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Manipulations of the Constitution in Africa: Forms and Manifestations

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Abstract:

Due to the constant issue with constitutional instability, it is advisable that the struggle should keep on going for the sake of the maintaining and protection of political pluralism, the rule of law and the constitution. To achieve this goal, emphasis should be put on the protection of the constitution against untimely manipulation. This should be the starting point if we do not want to allow Africa to remain a place of political crises. Otherwise, it may be harmful to African democracy. Africa today appears in its vast majority as a "dessert of democracy.[1]" It is sad to notice such a kind of behavior in the field of democracy. The blossom of democratic ideas in 1990 and juridical conceptions that were elaborated are gradually abandoned in most of the African nations. In some cases we can even say that those democratic values purely and simply ransacked. The previous theories and texts about democratic values have become a "museum contemplation[2]" in the last decade of the twentieth century.

Key words: Constitutional manipulations, Political pluralism, Political power, political agreement.

[1] It means the wrong practice of democracy
[2] It means that those values are just there to remind after the past and no more the reality.

1. INTRODUCTION

Since 1990s, Africa entered into a democratic system. But up now, almost 30 years, many African states are still facing political challenges related to the consolidation of democracy. It is clear that African democratic transitions[3] have a negative impact on the quality of most of the ongoing leadership. The modification of legal rules remains the crucial matter because it is constantly invariant since the accession of African states to independence. It appears as a constant challenge in the promotion of the rule of law[4] and democracy insofar as non-compliance with the rules of the democratic system as the common mark of most African political regimes. In French-

[3] The concept is used to describe a change of political regime or rather a profound change in socio-economic relations. It does not date from the 1990 revolutions in Eastern Europe or Africa. The concept already existed before, at the care of the Marxist transition, where it designated the transition from capitalism to communism. This remark is crucial because it is on this background that appears the new political orientation of the transition. The concept is distinguished by a reversal of traditional terms: we move from communism to democracy and capitalism. And this transition is called democratic because it leads to democracy.

[4] The rediscovery of the concept of the rule of law by philosophers and jurists is one of the major phenomena of the late twentieth century and early twenty-first century. It supposed a distinction between the rule of law and the police state following the theses developed by the jurists Mohl, Stahl, Geist. The state must submit to the rule of law and the administration, although it may act contra legem, is bound in this area to act secundum legem. The second stage dates back to the end of the 19th century and the beginning of the 20th century, when the work of writers such as Gerber, Jellinek and Hiering flourished, culminating in the work of the Austrian jurist Hans Kelsen and their philosophy in legal positivism. Hans Kelsen defines the rule of law as the structuring of a legal, hierarchical and pyramidal order in which norms fit together and articulate themselves within an organic whole, stratified successively by the constitution, legislation and the rule. The third, so-called "contemporary" stage presupposes a substitution for the civil bond based on war and conquest, a political society established on peace, in which disputes are arbitrated by legal negotiation and where the sovereign must recognize and guarantee the right to the safety of individuals. It is characterized in particular by various legal institutions and techniques such as: the independence of judges, the separation of public authorities, the constitutional review of the law and the legality of administrative acts as well as the protection of human rights.

speaking countries in particular, the dysfunction of the institutions, the inconsistency of the political actors among others, explains the defective quality of democracy. Indeed, in Sub-Saharan Francophone Africa, it is almost a truism to assert that authoritarian political regimes have a great hold on state institutions despite external pressures and popular protest movements. The great trend of political practices shows that the impact of the internal and external dynamics of the 1990s on African political actors encouraged them to democratize political regimes was limited. It can be seen that while the political overtures have made it possible to start the march towards democracy, they too have made it possible to legitimize many government officials whose image was heavily damaged so that, today, the democratic processes are still in certain States under the control of the dictators of the periods before 1990s.

In fact, in many states, the renewal of constitutionalism[5] has favored the instrumentalization of the law by the ruling leaders. Some of them, knowing that they will not remain in power any longer, have often opted for the political elimination of their political adversaries in order to maintain their position. The case reached now to the extent that the values conveyed by constitutionalism are obligatory in the sense that it is a question of playing with the new constitutional rules, either by manipulating them, or refusing to recognize them. The constitution despite its status as a Fundamental Law does not escape this logic of rule manipulation. The political ruse of the governors touches these new constitutions more or less

[5] Constitutionalism refers to the movement that appeared in the Age of Enlightenment, and which has successfully sought to substitute for existing customs, which are often vague and imprecise, and which leave great opportunities for discretionary action to the sovereigns of the written constitutions conceived as having to limit the absolutism and sometimes the despotism of the monarchical powers. The phrase "new constitutionalism" in Africa must be understood in the light of the new constitutions that swarmed across French-speaking Black Africa like a swarm of locusts in the 1990s, breaking with pre-1990 constitutionalism..

consensual and whose majority was elaborated through National Conferences sovereign.[6]

From the above argumentation we can say that the new African constitutions will not resist the old political practices that had become secularized throughout most of the African continent. Constitutions will be flexible both in their application and in their revision. In fact, they become easily tools of manipulation in the hands of those who exercise political power. We are witnessing everywhere a revisionist frenzy and sabotage marked by an acceleration of revisions, the examination of each of which sheds light on the vicissitudes of African constitutionalism. Constitutions are purposely transformed through revisions or political exit agreements whose main purpose is to serve partisan or clannish interests. Thus, the African political environment is dominated by the flouting of the rules to such an extent that the consolidation of democracy to a successful transitions has become a long term dream. The effervescence of constitutionalism, far from marking the break with the authoritarian practices of the past, favored the logic of self-legitimacy, the failure of which in some countries led to attack on the idea of constitutionalism. In places, the new constitutions did not put an end to the leading term. Worst there are also the attacks on the rights of the citizens. Because in some situations, freedoms and political rights are exercised under the control of the state, illustrating the deviation of democratization processes towards "illiberal democracies".[7] In other words, despite their consecration and their guarantee in legal instruments such as the constitution, the free expression of fundamental rights and freedoms is still illusory in many African countries.

[6] Sée BALDÉ Sory, La convergence des modèles constitutionnels : études de cas en Afrique subsaharienne, Thèse de doctorat en Droit, Bordeaux 4, 2009, p. 626.

[7] See FAREED Z., L'avenir de la liberté : la démocratie illibérale aux États-Unis et dans le monde, Paris, Odile Jacob, 2003, p.39.

The worst of this situation is that continuism at the top of the state and the patronization of power, except in a few rare cases, remain a constant political factor despite the legal conditions favorable to political alternations. To this end, subsequent political developments and the test of reality, as emphasized by Babacar GUÈYE, a decade after their advent, have reminded the most enthusiastic that these democratic transitions are still "foundation"[8] and therefore likely to reversible developments, even regressive.[9] The expression of interest of African states in favor of constitutional legality was not followed by a real desire of the rulers to comply with the restrictions inherent in constitutionalism. This is the case in particular of the rules governing devolution and the exercise of power, the constitutionalization of which does not in fact constitute a sufficient guarantee of their respect. In fact, in many African countries, the process of democratization is gradually moving towards authoritarianism.

We are witnessing a successful syncretism between the formalization of democracy and its illegitimate confiscation. In this decorum, constitutional consecration is only symbolic since the rulers are masters of the tricks of adopting constitutions, but to use them to a maximum extent so as to avoid grievances of the violation of legality. In this sense, the reforms are undertaken to allow the leaders to keep the control of the power or to discard electoral competitions of the candidates able to contest them power. To this end, in practically all African states, there is a profusion of political reforms to take back the concessions that had been made during the advent of democracy. These abuses of reforms, instead of making improvements, are reminiscent of pre-democratization situations marked by the rule of the will of a group of men.

[8] Guillermo O" DONNELL ET Philippe SCHMITTER, Transitions from Authoritarian Rule. Tentative Conclusion about Uncertain Democratic, Baltimore, the Johns Hopkins University Press, 1986, p78.
[9] See GUÈYE Babacar, "La démocratie en Afrique ", p. 6.

Rather than consolidate the process of democratization, constitutional reforms become excellent instruments of rule manipulation. In the same vein, the electoral laws are also tailor-made to ensure the victory of the party in power during elections.

In Africa, manipulations or negation of the constitution concern two general broad categories such as: the manipulations "unblocking" of political crises and the manipulations "fraud".

The first category appears during periods of political or institutional crises, to voluntarily destroy the effects of provisions of the constitution in order to find a conventional solution to the crisis that endangers the life of the nation. The second forms of manipulation, in the absence of any exceptional situation, to exploit the constitutional rules for the wicked purpose of serving the interests of a person or a group of people to the detriment of the common interests and requirements of the rule of law and democracy.

These two forms of instrumentalization of the rules are intended to remove from the constitution as the primary source of law in a state its sacredness.

The harmful effects that these manipulations entail oblige to question the scope of these reforms, better on the meaning of these African constitutions which are the object of abnormal political uses. To the extent that it has been revealed in the past that African constitutions were nothing more than a right of entry into the international arena, a sort of good conduct certificate for external use by countries also give authoritarian powers.[10] Today, some facets of the situation described by Professor LAVROFF are still observable, especially those relating to the practice of African leaders with

[10] See LAVROFF Dmitri Georges, Les Systèmes constitutionnels en Afrique noire : Les États francophones, Paris, A.
Pedone, 1976 ; LAVROFF Dmitri Georges, La Constitutionnalisation des régimes militaires en Afrique noire, Paris, Economica, 1984, p. 200-213.

constitutions shows to obtain the recognition that they aspire in the concert of modern nations and receive, in counterparts, legitimacy and respectability of this system.

The main purpose of this study is to show that some practices endanger constitutions in Africa. Participating thus in the "deconsolidation" of the achievements of the new constitutionalism. They thus give a positive legal value to practices or principles that were thought to have been buried in the 1990s following the winds of democratization that swept the African continent with dictatorship regimes[11]. The notion of dictatorship is, of course, ambiguous and vague. In its first dimension, dictatorship refers to a legal and temporary concentration of powers for the benefit of an authority or an organ. It corresponds to what Mommsen calls "a power of exception, almost what the suppression of civil justice and the proclamation of the state of siege are today." In the classical and noble sense, "the dictatorship therefore designates a regulatory mechanism implemented in accordance with the constitution of the State." In its second dimension, close to the tyrannies of ancient Greece, "dictatorship refers to the exercise without control of absolute and sovereign power. It involves the attribution of sovereign political power to an individual, a party, a class or an institution. This concentration of power in the hands of a single owner represents, like the sword of Damocles, a permanent threat to the freedom of citizens. Thus understood, dictatorship tends in common language to be confused either with totalitarianism or with despotism. It evokes the idea of an arbitrary, abusive power, shaking up political or individual rights, governing by terror and not shrinking from the most extreme violence."

The current developments lead us to believe that the current leaders on the African continent are only giving symbolic value to the constitution through fraudulent and

[11] Holo Theodore, « Réflexions sur la dictature en Afrique » Revue Béninoise des Sciences Juridiques et Administratives, n 6, mai 1986, p. 28-39.

unconstitutional reforms, often through the international community through the signing of political agreements out of the crisis.

2. Constitutional manipulations in order to "unblock" a political crisis

The suspension of the constitution may be understood as the momentary cessation of the effects of the constitution or of certain of its provisions. Since it is legally possible to suspend the effects of legal acts, the question here is to see under what conditions the effects of the constitution as a founding act of the state can be temporarily neutralized.

This is the "constitutional conventionalism[12]" that has been developing in Africa for some years and that often destabilizes constitutions instead of consolidating them. Even if political agreements give the illusion of being solutions to conflicts, in reality they often have adverse effects on the constitutional order.

The learning of democratic rites, the requirements of the rule of law, republican values, courtesy, good faith and good governance are not easy in African French-speaking countries. Submission to the Constitution is therefore more difficult. Thus, the quarrels of interpretation of constitutional provisions concerning the powers of each other within the Executive, or in the relations between it and the other organs of the State, the strategies of blocking used by the parliamentary minorities against the wishes of parliamentary majorities to pass some reforms in force within the Parliament, the blocking behaviors used by such public or political actor to protest against a decision taken or to come as well as the occurrence of events and circumstances exceptional, are sometimes the beginning of real situations of paralysis and crises likely to lead to the

[12] J-L ATANGANA AMOUGOU, « Les accords de paix dans l'ordre juridique interne en Afrique », R.R.J., 2008-3, p.1726.

unknown in the absence of an impartial referee responsible for removing the Republic from the blockage or uncertainty. However, when difficulties and crises settle down, actors often only have to resort to political agreements[13].

In many cases, with the help of the international community, it is possible to calm the conflict, to open a period of transition and to move towards the restoration of constitutional order. But the political situations of tensions and frontal divisions between political actors implemented, in 2012, in countries like Guinea, the Democratic Republic of Congo, Rwanda, Madagascar, Togo and Ivory Coast, all of which have known peace agreements, should not encourage optimism.

The political agreements which are the manifestation of a certain "constitutional conventionalism", for necessary that they be in certain serious circumstances of wars or armed rebellions, can constitute veritable elements of destabilization of the constitutional order.[14] Then, a suspension can be considered to have become fraudulent when it has been abused or if it has been diverted from its purpose. This implies that the suspension of the constitution, beyond the justified circumstance of its intervention, was motivated only by subjective interests. Consequently, the fraudulent suspension is the suspension of the constitution or of one of its provisions which, although it has been taken by the authority that is empowered to do so and is in the field of circumstances that may lead to it, is not justified by an objective necessity. The fraudulent nature here results from the misuse of a right or function recognized by the constitution. On this basis, we must look for some illustrations of fraudulent suspensions in Africa.

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[13] Sée J. de GAUDUSSON, « Les solutions constitutionnelles des conflits politiques », Afrique contemporaine, numéro spécial, 4ème trimestre 1996, pp. 250-256 ; J-L ATANGANA AMOUGOU, « Les accords de paix dans l'ordre juridique interne en Afrique », R.R.J., 2008-3, pp. 1723-1745

[14] See F-J. AÏVO, « La crise de normativité de la Constitution en Afrique », R.D.P., N° 1, 2012, p. 173.

In Rwanda, the Arusha Peace Agreement amends the Constitution of 10 June 1991 by creating new institutions. In Madagascar, the Convention of 31 October 1991 profoundly amends the Constitution of 31 December 1975 by abolishing certain institutions and creating others, while greatly reducing the powers of the President of the Republic. As for the Linas-Marcoussis agreement of January 23, 2003, concluded in an attempt to put an end to the conflict between the constitutional institutions in Côte d'Ivoire and an armed rebellion, it is an example of the failure of this solution.

Even though the President of the Republic sworn to "respect and defend the Constitution faithfully" of August 1, 2000, this agreement takes away important powers for the benefit of a prime minister designated by the Marcoussis political conclave. This "dysfunction of the executive" has not escaped the doctrine as well as "the undermining of the principles of functioning of the legislative" contained in the text elaborated by the political actors protagonists of the conflict and the politico-military crisis. Besides, its application has been a failure. The functioning of the government was blocked and the rebels decided to suspend their participation in the government.

It took several meetings in Accra without the problem being solved. Despite the decisions of international bodies such as the United Nations, the African Union and the Economic Community of West African States (ECOWAS), hostilities continued and the agreements were purely and simply buried, before being resurrected in part. The intervention of these political agreements in the resolution of political crises seems to mark the failure of constitutionalism in favor of conventionalism because the fact that constitutionalism is removed from the process of resolving these crises even though it is its vocation creates several problems.

Another example of the failure of these types of agreements of policy of crisis resolution is the case of Mali in

2012. Despite some political difficulties, this country was considered until early 2012 as an example of democracy in Africa. Indeed, since the adoption of the Constitution of 25 February 1992, political pluralism has become established and a democratically elected president has served two terms, has withdrawn from power and has been replaced by another, democratically elected, who is expected to finish his second and last term on April 28, 2012. A new presidential election that would not be attended by the outgoing president is expected to take place on April 29, 2012, in conjunction with a constitutional referendum. But in January 2012, a group called the "National Movement for the Liberation of Azawad" attacked Malian military camps and towns located in the northern regions of the country, including those of GAO, Timbuktu and Kidal.

After some inconclusive efforts of resistance by the national army, the country was seriously threatened with a partition in early March 2012. It is in this context that on March 22, 2012, mutinous soldiers led by Captain Amadou Haya SANOGO, by a coup d'etat, take control of several strategic places, including the presidency of the Republic, in Bamako, and announce the dissolution of the institutions and the suspension of the Constitution. Grouped in a National Committee for the Recovery of Democracy and State Restoration[15] (CN.RDRE), they denounce the management of the democratically elected president of the conflict in northern Mali between the national loyalist army and the rebellion Tuareg. They announce that they have adopted a new Constitution and introduced a transition[16]. During this transition, the duration of which is not determined, the C.N.R.D.R.E. would be the supreme organ of state power. This

[15] C.N.D.R.E. is the committee created by the authors of putsch in 2012 in Mali for the administration of state.

[16]http//www.la—constitution-en-afrique.org/article-la-constitution des putschistes-102586061.hotml" consulted at 2018-28-4.

period will end with the organization of new democratic elections to which members of the junta would not be allowed to run.

The entire international community immediately protests against this coup. On 27th March 2012, the Economic Community of West African States (ECOWAS), of which Mali is a member, condemns "unequivocally" the overthrow of the democratically elected President of the Republic, Amadou Toumani TOURE, and categorically denies any form of legitimacy to the junta. It demands "the immediate restoration of constitutional order in Mali". However, leaving the door open to dialogue, it will continue negotiations with the ruling junta and the overthrown President of the Republic until the reinstatement of the Constitution of 25 February 1992, the resignation of the President in office, Amadou Toumani TOURE, April 8, 2012, the finding of this vacancy of power by the Constitutional Court, the accession to power of the President of the National Assembly, all in accordance with the relevant provisions of Article 36 of the Constitution of Mali 1992 which provides: "(…) In case of a vacancy of the Presidency of the Republic for any reason whatsoever or absolute or definitive impediment noted by the Constitutional Court seized by the President of the National Assembly and the Prime Minister, the functions of the President of the Republic are exercised by the President of the National Assembly. A new President is elected for another five years".[17]

But while the politico-constitutional crisis was being resolved and the junta was gone, the latter counter-attacked by considering that, if the president of the National Assembly could not organize a presidential election within 40 days its take-over—which, given the war situation in the country, would not be possible—the country would find itself without a "legal president" and that it would be up to it to organize a national convention to designate a transition president.

[17] See the article 36 of Malian constitution of 1992.

As of May 16, 2012, the following could be read in the media: "The proposal of the Malian junta to organize a convention to designate the future transitional president in Mali divides the political class. Even before being formally invited, the anti-putsch Front united in the Front for the Defense of the Republic (FDR), which calls for the return to a constitutional order, decided to sulk the convention with a thundering 'no'. What about other parties? Unlike FDR, the approach of the junta is approved by another group, the Coordination of Patriotic Organizations of Mali (COPAM), which so far supports the coup of March 22nd. Another known reaction is that of a moderate party group led by former Malian Prime Minister Zoumana Sacko. This grouping would not participate in the convention if it stood. Other components of the forces of the Malian nation should, this Wednesday, May 16, give their opinion. But already we see, the proposal of the junta is not unanimous here. Time passes, he even goes. In six days, if nothing is done, Mali will no longer have a legal president. "[18]

The failure of political agreements and the lack of the function of regulating the functioning of institutions and the activity of public authorities have to be handled. Even though provisions authorizing the exercise by the Malian Constitutional Court of powers to regulate the functioning of the institutions exist in the same terms as in Benin[19], the lack of understanding of these powers in the sense expressed by the Beninese constitutional judge, namely that as a regulating organ of the functioning of the institutions, the Constitutional Court "is entitled to take any decision which allows to avoid the paralysis of the functioning of the institutions of the Republic."[20], prevents to resort to it so that the judge, in complete independence and in all authority, decides on

[18] "http://www.rfi.fr/afrique/20120516-mali-convention-proposee-junte-divise-classe-politique", consulted at 2018.5.20.

[19] For more information, see article 85 of the Benin constitution in force.

[20] See decision DCC 04–065 of 29 July 2004 of the Constitutional Court of Benin.

measures to be taken to manage the exceptional situation resulting from the impossibility of organizing the Malian presidential election within the deadlines set by the Constitution.

Today, the ideal would be to consecrate in the constitution, or where certain constitutional provisions allow it already, as is the case in Mali and in several French-speaking African states, to devote in the jurisprudence of the constitutional judge, tools and mechanisms to anticipate open conflicts, take charge of the management of exceptional situations or situations of real or imminent paralysis so that crises and conflicts are managed by a neutral and impartial arbitrator likely to make binding decisions.

Of course, we must avoid being naive. When the dice are loaded in advance, it is difficult to expect the constitutional judge to do miracles. Therefore, the State should first have a Constitution and laws drafted in a general and objective manner, containing provisions comparable in terms of their scope to the international standards of the rule of law and pluralist democracy; and which do not crystallize, in the most important texts of the Republic, the ulterior motives or ruses of the masters of the power, in particular their desire to exclude political opponents or to distort the results of the elections. We must also count on a Constitutional Court, independent and impartial, with first and foremost powers to act against laws (including elections) contrary to the Constitution. Finally, if the parliamentary majorities, elected following transparent and sincere elections, avoid creating grotesque discriminations and frustrations against the opposition, and/or if the constitutional judge does not associate himself with these validating, we can hope that the function of regulating the functioning of institutions and the activity of powers could then play a major role in the prevention and resolution of political conflicts.

If therefore at the political level, the agreements appears as a solution of the “last chance” because it makes it possible

momentarily out of the impasse, it cannot be preferred to a preventive mode of judicial settlement whose advantages and contours have been exposed. The mode of judicial settlement of crises offers indeed the advantage of being sometimes preventive, sometimes curative, compared to the situation of paralysis or unforeseen, but is always preventive as for the concern to preserve the constitutional order itself. This is because constitutional mechanisms for inter-institutional or intra-institutional crisis resolution or exceptional circumstances management solutions would have been planned and successfully used, and in time, that the constitutional order would be more likely to withstand opportunistically rebates. Through the developments mentioned above, it is easy to understand that the jurisdictional mode of regulating political crises is preferable to the solution of political agreements and that these agreements very often endanger the rule of law and democracy in Africa.

3. CONSTITUTIONAL FRAUD MANIPULATIONS

Constitutional fraud cannot be objectively appreciated without drawing up a typology of the different manifestations of the phenomenon. In fact, it seems appropriate to understand the phenomenon of fraud through the different facets under which it manifests itself. An examination of the various facets of constitutional fraud shows that constitutional manipulation occurs most often in revisions to the constitution. These frauds cover the revisions concerning the temporal limitation of the political mandates, the extent of the powers of the executive, the electoral divisions etc.

The purpose of the following developments is to review the various manifestations of constitutional fraud through fraudulent revisions[21] of the constitution in African states. In

[21] By fraudulent revisions we mean all forms of revisions that are contrary to the spirit or purpose of the constitution.

Africa constitutional revisions generally take two forms namely: partial revisions and total revisions. The fraudulent nature of these revisions results from the use of the right of amendment to lift a limit imposed by the constitution in order to achieve subjective objectives.

The common feature of any constitution is to provide for its own revision. The revision of the constitution is justified by the fact that the constitution as living act must accommodate itself to the evolution of time. This idea of mutability of the constitution was formulated by the French revolutionaries of 1793 in the following formula: "a people always has the right to review, reform, change its Constitution. A generation cannot subject future generations to its laws".[22]

While each constitution itself provides the conditions for its own revision, the general tendency of modern constitutions is to formulate them in terms of complex or strengthened validity. Thus, the revisions are subject to increased time and quorum conditions in order to block partisan impulses. This is why the revision is entrusted to an organ which is the derived constituent power which is subject to the conditions of substance and form that each constitution takes care to specify. If there is violation in the strict sense of the constitution when the constitutional revision does not respect the conditions provided for this purpose, this violation of the constitution can however turn into fraud in the constitution. This is the case when the review is conducted in accordance with the formal rules, but in contravention of the purposes of the constitution with a view to serving a personal interest. In other words, the revision is fraudulent because its realization has been tainted by the criteria of fraud that are the misuse of the purposes of the constitution and the search for subjective interest. These two criteria will serve as a guide for qualifying the offense of fraud to the constitution of many political practices. The

[22] See Article 28 of the French declaration of rights of 1793.

following developments will concern the partial revisions that remain the most important in Africa.

3.1. Fraudulent Partial Reviews of the Constitution

Partial revisions are said to be fraudulent when the manipulations are carried out by minor alterations carried out on one or more provisions of the constitution, in defiance of the purpose of the constitution for essentially subjective considerations. These partial fraudulent revisions are part of a political strategy that responds to one-off needs and can be detrimental to the overall coherence of the constitutional framework. In this sense, the revision is not always intended to ensure the permanent adaptation of the constitution, but the revision tends to mislead it. Unfortunately, this malicious use of revision is thriving in many African countries, so much so that every revision initiative under the continent raises concerns about its actual purpose. In many cases, recourse to constitutional review is intended to serve the private cause of its initiators. Thus, the political majorities find in the advantage of their number the favorite means to secure their hold on the conduct of state institutions. As a result, the sole purpose of most revision initiatives, most often of parliamentary origin, is "to make the law suffer to serve their power." Even if subjective considerations remain the main motivations for fraudulent revisions, they alone do not justify all revisions, some of which are found in legal or even judicial contexts. In most cases, the revisions are in an environment marked by political crises. That said, in almost all African states, especially French-speaking countries, minor revisions are only made to allow the leader to represent himself, to reinforce his powers or to settle certain accounts with his political opponents. As examples, it is shown that in Senegal, the 2001 constitution is revised on average every seven

months[23]. Also, this revisionist frenzy raises questions. This is how Professor Didier MAUSS points out that the recurrent revisions of the constitution "make it necessary to question the very content of constitutional law".[24] This is all the more true as African constitutional law, marked by the seal of youth, suffers from these changes which affect the powers of the president and the question of his succession. Amendments whose negative effects are noticeable on the constitutional balance end up making it lose its intrinsic value because they affect the content of constitutional law. Under these conditions, the constitution is only intended to directly or indirectly favor the attainment of objectives of a political nature, both internally and internationally.

The reality in Africa is that many constitutional revisions are not the subject of consensus and provoke very strong social reactions. The least that can be said about them is that they are less inspired by collective interests than by subjective interests. The proof is given by the fact that almost all the constitutional revisions made in the African States concern the circulation of the elites at the top of the executive, that is to say the question of the succession of the President of the Republic, and the question of the extent of the powers of the political majority in power. This one has more obvious practical interest than this one because it concerns the limitation of the mandate considered by many constitutionalists as the keystone of the African constitutionalism. Indeed, the foreclosure of presidential term limits appears in many cases as a decorative gadget. However, when they are locked, restrictive clauses are in principle within the legal category of rules that cannot be amended, and therefore cannot be revised either by parliamentary or referendum. On the other hand, in the absence of foreclosure, it appears that if the limitation clause of

[23] See FALL Ismaël Madior, "L'évolution constitutionnelle au Sénégal ", p. 91.
[24] MAUS Didier, « Où en est le droit constitutionnel ? » in Mouvement du droit public, Mélanges en l'honneur de Franck Moderne, Paris, Dalloz, 2004, p. 709.

the mandate can be revised, it must be done in compliance with the rules of amendments to the constitution, better in respect of the purpose of the constitution. In both cases, in view of the purpose of the presidential term limit, which is to guarantee alternations and to make the constitution the main rule of devolution of power, the handling of this principle must be more restrictive, or, at the very least, consensual. Consequently, any revision of this clause without taking this requirement into account would reveal the purpose of the constitution, which remains above all an instrument of the limitation of power. In this respect, to admit the possibility of revising the restrictive clause of the presidential term, is to disregard that the constitution to a spirit and a finality. The solution would be, besides the necessary internalization of the good constitutional practices by the political actors, to act on the conditions of its revision. The following illustrations of partial fraudulent reviews are, unfortunately, diametrically opposed to these principles.

The first example concerns revisions to the limitation of the presidential term and its duration. The revisions of these subjects constitute, in the African context, the prototypes of partial revisions that are fraudulent.

Thus Burkina Faso, the double reading of article 37 of the constitution of June 2, 1991, which concerns the duration and the limitation of the number of presidential terms in favor of the president of the Republic Blaise COMPARE is the perfect illustration of the authoritarian nature of the democratic process underway in Burkina Faso. Because, this country, was the first, since the advent of democracy on the African continent, to raise the limiting clause of the mandates. As a result, Burkina Faso is considered to be the ominous bird in that it has opened Pandora's box of revisionism of the imitative clause of presidential mandates in Africa in general, in French-speaking Africa in particular.

After the case of Burkina Faso, the constitutional revisions of the clause limiting the presidential terms will be repeated with some differences in Chad in 2001, Senegal, Tunisia in 2002, Cameroon in 2008, Algeria in 2008 and Niger in 2009. These revisions have been accomplished either through referendum law (Chad, Senegal and Niger) or through parliamentary laws (Cameroon, Algeria and Tunisia).

With the exception of Niger, the initiators of the revisions in the listed countries took care to respect the constitutional procedures. It should be noted that the respect of formalism in these countries has been facilitated by the non-locking of the imitative clause of the number of presidential terms. The incongruity of Niger's constitutional revision stems from the fact that the respect of the norms was neither a means, much less an objective sought by the authors of the revision. Also, the revision of the clause limiting the mandates, was particularized by the non-respect of the constitutional procedures[25], but was obtained by means of a total revision, which, according to the constitution of August 4, 1999, was impossible.[26] The fraud in this situation results not from the regular use, but from the instrumentalization of the law for subjective ends in the sense that the president TANJA abusively used the powers of the crisis to create a new right.

Also, Togo offers the example of the perfect illustration of the fraudulent manipulation of the constitution. Indeed in 2005, general EYADEMA who had led his country with an iron fist died. The military authorities of Togo, through the voice of the Togolese army chief of staff, Zakari NAJA, decide to entrust the vacant presidency to Faure EYADEMA, son of the late

[25] In Niger, Article 49 of the 1999 Constitution states that "after the opinion of the National Assembly and the President of the Constitutional Court, the President of the Republic may submit to the referendum any text that he considers should require direct consultation of the people, with the exception of any revision of this Constitution which remains governed by the procedure provided for in Title XII."

[26] See the decision of advice of the Constitutional Court of Niger of May 2009.

president and formerly minister of mines and equipment. National and international disapproval was rapid through UEMOA[27], the African Union[28], etc. Despite pressure from the national and international community, the supporters of Mr. Faure EYADEMA put in place a commando plan to ensure the presidential chair. This plan consisted, in a limited time, to propose the perfect scenario for Faure EYADEMA to accede to the throne. The organization of the succession will have to take into account article 60 of the constitution which provides for an interim of 60 days in case of a vacancy of the power. It was finally organized in four major phases:

—first operation: to prevent the president of the National Assembly, a constitutional dolphin on missions abroad, from returning to the country;

—second operation was to amend the Standing Orders of the National Assembly to allow Minister FAURE to return to his position as deputy lost after the 2003 presidential elections;

—third operation proceeds to his election as the new president of the National Assembly;

—Fourth operation, the Constitutional Court of Togo was to complete the work undertaken by designating and receiving the oath of the deputy Faure EYADEMA as interim head of state.

The unfolding of the facts shows that the fraud does not result here from a regular use of the procedures, but from a legal assembly, from a real instrumentalization of the law in order to circumvent the constitution for partisan ends. In this case, it will be less a question of verifying the existence of the material element of fraud, than of pointing out the legal artifice that has been realized. On the facts, it can be said that the means used

[27] Thus, the current president of ECOWAS and UEMOA, the Nigerian Mamadou TANJA, will say that the takeover by the army in Togo on Saturday is a "constitutional violation".

[28] See Alpha KONARÉ, then president of the Commission of the African Union, will say on Radio France International that "what is going on in Togo, call things by their name, it is a seizure of power by the army, and it is a military coup".

was fraudulent because the operation of succession was organized from scratch to bring Faure EYADEMA to power. A legal arrangement was made in order to give an appearance of legality to the organized succession. The examination of the acts will show that they do not benefit from the patent of legality.

The chronological examination of the acts posed first leads to answering the question of whether the absence of the President of the Assembly could be described as a case of a vacancy of power within the meaning of Article 54 of the Togolese Constitution. If, a priori, the terms of this article lent themselves to this interpretation, it was not so. Indeed, this article provides for the vacancy of the presidency of the National Assembly or the Senate in three hypotheses that are "death, resignation or for any other cause". Since the president of the Assembly Bambara OUATTARA NATCHABA was alive, but on missions abroad and had not resigned, the only way out was the gap left by the last hypothesis which foresees the vacancy for "any other cause". For the authors of this assembly, the official mission abroad of the President of the National Assembly returned in this hypothesis. Consequently, the finding of the vacancy of power was necessary. Before the Constitutional Court had to decide on this situation, the army noted the vacancy of power. This reading of the facts was not acceptable because, in many respects, the course of operations was influenced by the army whose attitude made the succession illegal. Indeed, the operation was tainted by illegality because the commercial plane borrowed by the President of the National Assembly was prevented from returning to Togo because of the closure of land and air borders. However, by preventing the President of the Assembly from returning to his country, his absence was less a voluntary absence or an insurmountable force majeure than a forced exile. In reality, the editing was rude. Worse, it did not comply with the constitution.

In this situation, the violation of the constitution leads to the lack of knowledge of the prohibition of revision in the event of the vacancy of the Presidency of the Republic as provided for in Title XIII of the Constitution. Article 144 in fine of this one provides, indeed, "that no procedure of revision can be committed or continued in periods of temporary or vacancy or when is damaged the integrity of the territory". Despite this ban, the constitution will indeed be revised in two major points by a majority of 67 votes out of 81. For Togolese deputies, it was to achieve a "fraud for third parties".

The first revision was to section 144 to remove the interim period from the limits of the constitution review so that the only cause for the prohibition of review is now the breach of territorial integrity.. Thus, this revision allowed for the second revision relating to article 65 setting sixty days the duration of the presidential interim. The new article 65 extended the period of the interim to the remainder of the mandate of the former president. On this basis Faure GNASSINGBÉ thus becomes president until 2008, term of the mandate of his deceased father. Both revisions were unconstitutional in that they were carried out in violation of the Togolese Constitution in its earlier version. Since the first revision was contrary to Article 144 of the original constitution, the second revision was itself unconstitutional. In doing so, since it was a question of unconstitutionality, that is to say, an infringement of an express provision of the constitution, the argument of fraud in its first understanding could not be retained. However, the challenge of this unconstitutionality by the international community gave rise to a semblance of legitimate succession bordering on fraud with the replacement of President Faure EYADEMA who resigned on 25 February 2005 by his Vice President Abbas BONFOH. In truth, the vicissitudes of the Togolese presidential succession denoted an instrumentalization of the constitutional law of succession, the denunciations of which forced the beneficiary to surrender. In

so doing, although Faure's resignation ended the unconstitutionality, the devolution of power that followed, on the other hand, deprived the constitutional dolphin, forced to exile, to access the power deflecting the spirit of the constitution. This outcome of the events removes any ambiguity on the real intentions of the authors of the manipulation of the constitution, the Rally of the Togolese People whose will was to preserve the power and to entrust it to the clan Eyadema who did not intend to lose it. Despite numerous violations of the constitution, the Constitutional Court of Togo validated the transfer of power of Faure EYADEMA. This certification of constitutional fraud poses the problem of the role of constitutional courts in Africa. In this case, apart from the Court, which could not find it, the violation of the Togolese constitution was manifest. Was she under orders under the pressure of camp EYADEMA, or had she decided to join in an instrumentalization to serve a cause?

The most recent case of a constitutional manipulation in Africa is that of Burundi. In late October 2017, the Burundian government adopted a draft revision of the Constitution in unfamiliar circumstances. An undemocratic project marked by a refusal of alternations in power, an absence of opposition (whose leaders are almost all in exile) and a "forced enlistment" of voters. There is much to be said about this sham democracy that provides for the removal of the two-term limitation for the president. Indeed, the new constitution of 2018 provides in its article 97 that "The President of the Republic is elected by direct universal suffrage for a seven-year term renewable. No one may serve more than two consecutive terms". While the 2005 constitution prescribes in its article 96 that "the President of the Republic is elected by direct universal suffrage for a term of five years renewable once". It is clear that this new constitution firstly broke the lock of Article 96, which limited presidential terms to two five-year terms, in accordance with the Arusha Peace Agreement on 28 August 2000. The lifting of

this provision allows the President to the Republic to seek a fourth term of seven (7) years renewable. This measure de facto positions the current President Pierre Nkurunziza as his own successor and rejects any possibility for the opposition to hope to run for office before 2034.

In addition to the increase in the length of the presidential term, other revisions proposed in the new constitutional text seem to confer on the President of the Republic even greater powers vis-à-vis a Council of Ministers which will have only a symbolic role.[29] In addition, with the new constitution, it would no longer be possible for the president to be prosecuted except for high treason.[30]

The examples mentioned show that some partial revisions, whatever the procedure used, constitute constitutive fraud. Examination of the total revisions will show that they also do not escape the characterization of constitution fraud.

3.2. Fraudulent Total Revisions

The total revision is the subject of several meanings. According to Professor Otto PFERSMANN, the qualifier "total" can have two meanings of the word total revision. That is to say a very precise meaning in a constitutional text, that is to say the replacement of one text by another, even if the content is the same, or, it is not the text, but the norm; the word "total" therefore means "very important", "fundamental", "affecting the essential structure". This distinction meets the support of Professor Jean-François AUBERT. For him, there is a complete revision of the constitution when a "revision replaces one constitution by another and replaces it" in the rules". Which means that the new constitution succeeds the old one according to the rules of the latter ".[31] This conception of the total revision

[29] See article 136 of the draft Constitutional Review of 2017 in Burundi.
[30] See article 116 of the draft Constitutional Review of 2017 in Burundi.
[31] See AUBERT Jean-François, « La révision totale des constitutions… », p. 456.

is qualified as legal. It puts the accent on the delimitation of the total revision. The criterion of total revision would be the existence of a new constitution replacing an old one.

In addition to the legal definition, there is another so-called political definition that makes it possible to compensate for the inadequacies of this approach, which is considered too formal. It differs from the legal approach to which it is criticized for not sufficiently accounting for the relationship between the content of the old constitution and that of the new. This second political approach to revision is based on four different purposes. Those are:

—change the political regime of a state;

—put a constitution on the job to deepen the principles and to remove the defects that its use will have revealed;

—modernize an old and old constitution and adapt it to the taste of the day without modifying its foundations;

—repeated partial revisions that lead to a new constitution.

To change the constitution is to completely change the set of rules, including the rule to change these rules. The problem of the total revision or change of constitution is not recent. It was provided for in several ancient constitutions. In France, the principle had been laid down in the Constitutions of 1793, 1848 and the Second Republic of 1875. That of 1793 provided that "a people always have the right to review, reform and change its constitution". The constitution of 1848 provided that "the National Assembly may express the wish that the constitution be modified in whole or in part." Article 8 of the Constitutional Law of February 25, 1875, provided that "Deliberations to revise constitutional laws, in whole or in part, shall be taken by an absolute majority of the members of the National Assembly".Professor Franck MODERNE remarked that in Latin America, even if the tendency is to be abandoned, certain constitutions perfectly envisage total revision alongside partial

revision in sometimes different ways.[32] This is the case of Argentina, Cuba and Brazil.[33]

The total revision can be fraudulent because despite the formalism that was observed in the adoption of the new constitution, the will of the original constituent power manifested in the old constitution was not respected. This means that, when a complete revision of the constitution which it itself did not foresee, there is a betrayal of the will of the original constituent power. Also, in this hypothesis, even if the total revision is carried out with the anointing of the people, its fraudulent character remains whole. The fraudulent nature that could subsist in some cases of total revision despite the direct intervention of the people does not mean that it cannot intervene directly in the management of the state. The reality is that the people enjoy democratic legitimacy, but this is subject to conditions. This is also what Henry ROUSSILLON believes that if the people can intervene at any time in the state life, his intervention is necessarily framed in a legal world. In a pre-state or pre-juridical world where it is the manifestation of the sovereignty to the state, "pure", the people can freely pronounce themselves in particular at the time of the creation or the fundamental transformation of the State in to adopt a new constitution.[34] This leads to distinguishing the original constituent power of the derived constituent power. However, the argument that has just been developed about the intervention of the people in state life is not sufficient to transform the derived constituent power into original constituent power. In any case, and to paraphrase Professor

[32] See MODERNE Franck, « La notion de révision de la constitution », XVIe Cours international de justice constitutionnelle, la révision de la constitution, in A.I.J.C, XX-2004, p. 437.

[33] The 1976 Constitution of Cuba provides that the "constitution may be reformed in whole or in part". The Argentine constitution of 1994 states that "the constitution may be revised in whole or in one of its parts". The constitution of Brazil of 1988 has the same.

[34] See ROUSSILLON Henry, « Contre le référendum », Pouvoirs, 77, 1996, p189.

Moderne[35], it can be concluded that, when the total revision is not organized by the constitution, the total revision would be tantamount to recognizing that the initial constitution was not the work of reason. Some total revisions will illustrate the constitutional fraud in Africa.

The cases of Senegal and Niger will be samples to highlight situations of total and fraudulent revisions of the constitution in Africa because in these two states, the procedures used for the adoption of the new constitutions are far from being free of all criticism.

Senegal is, indeed, the only country in the West African sub-region that has not yet experienced military coups, despite a strong constitutional history over the past two decades by a revisionist constitutional frenzy at least worrying. As proof, the adoption of the 2001 constitution, which is part of a "rupture perspective", meets the criteria for total revision. This total revision is at least questionable, because its development is tainted by fraud. At least, as some of the Senegalese doctrine points out, this revision is tainted with irregularity. It is the abnormality associated with the procedure of adoption of this constitution which makes Professor Ismael Madior FALL say, "The method of breaking borrowed was not scrupulously respectful of the forms and procedures prescribed by the constitutional order".[36] This constitutional revision of 2001 in these conditions hardly escapes the category of fraudulent total revisions. This is easily understood from the political context that gave birth to the 2001 constitution. If there is a total fraudulent revision in the adoption of the 2001 constitution, it is because the procedure used allowed to change, in the forceps, the will of the original constituent of 1963 for purely partisan purposes. The assessment of the facts will show that the elements of the fraud are constituted.

[35]See MODERNE Franck, « La notion de révision de la constitution», p. 438.
[36] See FALL Ismaël Madior, L'évolution constitutionnelle au Sénégal, p. 91.

Constitutional fraud, here, differs from the violation in the strict sense of the constitution in that the means used in this case enjoy a formal regularity both from the point of view of the procedure and the letter of the constitution. In the case of the adoption of the constitution of 22 January 2001 in Senegal, unanimity is not made on the regularity of the procedure used. If the authors of the revision affirm that the procedure was regular this position is not admitted by a part of the Senegalese doctrine. This irregularity would find its ground in the accession of President WADE to the presidency of the republic in 2000 after the second round of presidential elections against President Abdou Diouf which resulted in a "great alternation incomplete".[37] The incompleteness of this alternation would result according to Professor Madior Fall, because the replacement of the president was not accompanied by a change of a parliamentary majority favorable to the new president. The socialist opposition remained in the majority in Parliament. It was necessary for this to cause new elections to hope that with the dynamics of "sopi"[38], the people give a parliamentary majority to the president in order to allow him to carry out his program. President WADE proceeded to a dissolution of the Assembly which did not seem plausible in view of the configuration of the Parliament dominated by the Socialist Party. Indeed, the right of dissolution in Senegal was provided for by Article 75 bis of the Constitution Act of 1963 introduced by the 1970 reform which provided that "the President of the Republic may pronounce, by decree, the dissolution of the Assembly after receiving the opinion of its President, when it adopted a motion of censure of the Government". With the configuration of the political forces present, President WADE had no chance of achieving his objectives on the basis of this

[37] See LEBRETON G., "Les alternances sous la Ve République ", RDP, n ° 4, 1998, p. 1073.

[38] The word means "Change" in Wolof, one of the most spoken languages in Senegal.

constitutional provision, because it was inconceivable that the Socialist Party, which had already been weakened by the presidential election and the rallying of one of its fringes to the PDS, voluntarily decides to be hara-kiri by shortening the mandate of its elected. Parliamentary review was then illusory because it threatened the interests of those who had to approve it. President WADE then resorted to Article 46 of the constitution to pass the draft constitution directly by the people without going through the National Assembly. According to article 46 "the President of the Republic may, on the proposal of the Prime Minister and after consulting the presidents of the assemblies seek the opinion of the Constitutional Council, submit any bill to referendum". This raised the question of the regularity of the use of this provision. In other words, was recourse to the people for the adoption of a new constitution constitutionally consistent or was it a fraudulent total revision of the constitution? The answer to this questioning did not seem so simple as the constitutional provisions on the revision of the constitution offered a variety of interpretations that result from the shortcomings of the Senegalese constitution.

The answer to the possibility of recourse to the referendum to modify the constitution as Professor Ismael Madior FALL is concerned was the outcome of the equation posed by the expression "any bill". Presumably, the response invited the protagonists and the observers to exegesis of the aforementioned formula. Moreover, it was necessary to know if this formula realized with the expression "any project of constitution" a perfect synonymy. Was the law taken in its material or formal sense? Clearly, the question was whether the constitution should be considered as the law understood in its broad sense that is to say in its formulation of rule of law of general and impersonal scope. This would mean that in the wording "any bill" it was necessary to include the constitution. For many observers, the negative answer was needed. Taking a stand on the issue, Professor Ismael Madior FALL observes

that the Senegalese constitutional tradition admits a totally different practice, because the reading of the preparatory works of the constitutional reform of 1963 shows the will of the drafters of the constitutional act of 1963 of resort to Article 46 only for "particularly important issues".[39] According to him, one can even conclude the existence in the Senegalese situation of a convention of the constitution which forbade not to use this provision for a revision of the constitution, let alone to submit a draft constitution to the referendum. In these circumstances, notes Professor Ismael FALL, the result is an impossibility of the total revision of the 1963 Constitution. The argument thus stated is based on two fundamental elements. First, the Senegalese constitutional tradition has never equated the formula "any bill" with "any draft constitution". If this argument seems historically acceptable under Senegalese constitutional law which does not admit a diversity of interpretations of this formula, legally, it can be challenged, because the constitution is in the general sense a law. In this case, the Senegalese president could refer to it all the more because the constitution did not expressly prohibit such a procedure.

The second argument defended by Professor Madior FALL is that a provision of a constitution cannot be used to put to death the same constitution, because it cannot contain the seeds of its own destruction or provide the weapons that cause his own death. Such a position does not seem entirely acceptable to us, because the comparative study provides us with the examples of constitution which organize their own total modification.[40] Better still, the repeal of the law remains a means to put an end to the existence of a new rule that is unsuitable or obsolete.

[39] See FALL, Ismaël Madior op. cit. [96.

[40] See, the constitutions of France of 1793, 1848 and 1875 as well as more recent ones of Argentina, Cuba and Brazil.

For the proponents of the regularity of the recourse to Article 46, the constitution having not provided a specific procedure for its total revision, it remained possible through this provision. Consequently, recourse to the people to adopt the constitution without recourse to the opinion of the President of the National Assembly was not illegal. This controversy over the use of Article 46 by President WADE recalls the revision of the French Constitution of 1962. Indeed, General de GAULLE wanted to amend Article 7 of the 1958 Constitution to institute the election of President of the Republic by direct universal suffrage while the Senate was hostile to this reform. Knowing that she had no chance of succeeding under Article 89, he submitted the draft revision to the referendum directly, invoking not Article 89 but Article 11, which allowed bypass Parliament. This initiative triggered a constitutional controversy whose echoes are still heard. The main arguments can be summarized as follows.

For General de GAULLE and his then Prime Minister, G. POMPIDOU, Article 11 of the constitution, which authorizes the President of the Republic on the proposal of the government or assemblies, "to submit to a referendum any draft law on the organization of public authorities", would be applicable to a draft constitutional revision. The supporters of the referendum still maintained that the people being sovereign, it cannot be bound by any pre-established procedure.

For the opponents of this argument, these arguments were not acceptable. In response to the first argument, they argued that admitting it would amount to supporting the existence of two parallel review procedures: that of section 89 and that of section 11. In their view, if that were so, the constituents would have been a big mess because section 89 is included in a special title called "Revision". Or, this title does not make sense, or all the rules relating to revision are there.

On the other hand, in response to the second argument, the opponents argued with regard to the sovereign people that the

people are fully sovereign only when, in exercising the original constituent power, but having adopted the 1958 constitution, they accepted to exercise its sovereignty only in the forms provided by the text. Despite the constitutional controversy that it aroused, the bill was nevertheless successfully submitted to the referendum. Seized by the president of the Senate to assess its compliance with the constitution, the French Constitutional Council declared itself incompetent on the grounds that "this law was the direct expression of national sovereignty".[41]

To return to the case of Senegal, the critics of the procedure were heard by the executive since the procedure will be readjusted through an ex-post regularization which enshrined in the constitution the possibility of a constitutional revision through direct consultation of the people. The irregularity of this legal arrangement is reflected in Article 52 of the Constitution, which now provides that "the President of the Republic may submit any draft constitutional law to the people". This is the admission that the review procedure provided for in article 46 of the old Senegalese constitution was not the one that should be used for the founding of a new constitution, because it was rather reserved to the revision of the ordinary law as it was argued.

In any case, the lawfulness or otherwise of the proceedings does not detract from its fraudulent character if we confine ourselves to the blow to the will of the original constituent power of 1963 and to the actual destination of the act. We can see with Professor Madior FALL that the new constitution "settles accounts", and that its transitional provisions provide formidable legal weapons to the president to shorten mandates that have the same legitimacy as his own. Indeed, according to Article 105 of the Constitution, the President of the Republic could "either pronounce the

[41] See FALL Ismaël Madior, Évolution constitutionnelle au Sénégal, op. cit., p. 146.

dissolution of the National Assembly, or simply organize early elections without dissolution." Article 107 provides that "for the High Council for Audiovisual Affairs, the President of the Republic is authorized to terminate the functions of current members and to proceed, by consensus, to the appointment of new members. It may, as necessary, take all necessary measures to this end. These exorbitant powers of the chief executive are convincing of the fraudulent nature of the total revision of the Senegalese constitution of 22 January 2001.

The second example of a total fraudulent review of the constitution is offered by Niger. Although sharing with the case of Senegal, the irregular use of the constituent referendum that of Niger lies in a completely different register and in terms cannot be more different that are related to the will of the President of the Republic, whose mandate had come to an end, to tame the institutions.

In a study published at the end of 2008, Stéphane BOLLE raised a question that was already teasing the minds of observers of the Nigerian political scene as rumors about President TANJA's will and his camp to establish continuism had become worrying. It had become almost certain that the move to remain at the top of the executive would lead President TANJA to revisit the procedures of the constitution. It is with such impulses that Stéphane BOLLE posed this premonitory question which would become the central question of an institutional and social crisis. In this regard, he pointed out that it would be a first step to delete article 136 of the constitution or some of its provisions, and, secondly, to adopt a now lawful revision.[42] In the same sense, he raised this series of questions since supporters of President TANJA advocate a Sixth Republic, should we not fear that they are resolved to bring down the Fifth Republic and its constitutional order by a coup, even if to camouflage it by legal devices? Does not Niger

[42] See BOLLE Stéphane, « 2009 : année de toutes les révisions, année de tous les dangers ? », www.la-constitution- en-afrique.org.

run the risk of being the victim of a "constitution fraud", that is to say, a revision that is valid in the form, but which is illegal in substance, of the kind that, in France, carried off the Third Republic and consecrated "the French State", by the law of July 10, 1940?

This is indeed what happened, since the Tazartché[43] camp will resort to the popular referendum of August 4, 2009, to move to the constitution of the Sixth Republic. In the following lines, it will be shown the fraudulent nature of this constituent referendum of 2009 in the light of the constitution of Niger of August 9, 1999, and Law No. 2004-46 of June 16, 2004, determining the conditions for the referendum. Our analysis will show that legal devices were used to divert the purpose of the 1999 constitution in favor of President TANJA's re-election ad vitam aeternam.

The referendum instituting the Sixth Republic of Niger was to be organized in accordance with the provisions of the constitution of the Fifth Republic of 9 August 1999. However, this constitution prohibited the total revision in an express way. Article 136 provided that: "No review procedure may be initiated or continued where the integrity of the national territory is impaired. The republican form of the state, the multiparty system, the principle of the separation of state and religion, and the provisions of articles 36 and 141 of this constitution cannot be revised."[44]It was understandable that a complete revision of the constitution was impossible because Articles 36 and 141 could not be changed in any way. In spite of these constitutional limits, President TANJA, based on a questionable reading of Article 49 of the Constitution, will convene the electorate whose anointment was desired to establish a Sixth Republic. He will state in this connection, in a radio-televised message to the people that "I have decided on

[43] The word means "Continuity at the top of the state" in Niger in local language Haoussa.

[44] See Article 36 of the Niger Constitution on limiting the presidential term.

the basis of Article 49 of the Constitution to submit for your approval a new constitution that meets our realities and guarantees stability". Such a possibility seemed impossible to read literally even from the terms of Article 49, which provided that "the President of the Republic may, subject to the opinion of the National Assembly and the President of the Constitutional Court, submit to the referendum any text that appears to him to require the direct consultation of the people with the exception of any revision of this constitution which remains governed by the procedure provided for in Title XII. When the draft is adopted by referendum, the President promulgates it within the time limits provided for in paragraphs 1 and 2 of Article 47".[45] It appears from this provision that the referendum route could in no case be used to proceed to a revision of the constitution that it was partial or total, as was noted above. The constitutional revisions were in fact dependent on Title XII of the Constitution of the Fifth Republic, which, moreover, contained insurmountable limits. The first obstacle to the president's attempt was the Constitutional Court, whose opinion, although optional, pointed to the unconstitutionality of a possible revision of the limitation clause on warrants. For its part, the National Assembly unfavorable to the project of President TANJA will not have time to stand as a second obstacle that will be dissolved. The Constitutional Court will suffer the same fate. The dissolution of the institutions which were hostile to the project of a constitution shows that the president waited used of all the legal means whatever their legality. The institution of the Sixth Republic by referendum did not confer on the president nor the legality even less the desired legitimacy. The constituent referendum that was organized should have been organized within the framework of the previous constitution. This means that the intervention of the people acting as an established constituent power must be done in accordance with the

[45] See Article 49 of the Constitution of Niger.

constitutional limits of the revision. On the other hand, in deciding to move to another Republic, the President was ruining the will of the original constituent power, one of whose aims was to outlaw the personal and absolute power of an individual over the community. Constitutional fraud was constituted by the misuse of exceptional powers and the referendum procedure to satisfy a personal destiny.

In summary, the practice of total revisions, whether regular or not, leads to the weakening of African constitutionalism. In Senegal, as in Niger, the adoption of new constitutions has weakened constitutional processes under construction. By way of example, in Senegal, the provisions of the 2001 constitution have allowed President WADE to have a quasi-monopoly of institutions resulting in dissolution-recreation of institutions. If Senegal escaped without major impact, it was not the same for Niger which plunged into a social political crisis after the non-recognition of the "TANJA constitution" followed by the military coup d'état. February 19, 2010, which, according to one of its authors, is always a moment of decline of democracy. Undoubtedly, coups d'état constitute setbacks because they lead to the suspension of constitutions and democratically established institutions.

Other forms and examples of constitutional manipulation exist on the African continent, the examples illustrated in the context of this article are only study samples.

4. CONCLUSION

The normative and jurisdictional guarantees constitute three guarantees necessary for the effectiveness of a right. Therefore, their performance depends on the success of the fight against violations of the constitution.

In Africa, the fact is that the democratic renewal of the 1990s has helped to restore the value of the rights and freedoms of the human person. Under the weight of internal challenges

and external pressures, almost all states have succeeded in establishing a normative and institutional mechanism for promoting the rule of law and the expression of democracy.

Normally, the secret rules concern the organization and functioning of States. With regard to the organization and devolution of the powers inspired by the 1958 French constitution, African constitutions define more open and democratic rules of devolution of power. In doing so, they outlaw the personalization of power and in some countries limit time to power.

With regard to the protection of citizens, the new constitutions offer a range of fairly important rights to citizens. To ensure the effectiveness of the rules created, an institutional mechanism is then put in place to mark the break with the authoritarianism of the past. The creation of specialized constitutional jurisdictions will mark the strong will of States to promote democracy and to submit to the right that has been secreted. Constitutional jurisdictions then become custodians of the constitutional system. From this point of view, they are obliged to fight against violations of the constitution. But this struggle is particularly complex in that in many African countries these jurisdictions remain under the domination of political power.

In this case, in order to prevent the constitutional law from being devalued, the commission of an offense of constitutional fraud is necessary in positive African law. This recognition is all the more necessary as the impact of constitutional manipulation on the legal order is important. Indeed, through these multiple manifestations, constitutional fraud can contribute to changing the nature of a political regime or sometimes even the stability of a state. It has been shown to this effect that frauds inherent in abuses in the use of powers can lead to deep crises in some countries.

As a result, it is up to the jurisdictional and political bodies to use the legal means provided by international

constitutions and instruments to effectively combat constitutional fraud. For the constitution the constitution as the fundamental law of a state cannot, and must not be, defeated by a political group.

To ensure effective protection for the constitution, African courts, politicians and civil societies must take over the theory of supra-constitutionality in order to promote the more constitutional culture in Africa. Indeed, the principle of supra-constitutionality can be built on the basis of the hierarchy of rights and principles in force in the constitutional system or on the principles contained in certain international legal instruments such as the Charter of the African Union. These legal instruments offer rules that make it possible to fight against the violation of constitutional principles, notably through the condemnation of unconstitutional changes of government or the appropriation of the will of the people by a ruler.

Also, the international community through the United Nations organization could also allow sanctions against constitutional manipulation in the same way as against the crimes against humanity provided for in the legal provisions of the international criminal court. In doing so, the leaders of states, be they African or foreign, will pay attention to anti-democratic practices in the management of public affairs or in the fulfillment of their political mandates. Of course, this is difficult, but all it takes is a political will to restore the constitution's value as a fundamental and sacred law.

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