cannot adopt a no-confidence vote resulting in the resignation of the government or some of its members.

The Senate has no say on the impeachment of the members of the executive other than the President of the Republic and the Prime Minister.¹⁴⁶ However, the Senate seems to be more powerful in some other matters. For instance, in the case of a vacancy in the office of the President of the Republic, for instance, the interim period is taken up by the President of the Senate¹⁴⁷ and not by the Speaker or the President of the National Assembly.

¹³⁷ Art. 113.

¹³⁸ Art. 148.

¹³⁹ Arts 104-106.

¹⁴⁰ Art. 104.

¹⁴¹ Art. 105.

¹⁴² Art. 106.

¹⁴³ Art. 113.

¹⁴⁴ Art. 120.

¹⁴⁵ Arts 90, 91, 146-147.

¹⁴⁶ Art. 166.

¹⁴⁷ Art. 75.

Moreover, unlike the National Assembly, which can be dissolved during a political crisis, the Senate can never be dissolved.¹⁴⁸

D. The Judiciary¹⁴⁹

The judicial authority of the DRC is vested in the courts and tribunals¹⁵⁰ that constitute the judiciary. The Constitution provides that justice is administered in the name of the people, but judicial decisions are enforced in the name of the President of the Republic.¹⁵¹

The judiciary is the guarantor of individual freedoms and fundamental rights of the citizens. In the exercise of their functions, judges are subject only to the law. A special law determines their status. A judge can only be replaced and transferred to another jurisdiction following a new appointment at his or her request or according to a general and motivated decision of the High Council of the Magistracy.¹⁵²

The judiciary is independent from the legislature and the executive. Neither the executive nor the legislature can interfere in the exercise of judicial power, decide on judicial matters, obstruct the administration of justice, or oppose the enforcement of a judicial decision.¹⁵³ It has a budget which is prepared by the High Council of the Magistracy and sent to the government, annexed to the general budget of the state.¹⁵⁴ The High Council of the Magistracy is the competent authority to manage the judiciary and to advise on the appointment, promotion, and the dismissal of judges and magistrates. The Constitution provides for the High Council's composition, which is limited to the members of the judiciary, while an organic law provides for its organisation and its running.¹⁵⁵

Courts and tribunals that form the judiciary include the Constitutional Court, the Court of Cassation, the State Council, the High Military Court, and other civil and military courts and tribunals.¹⁵⁶ Specialised jurisdictions can be established by law, but the Constitution outlaws the existence of extraordinary courts or tribunals.¹⁵⁷ The Office of the Public Prosecutor, which earlier enjoyed independence like judges and magistrates, lost this in terms of the 2011 constitutional amendment that put it under the authority of the government through the Ministry of Justice. This constitutional change aimed to reinforce the powers of the executive, especially the President. Arguably, it violated Article 220 of the Constitution insofar as it affected the independence of the judiciary.

¹⁴⁸ Art. 148.

¹⁴⁹ Arts 149-169.

¹⁵⁰ Under the DRC Constitution, courts and tribunals are all judicial institutions. However, courts rank higher than tribunals, which are hierarchically inferior.

¹⁵¹ Art. 149.

¹⁵² Art. 150.

¹⁵³ Arts 49 and 151.

¹⁵⁴ Art. 149.

¹⁵⁵ Arts 149 and 152.

¹⁵⁶ Art. 149.

¹⁵⁷ Art. 149.

The DRC's judicial system was inspired by the French system, which distinguishes between judicial¹⁵⁸ and administrative¹⁵⁹ jurisdictions that deal with judicial and administrative matters, with the Constitutional Court standing alone.¹⁶⁰ Military jurisdictions are also established. When the President of the Republic has declared war or proclaimed a state of siege or a state of emergency, he or she may for a specified time and for specified crimes suspend the criminal action of ordinary courts and tribunals to the benefit of military jurisdiction on the entire or part of the national territory.¹⁶¹ The Court of Cassation and the State Council are the highest judicial and administrative jurisdictions, respectively.

The Constitutional Court consists of nine members,¹⁶² three of whom are appointed by the President, three by Parliament, and three by the High Council of the Magistracy, for a non-renewable nine-year period. The President of the Constitutional Court is elected by his or her peers for a period of three years, renewable once.¹⁶³

The Constitutional Court is competent to deal with disputes related to parliamentary and presidential elections and referenda, and proclaims their results. It decides on the conflict of competence between the national executive and the legislature, between the state and the provinces, and between jurisdictions that both declare themselves competent or incompetent to deal with a particular case.

The Constitutional Court also pronounces on appeals lodged against the decisions of the Court of Cassation and the State Council about the distribution of cases among judicial or administrative courts or tribunals under their respective authorities.¹⁶⁴ It is the judge of the President and the Prime Minister following the procedure of impeachment initiated by the Members of Parliament, while other high-ranking officials, such as deputies, senators, ministers, and governors can be judged by the Court of Cassation.¹⁶⁵ Further details on the competence of the Constitutional Court in constitutional matters are provided in Section VI dealing with 'Constitutional Adjudication'.

E. Institutions supporting democracy

Under its Title V, the Constitution provides for two institutions that support democracy: the National Electoral Independent Commission¹⁶⁶ and the High Council of the Media and Communication.¹⁶⁷ The first is responsible for the organisation of referenda and regular, free, and fair elections. The second is mandated to regulate the media and ensure its freedom.

¹⁵⁸ Art. 153.

¹⁵⁹ Arts 154-155.

¹⁶⁰ Art. 157.

¹⁶¹ Art. 156.

¹⁶² Arts 157-158.

¹⁶³ Art. 158.

¹⁶⁴ Art. 161.

¹⁶⁵ Arts 165-167.

¹⁶⁶ Art. 211.

¹⁶⁷ Art. 212.

Other institutions supporting democracy can be established by law.¹⁶⁸ This is the case of the National Council of Human Rights that was inaugurated in March 2015.

The harsh reality of politics is different. The National Electoral Commission is independent in name only. Most of its members are appointed by the ruling coalition, and the Commission has so far failed to deliver free and fair elections. The High Council of the Media and Communication, which should autonomously regulate all the media, whether public or private, is supervised by the Minister of Information under the leadership of the President. On the other hand, more than five months after their election in March 2015, the members of the National Council of Human Rights were prevented from taking up their posts by a challenge before the Constitutional Court over their election.¹⁶⁹ The DRC is a country where serious and massive human rights abuses continue unabated and the various institutions established by the Constitution to support democracy have not yet risen to the challenge.

F. Nature of the political system

The system of government established by the 2006 Constitution was inspired by the French model. On paper, it is a semi-parliamentary system, having many features of the parliamentary system but also borrowing some features from the presidential regime. From the parliamentary system, the political system established by the Constitution borrows the following features:

- accountability of the Cabinet to the National Assembly;¹⁷⁰
- a two-headed executive, consisting of the President of the Republic¹⁷¹ and the government under the leadership of the Prime Minister;¹⁷²
- a Prime Minister appointed from the majority party or coalition in Parliament, especially within the National Assembly;¹⁷³
- a government that needs the confidence of the National Assembly to function and remain in power, as a no-confidence vote would result in the resignation of all or some of its members;¹⁷⁴ and
- the possibility of the dissolution of the National Assembly by the President of the Republic in case of a persisting crisis between the government and the National Assembly.¹⁷⁵

The regime has also some presidential features. The most important relates to the central place in the system of the President of the Republic and the powers vested in him or her, contrary to a parliamentary system where the President is a figurehead and most decisions he or she makes are dictated by the government or the Cabinet.

¹⁶⁸ Art. 222.

¹⁶⁹ <http://www.radiokapi.net/actualite/2015/04/03/rdc-controverse-sur-la-composition-de-la-commission-nationale-des-droits-de-lhomme> (accessed 7 July 2015).

¹⁷⁰ Arts 90, 91, 138, 146-147.

¹⁷¹ Arts 69-89.

¹⁷² Arts 90-95.

¹⁷³ Art. 78.

¹⁷⁴ Arts 90, 91, 146-147.

¹⁷⁵ Art. 148.

The 2006 Constitution provides that the President of the Republic is directly elected by the people.¹⁷⁶ He or she participates in the definition of the policies of the nation by the government.¹⁷⁷ He or she convenes and chairs the Council of Ministers or the Cabinet and can delegate this power to the Prime Minister.¹⁷⁸ He or she may veto an Act adopted by Parliament or request the Constitutional Court to pronounce on its constitutionality prior to its promulgation.¹⁷⁹ The President of the Republic invests by ordinance the governors and vice-governors of the provinces.¹⁸⁰ He or she can dissolve the National Assembly,¹⁸¹ a provincial assembly,¹⁸² or dismiss a governor of a province.¹⁸³ He or she can approach the Constitutional Court to request the interpretation of the Constitution¹⁸⁴ or to check the constitutionality of a treaty or an international agreement prior to its ratification or approbation.¹⁸⁵ The President of the Republic can also initiate a constitutional amendment.¹⁸⁶

The above presidential powers are unprecedented and in practice take the system far beyond a presidential system to make it a 'presidentialist' one, since most executive, legislative, and even judicial powers are actually in the hands of the President. The 'presidentialist system' is a corrupt presidential regime characterized by the concentration of powers in the hands of the President. There is no separation of powers but, in Buchmann's words, 'a real hierarchy of powers where one institution, actually a man, dominates all other institutions including Parliament that is left a very derisory role.'¹⁸⁷

The reference to the domination of a 'man' may sound too paternalistic by today's standards since it can also benefit 'woman' in the office of the President. This recently happened in Liberia, where Ellen Johnson Sirleaf Johnson, who served as Minister of Finance under President William Tolbert from 1979 until the 1980 *coup d'état*, was elected Liberia's 24th President and Africa's first female democratically-elected head of state in 2005. She was re-elected for a second term in 2011 and is still running the country. Joyce Banda, who was the first female Vice-President of Malawi and succeeded President Bingu wa Muthariki when he died in office in 2012, became Malawi's first and Africa's second female President from 7 April 2012 to 31 May 2014. The third woman to defy stereotypes by fighting her way to acquire the top post in her country is Catherine Samba-Panza, the former Mayor of the city of Bangui, who was elected Central African Republic's Interim President on 20 January 2014 and is the first female to lead this country. There is no evidence that female Presidents are less authoritarian and more democratic than their male counterparts.

¹⁷⁶ Art. 70.

¹⁷⁷ Art. 91.

¹⁷⁸ Art. 79.

¹⁷⁹ Arts 124 and 137.

¹⁸⁰ Art. 80.

¹⁸¹ Art. 148.

¹⁸² Art. 197.

¹⁸³ Art. 198.

¹⁸⁴ Art. 161.

¹⁸⁵ Art. 216.

¹⁸⁶ Art. 218.

¹⁸⁷ J Buchmann, *L'Afrique noire indépendante* (LGDJ, 1962) 252-278.

However, in Africa as in other parts of the world, including in the countries of ‘old democracy’ like France and the United States, male citizens have so far reserved the top post for themselves, despite women constituting the majority of the population, and this is unlikely to change soon.

In any event, in a presidentialist system like the one that actually operates in the DRC, the Prime Minister is the principal assistant to the President and not the head of the government. The other members of the government are appointed and can also be dismissed by the President. Moreover, contrary to the Constitution,¹⁸⁸ the President of the Republic is the one who determines the policies of the nation, not the government. Parliament is also totally dependent on the President as the leader of the majority party or coalition in Parliament.

Most Acts of Parliament are initiated by the government under the leadership of the President. Parliament has also failed to hold the government accountable. As far as the judiciary is concerned, most judges, including the members of the recently established Constitutional Court, are actually appointed by the President.

The judiciary also lacks independence from the other branches of the government, especially from the President of the Republic, in the name of whom judicial decisions are enforced¹⁸⁹ and who is generally referred to as ‘the Supreme Magistrate’.

V. Federalism/Decentralisation

As stressed earlier, the nature of the state – whether it should be a federal or a unitary state – was the most important issue discussed during the 1960 Political Round Table Brussels Conference. The debate resurfaced during the Inter-Congolese Dialogue (ICD). The end result was a compromise. The 2006 Constitution organises three spheres of government: the central, the provincial, and the local spheres of government. Each sphere has its own executive and legislative institutions, while the judiciary remains a national institution.

National Sphere	Provincial Sphere	Local Sphere	
- President of the Republic - Parliament (National Assembly & Senate) - Government (Prime Minister & Ministers) - Judiciary (Courts & Tribunals).	- Provincial Assembly (Provincial Deputies)	City	- Urban Council - Executive Urban Council
		Municipality	- Municipal Council - Executive Municipal Council
	- Provincial Government (Governor, Vice-Governor and Provincial Ministers)	Sector or Chieftaincy	- Council of Sector or Chieftaincy - Executive College of the Sector or the Chieftaincy

¹⁸⁸ Art. 91.

¹⁸⁹ Art. 149.

The Constitution provides, *inter alia*, that the DRC is a united and an indivisible state.¹⁹⁰ The President of the Republic, Parliament, the government, and the courts and tribunals are the main institutions of the Republic.¹⁹¹ As in a federal state, the provinces are represented in the second chamber of Parliament, namely the Senate.¹⁹²

The DRC consists of the city of Kinshasa and 25 provinces.¹⁹³ The city of Kinshasa and each province is under the executive authority of a provincial government led by the governor, assisted by a vice-governor, and the legislative authority of the provincial assembly.¹⁹⁴ The Constitution distinguishes between the provinces, as political entities, and territorial decentralised entities, which are the cities, municipalities, sectors, and chieftaincies. These entities enjoy legal personality. They are autonomous, but not independent.¹⁹⁵

As in a federal state, there is a constitutional distribution of powers¹⁹⁶ and resources between the central and the provincial spheres of government. Powers are divided into exclusive powers for the state¹⁹⁷ and the provinces,¹⁹⁸ respectively, and into concurrent powers that belong to both spheres of government.¹⁹⁹ Each province is also entitled to 40 per cent of the resources of a national character collected on its territory.²⁰⁰ However, the provinces cannot adopt their own budgets. Nor are they entitled to enact their own constitutions. The state prevails over the provinces in the case of conflict related to the exercise of concurrent competences.²⁰¹ The 2011 constitutional amendment reduced even further the powers of the provinces by granting the President of the Republic the power to dissolve a provincial assembly²⁰² or to dismiss a governor of a province.²⁰³

Against this background, and despite having some federal features, the DRC remains a unitary and decentralised state. However, inspired by Spain and Italy, and considering the political nature of the provinces and the constitutional distribution of powers and resources between the state and the provinces, some Congolese constitutional lawyers have argued that the DRC could qualify as a 'regional', a 'regionalised', or a quasi-federal state, which is a form between a unitary and a federal state.²⁰⁴ However, a 'regional' or a 'regionalised' state is only one of the forms of a unitary state.

¹⁹⁰ Art. 1.

¹⁹¹ Art. 68.

¹⁹² Art. 104.

¹⁹³ Art. 2.

¹⁹⁴ Arts 195-198.

¹⁹⁵ Arts 3, 195-198.

¹⁹⁶ Art. 201.

¹⁹⁷ Art. 202.

¹⁹⁸ Art. 204.

¹⁹⁹ Art. 203.

²⁰⁰ Art. 175.

²⁰¹ Art. 205.

²⁰² Art. 197.

²⁰³ Art. 198.

²⁰⁴ J Djoli Eseng'Ekeli, *Droit constitutionnel. L'expérience congolaise (RDC)* (L'Harmattan, 2013) 191-196.

VI. Constitutional Adjudication

The Constitutional Court is part and parcel of the judiciary. The Constitutional Court is the only court mandated by the 2006 Constitution to control the constitutionality of Acts of Parliament and other acts having the force of law.²⁰⁵

Accordingly, as in other African Francophone countries, where a Constitutional Court or Council exists – but unlike many other Anglophone countries, where constitutional matters can be dealt with by different courts, with the Constitutional or Supreme Court only being the highest court – constitutional review is the exclusive function of the Constitutional Court. When any other court is faced with a constitutional issue, it should refer it to the Constitutional Court and await its ruling.

Organic laws, prior to their promulgation by the President,²⁰⁶ and the rules of procedure for the two Chambers of Parliament and the Congress, the National Independent Electoral Commission, and the High Council of the Media and Communication, prior to their implementation, should be submitted to the Constitutional Court, which decides on their conformity to the Constitution before their coming into force.²⁰⁷

Any Act of Parliament can also be submitted to the Constitutional Court by the President, the Prime Minister, the Speaker of the National Assembly, the President of the Senate, or a tenth of the deputies or senators for a review of its constitutionality prior to its promulgation.²⁰⁸

The Constitutional Court is competent to interpret the Constitution at the request of the President of the Republic, the government, the President of the Senate, the President (Speaker) of the National Assembly, a tenth of the Senate or the National Assembly, the governors of the provinces, and the presidents of the provincial assemblies.²⁰⁹ The Constitutional Court deals with an objection of unconstitutionality raised by a party to a legal dispute before any other court of law. Anyone can also approach the Constitutional Court to allege the unconstitutionality of any Act of Parliament or regulation. The proceedings will be suspended until the Constitutional Court has ruled on the objection of unconstitutionality.²¹⁰ The decisions of the Constitutional Court are final and binding.²¹¹ The organisation and functioning of the Constitutional Court are based on an organic law.²¹²

The Constitutional Court can also be approached by the President of the Republic, the Prime Minister, the President of the National Assembly or the President of the Senate, or a tenth of the deputies or the senators to decide on the constitutionality of a treaty or an international agreement prior to its ratification or approbation. If the Constitutional Court declares that a provision of such a treaty or international agreement is inconsistent with the Constitution, it can only be ratified or approved after amendment of the Constitution.²¹³

²⁰⁵ Arts 160-162.

²⁰⁶ Art. 124.

²⁰⁷ Arts 124 and 160.

²⁰⁸ Art. 160.

²⁰⁹ Art. 161.

²¹⁰ Art. 162.

²¹¹ Art. 168.

²¹² Art. 169.

²¹³ Art. 216.

Although the Constitutional Court was provided for in the current DRC Constitution when it was promulgated and came into force on 18 February 2006, its members were only appointed in 2014. Until its establishment, its functions have been vested in the Supreme Court of Justice,²¹⁴ which only deals with issues of interpretation of the Constitution.

VII. International Law and Regional Integration

The 2006 Constitution contains a specific title²¹⁵ that deals with treaties and international agreements, which are one of the sources of international law.²¹⁶ All three arms of government, namely the executive, the legislature, and the judiciary, participate in the incorporation of international law in the domestic law.

The President of the Republic negotiates and signs treaties and international agreements, while the government concludes international agreements that are not subject to ratification. The government then informs the National Assembly and the Senate.²¹⁷

Peace treaties, commercial treaties, treaties and agreements related to international organisations, the settlement of international disputes, public finances, those that modify legal provisions, those that relate to the status of individuals, and agreements that result in exchange or merger of territories require the intervention of Parliament as they can only be ratified or approved in terms of an Act of Parliament. Transfer, exchange, or merger of territories is only valid when approved by popular referendum.²¹⁸

The judiciary also has a role in both the enforcement and the incorporation of international law in the domestic law. The courts and tribunals, whether civilian or military, apply treaties that have been duly ratified.²¹⁹ The judiciary in the DRC is still to decide on the status of treaties that have not yet been signed or ratified. The Constitutional Court is competent to deal with the constitutionality of any treaty or international agreement prior to its ratification or approval at the request of the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or one tenth of the deputies or senators. If the Constitutional Court finds that a provision of the treaty or international agreement is inconsistent with the Constitution, its ratification or approval can only take place after the Constitution has been amended accordingly.²²⁰

The Constitution also deals with the relationship between treaties or international agreements and domestic law. It provides that treaties and international agreements that have been lawfully concluded, once published, prevail over Acts of Parliament, subject to their application by the other party.²²¹

²¹⁴ Art. 223.

²¹⁵ Title VI.

²¹⁶ Statute of the International Court of Justice, Art. 38.

²¹⁷ Art. 213.

²¹⁸ Art. 214.

²¹⁹ Art. 153.

²²⁰ Art. 216.

²²¹ Art. 215.

Unlike Anglophone countries that are dualist and require an Act of Parliament to be enacted to give a signed and ratified treaty effect in the domestic law, the DRC is a monist country. As a matter of principle, no Act of Parliament is required for the domestication of a treaty that has been already been signed and concluded.

Moreover, unlike dualist countries where even incorporated or domesticated treaties are equal to Acts of Parliament or ordinary laws, in the DRC, treaties and international agreements that have been regularly concluded prevail over ordinary laws or Acts of Parliament on their publication. In practice, most treaties invoked before the courts have been human rights treaties. Due to the fact that few judges and lawyers are conversant with their constitutional status, treaties rarely feature in Congolese case law. However, the debate on the 1998 Rome Statute of the International Criminal Court, which had to be incorporated into domestic law by a special Act of Parliament, as required by dualism, may serve as evidence of the problems of monism in Francophone countries.

With regard to regional integration and the transfer of sovereign powers to the African Union for integration purposes, the 2006 Constitution provides that the DRC can conclude treaties or agreements of association or community resulting in a partial abandonment of sovereignty to promote African unity.²²² This is an important provision, in line with the statement in the Constitution's Preamble that the Congolese people are willing to see all African states unite and work together to promote and consolidate African unity through continental, regional, and sub-regional organisations to offer better prospects for development and socio-economic progress to African peoples. The Preamble also refers to the responsibilities of the Congolese people towards God, the nation, Africa, and the world.²²³

VIII. Recent Debates on Constitutional Reform in the DRC

Joseph Kabila was elected President in 2006. In early 2010, as his first five-year term was coming to an end, the debate on constitutional reform or review was launched by his political party, the *Parti du peuple pour la reconstruction et la démocratie* (PPRD). The call for constitutional reform was later endorsed by his coalition, the *Alliance de la majorité présidentielle* (Alliance of the Presidential Majority) (AMP). As a result, Parliament, under the leadership of the AMP, amended the 2006 Constitution on 20 January 2011. The main objective was to secure President Kabila's re-election during the November 2011 election by suppressing a possible second round that could have helped the Opposition unite and present a single candidate,²²⁴ and also to reinforce his control over the provinces by allowing him to dissolve a provincial assembly²²⁵ and to dismiss a governor of a province,²²⁶ to deal with a severe political crisis threatening the regular functioning of provincial institutions.

²²² Art. 217.

²²³ Preamble.

²²⁴ Art. 70.

²²⁵ Art. 197.

²²⁶ Art. 198.

The people somehow accepted the constitutional amendment, although it clearly violates the spirit and even the letter of the Constitution, which prohibits any constitutional change that reduces the prerogatives or autonomy of the provinces.

The 2006 Constitution provides that:

The republican form of the State, the principle of universal suffrage, the representative form of the Government, the number and duration of the terms of office of the President of the Republic, independence of the judiciary, political pluralism and that of trade unions can never be the subject of a constitutional amendment.

Is formally prohibited any constitutional amendment that would aim to or result in the reduction of individual rights and freedoms or that of the prerogatives of the Provinces and territorial decentralised entities.²²⁷

A fresh debate took place in 2013 and intensified in 2014 and 2015. The bone of contention was Article 220, which President Kabila's supporters wanted amended to allow him to run during the 2016 election for a third term, which was prohibited by the Constitution.²²⁸

According to President Kabila's supporters, there is no constitution for all eternity, and the 2006 Constitution was not an exception. It provided for constitutional amendment by Parliament when it enjoyed a strong majority, or by referendum. All of its provisions, including Article 220, were amendable. The debate on this constitutional reform was initiated by Evariste Boshab,²²⁹ the Secretary-General of the ruling PPRD party, who published a book for this purpose. His views were shared by several other members of the ruling coalition, the *Majorité Présidentielle* (Presidential Majority) (MP). This debate on a third presidential term also raged in other African Francophone countries, such as Benin, Burkina Faso, Burundi, Rwanda, and the Republic of Congo (Congo-Brazzaville), where the terms of office of the incumbent respective Presidents Boni Yayi, Blaise Compaore, Pierre Nkurunziza, Paul Kagame, and Denis Sassou Nguesso were drawing to an end.

In the DRC, the majority of the people remained opposed to any constitutional amendment to allow for a third presidential term, as they found it inconsistent with the Constitution approved by referendum in December 2005 and promulgated by the President on 18 February 2006. Due to unprecedented international and domestic pressure mostly from the Opposition and civil society organisations, including students and the powerful Catholic Church, the ruling party and coalition, as well as the President himself, who had pledged to observe and defend the Constitution after his first election in 2006 and his re-election in 2011, seem to have abandoned their project to have the Constitution amended to allow a third presidential term. This is good news for the 2006 Constitution and for constitutionalism in the DRC.

²²⁷ Art. 220.

²²⁸ Art. 70.

²²⁹ E Boshab, *Entre la révision de la constitution et l'inanition de la nation* (Larcier, 2013).

The relationship between constitutions and constitutionalism in the world in general and in Africa in particular has been analysed by a number of scholars. According to Grey²³⁰ and Olukoshi,²³¹ there is a great deal of confusion between constitutionalism and constitutions. Written constitutions have come to be identified with constitutionalism, despite the fact that a country such as the United Kingdom, which is considered one of the best examples of constitutionalism in the world, does not have a written constitution.

Olukoshi²³² and Andrews²³³ have pointed out that ‘Constitutions as law and rule of law are instruments of constitutionalism’. Rosenfeld has also contended that constitutions were ‘apt vehicles for the constitutionalization of the essential requisites of constitutionalism’.²³⁴ However, as Okoth-Ogendo found out, constitutions may go without constitutionalism.²³⁵

Nwabueze identified three major tests that must be passed for a constitution to comply with the requirements of constitutionalism. The first test is whether the constitution imposes any limitation upon the three arms of the government, namely the executive, the legislature, and the judiciary. The second test is whether it is legitimate or expresses the will of the people, and not that of the government or some foreign power. The third test is whether it provides for the protection, promotion, and enforcement of human rights.²³⁶

To these three tests I would add a fourth one: the test of effectiveness, which is whether the constitutional provisions are upheld in practice or remain dead letters. The main problem of constitutionalism on the African continent is not the lack of constitutions, but rather the compliance with the idea of constitutionalism and the respect the constitutions are given by the people and, most importantly, by the government. Shivji has deplored that although we have had great need, if not reverence, for these documents called constitutions, there has been little regard for the constitutional principle or constitutionalism.²³⁷ This is true of many African countries, including the DRC. Each African country has a constitution and many have adopted several constitutions since they acceded to independence. The DRC now, under the 2006 Constitution, can be considered a leader in this field. The country has enacted more than twenty different constitutions in its 50 years of independence, which makes an average of a new constitution every two years.

²³⁰ TC Grey, ‘Constitutionalism: An Analysis Framework’, in JR Pennock and JW Chapman (eds.), *Constitutionalism* (New York University Press, 1979) 189.

²³¹ A Olukoshi, ‘State, Conflict and Democracy in Africa: The Complex Process of Renewal’, in R Joseph (ed.), *State, Conflict and Democracy in Africa* (Lynne Rienner Publishes, 1999) 453.

²³² Ibid. 456.

²³³ WG Andrews, *Constitutions and Constitutionalism* (New Jersey, 1968) 22.

²³⁴ M Rosenfeld, ‘Modern constitutionalism as interplay between identity and diversity’, in M Rosenfeld (ed.) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press, 1994) 14.

²³⁵ HWO Okoth-Ogendo, ‘Constitutions Without Constitutionalism: Reflections on an African Political Phenomenon’, in IG Shivji (ed.), *State and Constitutionalism: An African Debate on Democracy* (SAPES, 1991) 3-25.

²³⁶ BO Nwabueze, *Constitutionalism in the Emergent States* (Hurt, 1973) 2, 24-27.

²³⁷ IG Shivji, ‘Contradictory Class Perspectives in the Debate on Democracy’, in IG Shivji (ed.), *State and Constitutionalism: An African Debate on Democracy* (SAPES, 1991) 254.

Some Congolese constitutions have been provisional²³⁸ and others permanent.²³⁹ However, in the DRC, as in many other countries, there is a huge gap between what the constitutions provide and political practice, or the manner in which the constitutions actually operate.

Based on its popular adoption by referendum, its fundamental principles, its Bill of Rights, its separation of powers between the President of the Republic, Parliament, the government, and the judiciary, and the decentralised nature of the state, the 2006 Constitution broadly complies with constitutionalism. However, this is only on paper. The major problem faced in the DRC is not that the country does not have a constitution or that its constitution does not contain the rudiments of constitutionalism, but how this Constitution can be respected and defended by all, especially the political elite, as the supreme law of the land, in order to promote the rule of law and democracy as a prerequisite for peace and development. It is also worth stressing the role played by Western nations in the violations of the constitution and the demise of constitutionalism and democracy in the DRC. Arguably, since the DRC acceded to independence from Belgium on 30 June 1960, the Congolese people have never been allowed to govern themselves freely in terms of the constitution. Western nations have always interfered with constitutionalism and democracy in order to control the DRC and its immense natural resources.

When President Joseph Kasa-Vubu dismissed Prime Minister Patrice-Emery Lumumba, despite the fact that the latter still enjoyed the confidence of Parliament, his unconstitutional decision was inspired and supported by the government of Belgium, the former colonial power, and its allies, especially the United States. The conflict between the President and the Prime Minister who dismissed each other paved the way for the first *coup d'état* of Colonel Mobutu, the army chief of staff, who actually neutralised the Prime Minister and appointed an interim government known as the College of General Commissioners. Like Kasa-Vubu, Mobutu enjoyed the support of the Belgian government and the US administration.

The Belgians hated Lumumba. In Belgium, the nationalist Prime Minister was considered a public enemy for his vehement criticism of Belgian colonial rule, as expressed in the speech he made on 30 June 1960 in the presence of King Baudouin.²⁴⁰ For the Americans who were involved in the Cold War, and who accused him of being a communist, Lumumba was also a public enemy. His dismissal was enough, though he ended up being assassinated.

Around five years later, on 24 November 1965, the National Congolese Army, under General Mobutu's leadership, overthrew the regime of President Kasa-Vubu, alleging that the civilians had led the country into chaos.

²³⁸ See, for instance, the Fundamental Law of 17 June 1960 on the Structures of the Congo, Law no 93-001 of 2 April 1993, related to the Harmonized Constitutional Act of the Transition Period, the Constitutional Act of the Transition of April 1994, and the Interim Constitution of 4 April 2003.

²³⁹ For instance, the Constitution of 1 August of 1964, the Constitution of 24 June 1967, and the current Constitution of 18 February 2006.

²⁴⁰ AMB Mangu, *The Road to Constitutionalism and Democracy in Postcolonial Africa: The Case of the Democratic Republic of Congo* (LLD Thesis, University of South Africa. 2002) 345.

Mobutu established military rule and later a single party regime that lasted for 32 years. He was backed by Western countries as the best representative of Western interests in the DRC and the central African region.²⁴¹ Unsurprisingly, the formula that had long shaped US foreign policy towards Zaire was ‘Mobutu or Chaos’.²⁴²

From 1990 to 1993, the United States 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 be an impediment to it.²⁴³ The United States and other powerful Western countries chose to follow Mobutu in not recognising the decisions of the National Sovereign Conference.²⁴⁴ They also assisted the rebellion of Laurent-Desire Kabila that overthrew the Mobutu regime, and they moved quickly to recognise the new leader while there was little support for non-violent and democratic opposition. They maintained the same attitude towards Joseph Kabila, who from nowhere replaced his assassinated father on 17 January 2001 and became the DRC President. Two presidential elections have been already held under the 2006 Constitution. The United States and other Western countries still recognised Joseph Kabila as the ‘legitimate’ DRC President, despite the well-documented and massive vote-rigging denounced by several observation missions, including the Carter Center and the European Union.²⁴⁵

Driven by their national interests that generally outweigh their values, Western governments under US leadership have for a long time been part of the problem of authoritarianism and have failed to promote their own ideals in their African policy. As Senator Barack Obama admitted in his *Audacity for Hope*, ‘[f]or decades we would tolerate and even aid thieves like Mobutu, thugs like Noriega, so long as they opposed communism. Occasionally U.S. covert operations would engineer the removal of democratically elected leaders.’²⁴⁶

Obama’s promise of ‘change’ in US foreign policy²⁴⁷ will not be fulfilled when he retires after his second presidential term in 2017. As might have been expected, Obama’s message and commitment to change was opposed by numerous forces that besiege Washington and continue to dominate international politics and require ‘business as usual’ in US foreign policy.²⁴⁸

²⁴¹ Mangu (n 240) 454-455.

²⁴² See MG Schatzberg, *Mobutu or chaos? The United States and Zaire, 1960-1990* (University Press of America, 1991); SR Weisman, *American Foreign Policy in the Congo 1960 -1964* (Cornell University Press, 1974).

²⁴³ Schatzberg (n 242) 123.

²⁴⁴ Nzongola Ntalaja (n1) 1.

²⁴⁵ AMB Mangu, ‘Democracy and States’ Compliance with Regional and Sub-regional Election Benchmarks in Africa: The 28 November 2011 Elections in the Democratic Republic of Congo in Retrospect’, 12(1) *Journal of African Elections* (June 2013) 48-51.

²⁴⁶ B Obama, *The Audacity of Hope* (Vantage Books, 2008) 337-338.

²⁴⁷ *Ibid.* 320-382.

²⁴⁸ AMB Mangu, *Obama’s Election and Change: Lessons for the World, Africa and US Foreign Policy* (Lambert Academic Publishing, 2011) 197.

Western democratic governments are still expected to become part of the solution for African problems that mainly relate to disrespect for the constitution and democratic rule of law. Economic and strategic interests should no longer be allowed to prevail over ideals to command support for African autocrats.²⁴⁹ However, although they expect help from other peoples in their struggle for constitutionalism and democracy, Congolese and other African citizens agree with Obama that

there are few examples in history in which the freedom men and women crave is delivered through outside intervention. In almost every successful social movement of the last century, from Ghandhi's campaign against British rule to the Solidarity movement in Poland to the antiapartheid movement in South Africa, democracy was the result of a local awakening.²⁵⁰

Accordingly, they should take on the primary responsibility for constitutional and democratic change in their countries. They should not only take ownership of the constitution as the supreme law of the land, but also defend it at all costs.

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²⁴⁹ Mangu (n 248) 186.

²⁵⁰ See Obama (n 246) 374.

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