Introduction to the Constitution of Togo

Kossi Komali[1] and Lukman Abdulrauf [2]

I. Origins and Historical Development of the Constitution

Although the country was considered a model in colonial times, Togo has become a constitutional laboratory since it gained independence.[3] This is evident in the multiplicity of constitutions and constitutional practices that the country has experienced since 27 April 1960. The First Republic (1960-1963) and the Second Republic (1963-1967) were followed by a period of emergency rule (1967-1979). Then came the Third Republic (1979-1991) and a transitional period (1991-1994). Togo entered its Fourth Republic with the promulgation of the Constitution on 14 October 1992, following it adoption by referendum on 27 September of the same year. This constitutional cycle and its practice provide rich lessons of law and politics. Togo has adopted, challenged, suspended, revoked, and then renewed its Constitution. The constitutional back-and-forth has always revived the permanent search for a form of government that would best bring political stability, peace, and economic and social development to the people of Togo.

In reality, however, these constitutional changes are very much part of a general trend that is typical of French-speaking countries in black Africa. The First Republic had a parliamentary system based on the Western model. This was followed, all the way to the Third Republic, by a system referred to as Black African presidentialism, characterized by a Head of State at the heart of the political system. The freedoms brought about by the fall of the Berlin Wall laid the foundations for the Fourth Republic. This was based on the observance of democratic principles, including the separation of powers, the rule of law, multiparty politics, democratic transition of power, and the protection of human rights and freedoms.[4]

After more than twenty years of constitutional practice, has the Fourth Republic met the people's expectations? Did this great feat of architecture, which heralded a new era, keep its promise? Unfortunately, the results were not what was expected, leading to a bitter realisation

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[1] He holds a Doctorate in Public Law, and is a Lecturer and Researcher at the Faculty of Law, University of Lomé (Togo).

[2] He holds an LL.D. from the University of Pretoria and is a lecturer in the Department of Public Law, Faculty of Law, Ilorin University, Nigeria.

[3] CDP/CERDRADI, *L'Afrique et l'internationalisation du constitutionnalisme : actrice ou spectatrice ?* (Lomé Colloquium I), 2010.

[4] K. Tchodie, *Essai sur l'évolution du présidentialisme en Afrique noire francophone : exemple du Togo*, Public Law thesis, Université de Caen, 1993, p. 25.

for both the government and the people. As a matter of fact, a number of political, economic, and legal events conspired to eclipse the Constitution. The Constitution was manipulated, revised, and even set aside on a number of points, supplanted by political agreements that would unite different political figures. This progressive weakening of the Constitution over more than twenty years makes for an interesting examination. For over two decades, this revitalized form of constitutionalism has been a progressive disappointment. It is only natural that one feels the urge to pause, catch one's breath, and begin reflecting on Togo's Constitution.

A. Political and constitutional developments in Togo prior to 1992

Just like most newly independent countries in French-speaking black Africa, Togo adopted an independence Constitution that set out the various institutions of the Republic, defined political power, and regulated its operation. The first seven years of Togo's independence, however, were characterized by a turbulent constitutional and political life. There were two military coups. The first occurred on 13 January 1963, ending the First Republic led by Sylvanus Olympio (1960-1963); the second occurred on 13 January 1967, which saw the overthrow of President Nicolas Grunitzky (1963 to 1967) and brought General Gnassingbé Eyadema[5] to power. The Third Republic was born with the adoption by referendum of a new Constitution on 30 December 1979. This was nothing more than the codification of political practice during the twelve years of emergency rule. This Constitution created the one-party system.

1. Togo from 1960 to 1963

Prior to the Constitution of the First Republic, political life in Togo was regulated by the Constitutional Law of 23 September 1960. Passed by the House of Representatives before the country's independence on 27 April 1960, this first Constitution instituted a parliamentary-type regime in the image of the 1946 French Constitution (Fourth Republic) with a dual executive: a Head of State and a Prime Minister. In fact, according to Article 46 of the Constitution, 'Parliament can censure Government policy with a majority of Members of Parliament passing a no confidence motion.' The same Constitution further specified that 'Parliament may be dissolved by decree of the Prime Minister, following a decision of the cabinet.' In reality, this type of parliamentary regime struggled to function. It should be noted that the Constitution of 23 September 1960 was a transitional instrument, which played a dual

[5] See in this regard Robert Cornevin, *Histoire du Togo* (3rd ed., Paris, 1969), p. 554.

role: on the one hand, it was a positive step in the amicable de-colonization process from a French Republic with liberal institutions; on the other hand, it served as a temporary constitution while awaiting the Constitution of the First Republic[6] and the establishment of a clear political system in Togo.

The Constitution of 14 April 1961 instituted a presidential regime characterized by the monocephalic concentration of power in the hands of the President of the Republic. The institutional imbalance occasioned by the 1961 Constitution (the relationship between the executive and the legislature) degenerated into abuse of power. This included actions against the political opposition, which was essentially made up of the following parties: JUVENTO (Justice-Union-Vigilance-Education-Nationalism-Tenacity-Optimism), MPT (*Mouvement Populaire Togolais*) (Togolese People's Movement), UCPN (*Union des Chefs et des Populations du Nord*) (Union of Northern Chiefs and Populations), and PTP (*Parti Togolais du Progrès*) (Togolese Progress Party). Accused of plotting to overthrow the regime, opposition leaders were arrested or forced to leave the country. This was the case for a number of leading figures, such as Antoine Méatchi, Ben Abalo, Anani Santos, and Nicolas Grunitzky. In the end, all opposition political parties were banned on 13 January 1962. Naturally, these excesses caused deep unhappiness among the political opposition in Togo. The country had fallen into a political malaise for several reasons. A part of the peasant population had withdrawn its support for the regime after many traditional leaders were more or less arbitrarily dismissed. Young professionals and intellectuals openly turned their backs on the regime, having been denied positions of political or administrative responsibility in favor of the old struggle companions of President Sylvanus Olympio. Even within the President's party, the dissatisfaction brought about by the numerous internal divisions eventually paralyzed most branches, thereby depriving the government of a solid political base.[7] The First Republic ended tragically under these conditions, in the wake of the military coup of 13 January 1963 in which the first President of Togo died.

2. Togo from 1963 to 1967

The Constitution of the Second Republic was adopted on 5 May 1963 and promulgated on 11 May 1963. It proclaimed, in the preamble, the Togolese people's attachment to the principles of democracy and human rights as defined in the Universal Declaration of Human Rights of

[6] T. Tete, *Histoire du Togo: le régime et l'assassinat de Sylvanus Olympio 1960-1963* (Créteil: NM7, 2003), p. 352.
[7] Cornevin (n 4).

10 December 1948. It proclaimed its commitment to ensuring respect for and the guarantee of public freedoms, trade union freedoms, human rights and freedoms, rights of the family and local communities, freedom of thought and religion, individual and collective ownership of property, and economic rights. The 1963 Constitution was liberal and more generous than the 1961 Constitution. This Constitution contained a more extensive list of rights and demonstrated a greater sense of solidarity in providing for the most disadvantaged.

Four years later, and after a short-lived era of liberalism, the old demons of authoritarianism and practices of the First Republic returned in force. Once again accusing civilians of having failed in their mission to build the nation and promote economic development, the military seized power once more. As soon as the coup was carried out, the Constitution was abrogated, the National Assembly was dissolved, and political activity was banned. A few weeks later, deliberative assemblies, municipal councils and constituencies, political parties, and trade unions were dissolved. A short-lived executive body called the 'Committee for National Reconciliation', chaired by Colonel Kléber Dadjo, took power from 14 January 1967. As its name suggests, its mission was, among others, to promote reconciliation and national unity, which the military claimed had been badly affected by partisan struggles and rivalries between civilian politicians.[8]

The Committee was accused of incompetence, however, and on 15 April 1967 it quickly made way for a government composed of military and civilian personnel and chaired by Lieutenant Colonel Gnassingbé Eyadema, then Chief of Staff and leader of the two coups of 13 January 1963 and 1967.

These first two Constitutions clearly provided for democratic regimes, based on a multiparty system and respect for fundamental rights and freedoms. The hopes raised by these Constitutions were short-lived. Only three years after independence, Togo was experiencing chronic instability of the newly created institutions, a worrying militarization of established political bodies, and the emergence of the single party. It is evident that in the years following independence, the political situation in Togo, like in most African countries, was characterized by the use of violence in various forms.

Constitutionalism – hailed, praised, and even canonized by Togolese leaders as the royal road to economic, political, and cultural development – was now on trial, accused of creating all the difficulties faced by the newly-independent states, including government instability and

[8] Adovi Goeh-Akue, *Brève introduction à l'histoire du Togo*, Department of History, University of Lomé.

ineffective political power. It was also accused of being an artificial legacy of France, completely disconnected from African realities, and of being the catalyst for ethnic, religious, or cultural opposition.

Thus the new constitutional system, based on multiparty politics, was quickly abandoned in favor of a one-party presidential system, characterized in law and in practice by a predominant executive and correspondingly reduced powers particularly for the legislature, which its proponents justified at the time with two sets of arguments. On the one hand, the ethnic and linguistic diversity of the country made it necessary to create a political instrument capable of uniting all citizens. On the other hand, in the face of the reality of underdevelopment, a multiparty system was considered to be a source of division among the population that could jeopardize the struggle for development.[9]

3. Togo from 1967 to 1991

This period is divided into two sub-periods. The first period was a period of emergency rule from 13 January 1967 to 9 January 1980, until promulgation of the Constitution adopted by referendum 30 December 1979. On 30 December 1979, the people also voted for the President of the Republic (a single candidate) and for members of the National Assembly (a single list presented by the *Rassemblement du Peuple Togolais* (RPT)). The second period was a constitutional period from January 1980 to August 1991. The Constitution of the Third Republic formally proclaimed Togo's accession to international instruments, the United Nations (UN) Charter and the Universal Declaration of Human Rights. Politically and institutionally, this period was also characterized by the one-party system.[10]

This was a political-institutional mechanism to concentrate power in the hands of one man, the President of the Republic. It allowed him to use the considerable legal and political means at his disposal to be both Head of State and Head of Government. Everything began and ended with him. In addition to his unique position as head of the executive, the President of Togo was also head of the single party, which enabled him to dominate Parliament and transform it into a rubber stamp. As the leader of the only political party, the President controlled all electoral mechanisms: those that ensured his survival as Head of State, and those responsible for selecting Members of Parliament.[11]

[9] K. Somali, *Le parlement dans le nouveau constitutionnalisme en Afrique* (Lille, ANRT, 2008), p. 468.
[10] C. Toulabor, *Le Togo sous Eyadema* (Paris: Karthala, 1986), p. 332.
[11] O. Yagla, *Le pouvoir politique au Togo* (Lomé: l'Harmattan, 1978), p. 215.

Under one-party rule, the National Assembly was given the necessary powers to pass laws and monitor the executive. It had the power to initiate both ordinary and constitutional legislation, as well as the right to amend such legislation. It could enact laws and vote on the budget, authorize war, ratify certain treaties and international agreements, etc. With regard to monitoring government action, Members of Parliament could pose written or oral questions to ministers, who were required to respond. For most people, however, these provisions were ignored for two reasons: one constitutional, the other political.

Constitutionally speaking, the laws that governed political life in Togo during the one-party system were designed to ensure the supremacy of executive power. The President of the Republic enjoyed important prerogatives, such as defining the scope of the law and streamlining Parliament's work. These were inherited from the French Constitution of the Fifth Republic (where the President would determine the duration of parliamentary sessions, decide on the admissibility of certain legislative proposals, and determine Parliament's agenda). As the exclusive holder of executive power, the President could determine and execute national policy, initiate legislation, and request a second reading of laws passed by Members of Parliament. As head of the administration and of the army, he could negotiate and ratify international agreements and call a referendum. Most importantly, he had sole discretion to take necessary action in an emergency period. The Constitutions of the Third Republic thus created conditions for presidential supremacy, an idea which seems incompatible with Parliament exercising its rights.

During this period, political life was dominated by the party of the President of the Republic, a monopoly by one political party. Evidence of this includes control of citizens and groups, curbing the activities of trade unions, and suppressing politically heretical organizations. Ministers were senior party officials who appeared alongside the Head of State, who was also head of the ruling party. The National Assembly, meanwhile, was confined to a rubber stamp role. Its right to initiate legislation remained largely theoretical and its prerogative to control executive action was only symbolic. During this monocentric period up until 1990, and despite declarations of intent, Parliament was successively denied its legislative power; its only purpose was to satisfy the academic curiosity of theorists of democracy rather than to serve another purpose.[12]

This perversion of independence constitutionalism under the pretext of ensuring government effectiveness and political stability had serious consequences in Togo: general economic

[12] Somali (n 8).

failure, identity politics and tribal antagonism, and human rights challenges. None of the purported benefits of authoritarian one-party states and military regimes ever materialized. Faced with this economic, social, and political impasse, the basic question for the people of Togo and its leaders at the end of the 1980s was what type of leaders and what political structures were needed in order to achieve well-being and human development?

The answer to this question came from liberalists, who continuously linked economic development to multiparty democracy. In Africa it was important to liberalize not only the economy but the political system itself, and to move from the one-party authoritarian regime that had been practiced so far, to a more liberal, more democratic political system, such as in the West. Clearly, there was a need for more effective leaders who derived their power from citizen participation at all levels and who would match development priorities with human needs and use available resources in an efficient manner.

The protest movement against the military regime that began on 5 October 1990 forced General Gnassingbe Eyadema to give in to multiparty politics in April 1991 and to organize a meeting of all social and economic political forces in June 1991 to find a solution to the crisis in Togo. This National Conference undertook an appraisal of political, economic, and social life in Togo since independence and, in particular, for the period between 1967 and 1991.

Conference delegates ruled that the regime's policy of national unification and development had been a complete failure; they seriously condemned human rights violations to which the regime pleaded guilty; and they reaffirmed the need to restore national unity and economic modernization. Delegates further adopted the outline of a democratic constitution based on a multiparty system, the guarantee of human rights, and the effective separation of powers. Pending the establishment of new institutions, delegates set up transitional arrangements including, among others, a 79-member High Council of the Republic (HCR) consisting of Conference delegates representing all political parties, elected by their peers and acting as a provisional legislature; and a Prime Minister, elected by the National Conference, who would act as Head of Government under the supervision of the HCR. Although the President continued in office, he lost most of his powers to the Prime Minister. In this regard, Article 26 of Act No. 7 of 23 August 1991 provides: 'The President of the Republic is the Head of State. He embodies continuity, independence and national unity. He ensures compliance with treaties and international agreements. He is the Commander in Chief of the armed forces. He represents the state abroad.'

This opened up an era of democratic renewal and true liberalism, marked in particular by unprecedented freedom of expression, the flowering of multiple associations and political parties, and the opening of state media to all political parties.

B. The constitutional system of the Fourth Republic

The Constitution of 14 October 1992 was drafted by the transitional authority emanating from the Togolese National Conference of 8 July 1991 to 28 August 1991. The Constitution was adopted by referendum on 27 September 1992 and promulgated into law on 14 October the same year.[13] Its aim was the definitive establishment of a democratic system in Togo, based on multiparty politics. That is why the Constitution of the Fourth Republic incorporated various international human rights instruments (the UN Charter of 1945, the Universal Declaration of Human Rights of 1948, the International Covenants of 1966, and the African Charter on Human and Peoples' Rights).

This Constitution was substantially amended on 31 December 2002. According to its supporters, the constitutional revision had a four-fold objective: to increase the power of the people; to ensure better separation of powers between the executive and the legislature and to create the Senate in order to ensure better representation of local authorities in the legislature; to involve Togolese men and women who had rendered outstanding services to the nation in the work of the legislature; and to allow laws relating to local matters to be better prepared and voted upon.[14]

II. Fundamental Principles of the Constitution and Fundamental Rights Protection

The fact that safeguarding individual freedoms falls primarily within the functions of the Judiciary demonstrates the central and fundamental role of the judiciary in protecting individual and collective freedoms in our society. It is the ultimate guarantor of respect for individual freedoms, since the mission of the courts is, by definition, to protect and safeguard. Thus, the 1992 Constitution of Togo states that the judges of the ordinary courts, the administrative courts, and the Constitutional Court are guardians of these freedoms.

Togo's 1992 Constitution establishes a set of citizens' rights.

A. Freedom of movement

[13] Y.E. Dogbe, *Le renouveau démocratique au Togo* (Lomé: Akpagnon, 1991), p. 320.
[14] E. Koupokpa, *Le régime politique togolais de la 4e République*, Thèse droit public, Universités de Lomé et de Gand, 2011, p. 523.

Freedom of movement has a constitutional basis and is enshrined in various international and African instruments. Thus, according to Article 22 of the 1992 Constitution,

> [e]very citizen of Togo has the right to move freely and to settle anywhere in the country, within the limits of the law or local custom. No citizen of Togo may be deprived of the right to enter or leave Togo. Any foreigner who is living lawfully in Togo and is respectful of applicable laws, enjoys freedom of movement, may choose their place of residence and may leave the country freely.

B. Freedom of conscience and religion

The progress of civilization has always been accompanied by a decline in theocratic systems. This is a form of political organization in which civil power is held *ex officio* by the religious establishment. In fact, in the very beginning of human society, power was essentially religious in nature.

The legal frameworks in France and Togo today are influenced by liberal philosophy, but are also the result of a turbulent history of ideological struggle between clericalism and secularism. Liberal philosophy holds that the state must, in principle, disregard opinions and beliefs, and therefore religion, as these are private matters for every individual and are therefore exempt from public intervention.

In recent times, both in France and in Togo under the new Constitution, there has been a new balance between indifference and tolerance of religion by the state. Article 25 of the 1992 Togo Constitution clearly reflects the drafters' intention in this regard:

> Everyone has the right to freedom of thought, conscience, religion, worship, opinion and expression. These rights and freedoms are exercised with due regard to the freedoms of others, public order as well as laws and regulations. The organisation and practice of religious beliefs are freely exercised in compliance with the law. The same applies to philosophical groupings. Religion is practiced and belief expressed with due regard to the secular nature of the state. Religious denominations have the right to organise themselves and to exercise their activities freely in compliance with the law.

C. Freedom of the press

Alexis de Tocqueville stated in his book *Democracy in America* that '[s]overeignty of the people and freedom of the press are two entirely correlative things (...). [It press freedom] is an extraordinary power, a strange mixture of good and evil; liberty cannot live without it, and

order can hardly be maintained with it.'[15] Governments have always feared the press, which has established itself as the fourth power. As proof, the Polignac government in France wrote the following in a report to the King on 25 July 1830: 'Throughout history, the press has been, and by nature could only be, an instrument of disorder and sedition'.[16] However, it should be noted that today, the press is an essential aspect of citizens' lives. Today's citizens are constantly in search of information; their thinking has evolved, and so has communication technology. In Togo, therefore, the 1992 Constitution states in Article 26:

> Freedom of the press is recognised and guaranteed by the state. It is protected by law. Everyone has the freedom to express and to disseminate their opinions or information by speech (in writing or by any other means), in accordance with the limits set by law. The press cannot be subject to prior authorisation, to bond payments, to censorship or to other restrictions. No publication may be banned except by court order.

For the first time, the principle of press freedom is governed by the High Authority for Audiovisual and Communication (*Haute Autorité de l'Audiovisuel et de la Communication*) (HAAC) established by Article 130 of the Constitution. The HAAC is a body created to guarantee and ensure the freedom and protection of the press and other mass media. The status of the HAAC is set out in the Organic Law of 15 December 2004. Article 1 states: 'The HAAC is an independent institution vis-à-vis every administrative authority, political power, political party, association or pressure group.' Article 5 states:

> The HAAC is made up of nine members chosen on the basis of their expertise and extensive knowledge of the communications industry: four appointed by the President of the Republic, and five elected by the National Assembly. Members of the HAAC should be nominated and elected with due regard to gender considerations. Members must have at least ten years' professional experience.

D. Freedom of association

The principle of freedom of association in Togo is recognized in Article 30 of the 1992 Constitution, and was influenced by French law. In France, this freedom was first recognized under the Third Republic, at the same time as a wide range of civil liberties. Article 2 of the Law of 1 July 1901 repeals previous provisions of the French Criminal Code and proclaims

[15] Alexis de Tocqueville, *Democracy in America* E. Nolla (ed) and translated by J.T. Schleifer (Indiana: Liberty Fund, 2010) 292-293.

[16] The report to the King was quoted in "At all epochs , the periodical press has only been, and from its nature must ever be, an instrument of disorder and sedition" F.Lieber *et al* (eds) *Encyclopedia Americana: A popular dictionary of arts, sciences, literature, history, politics and biography* (Philadelphia: Blanchard & Lea, 1851) 236.

that '[a]ssociations may be formed freely and without permission or prior notification.' The same provisions regulate associations in Togo.

E. Freedom of assembly

This fundamental freedom is particularly treasured in liberal democracies, because it determines in part the exercise of other civil liberties (trade union freedom, freedom of association, religion, etc.). Nevertheless, governments consider it a risk to public order, especially when this involves public gatherings. This freedom was however guaranteed in Article 30 of the 1992 Constitution.

F. Right to protest

In its current sense, 'protest' means a group of people using public roads to express a claim or to protest against public authorities. A protest is characterized by an objective, expressed through ideas or opinions, singing, or shouting. This is different from a meeting, whose objective is the delivery of a speech.

The right to protest is both a branch of freedom of expression and an instrument of direct democracy. As a component of freedom of expression, the right to protest can also be understood as springing from the art of governance. Generally speaking, recourse to protest remains a privileged means to express opinions and defend interests. Thus, under Article 30 of the 1992 Constitution, '[t]he state recognises and guarantees the right (...) to protest peacefully and without instruments of violence, under conditions determined by law.'

In Togo, this right to protest is regulated by the Law of 13 May 2011, which lays down 'conditions of exercise of the freedom of assembly and peaceful public protest' (commonly called the 'Bodjona Law' after the Minister of Territorial Administration who tabled it before Parliament). This law does not take into account private meetings and events, meetings and protests held during election campaigns, and spontaneous gatherings and protests. It advocates the freedom to hold meetings and public events.

G. The right to participate in political life

There are two different elements here: the right to citizenship and the right to collective organization and political action.

With regard to citizenship, all international instruments echo this fundamental freedom: the right to take part in the conduct of public affairs, directly or through freely chosen

representatives; the right to vote and to be elected in free elections by universal suffrage; and equal access to the public service in one's country.

As for the collective organization of political action, it takes into account political rights which 'encompass the freedom to engage individually or through political parties in political activity, the freedom to debate public affairs, to criticise the Government and to publish material with political content.'

In Togo, Article 6 of the 1992 Constitution proclaims the freedom to create political parties by providing that '[p]olitical parties and alliances of political parties contribute to the formation and expression of the political will of the people. They may be formed freely and should operate in compliance with laws and regulations.' Law No. 91-04 of 12 April 1991, on the charter of political parties, establishes the status and regime of political parties in Togo. Article 5 provides that

> [p]olitical parties should contribute: to the defence of national sovereignty and democracy, the protection of the republican form of government and the secular nature of the state, the consolidation of national independence, the defence of territorial integrity, the protection of citizens' freedoms and fundamental rights, and the defence of the Constitution and laws of the Republic.

Furthermore, Article 11 of the charter of political parties stipulates that at least thirty people are required to form a political party, and must be drawn from at least two thirds of the country's prefectures.

H. Economic freedoms

In an increasingly liberal and globalized economy, entrepreneurial freedom is protected by law, despite Togolese laws being silent to a certain extent in this regard. The 1992 Constitution nevertheless touches on it, since it says in its Article 37 that '[t]he state recognises every citizen's right to work and strives to create the conditions for the effective enjoyment of this right.' Thus freedom of trade and industry is an element of entrepreneurial freedom and involves the right to establish a business; that is to say, the freedom to choose and change the purpose of one's business and to determine its form; but also the freedom to organize the way in which it is governed, and to recruit, dismiss, and penalize employees in accordance with employment law. Today, entrepreneurial freedom also implies 'free competition' in the sense of freedom to compete in the market.

III. Separation of Powers

Under the Togolese Constitution of 1992, the distinction between the various organs of the state is based on the theory of the separation of powers as formulated by Aristotle and John Locke and systematized by Montesquieu. According to the latter,

> [p]olitical freedom is found only in moderate governments. It only exists when there is no abuse of power, but it is an eternal truth that all men who wield power also abuse it; they carry on until they reach their limits. Who would say it, but even virtue needs limits. In order to prevent the abuse of power, things must be arranged so that power checks power.[17]

The drafters of the Togolese Constitution of 1992 took this principle into account due to the confusion that exists between the different organs in non-democratic regimes. As a result, they wanted to ensure a true separation between the three major branches of government: the legislature, the executive, and the judiciary.

A. The Executive

The executive has two components: the President of the Republic and the Government, headed by a Prime Minister.

1. The President of the Republic

In accordance with Article 59 of the Constitution of 1992, as amended by the Law of 31 December 2002, the President of the Republic is elected by direct and secret universal suffrage for a term of five years. He is eligible for re-election. There is no term limit, as previously foreseen by the former Article 59, which stated: 'The President of the Republic is elected by direct universal suffrage for a term of five years renewable once. No person may serve more than two terms.' The President of the Republic remains in office until the inauguration of his elected successor. The new Article 60 specifies the method of election in these terms: the President of the Republic is elected by a one-ballot uninominal majority poll. He is elected by a majority of the votes cast.

The President of the Republic is the Head of State, and the cornerstone of public institutions. He is the guarantor of independence and national unity, territorial integrity, respect for the Constitution, and international treaties and agreements.[18]

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[17] C. L. de Secondat & Baron de la Brede et Monstequieu, *The Spirit of the Laws* Book 11, chapter 4.
[18] B. Etekou B, *L'alternance démocratique dans les États d'Afrique noire francophone*, Public Law thesis, 2013, p. 231.

In case of vacancy of the Presidency of the Republic by death, resignation, or permanent incapacity, the Speaker of the National Assembly acts as interim President. The Constitutional Court rules that such a vacancy indeed exists, after being seized by the government.

The President of the Republic appoints and dismisses the Prime Minister. He appoints the other members of the government upon the suggestion of the Prime Minister. As in the French system, the President of the Republic presides over the Council of Ministers. He promulgates laws within fifteen days of the said laws being transmitted to the government, once they have been definitively adopted by the National Assembly; during this period, he may request a fresh deliberation of the said law or some of its articles. Such a request must be substantiated. The National Assembly may not refuse to hold this new deliberation. The President has the same power of dissolution as in France. He may dissolve the National Assembly, after consultation with the Prime Minister and the President of the National Assembly.

In the Togolese Constitution, the Head of State wields significant authority to sign and to appoint. The President of the Republic signs ordinances and decrees deliberated upon by the Council of Ministers. After deliberation by the Council of Ministers, he appoints the Grand Chancellor of the Order of Mono, ambassadors and special envoys, prefects, officers, military commanders of land, sea, and air forces, and the directors of central administrations.

By decree emanating from the Council of Ministers, the President of the Republic appoints university presidents elected by the electoral colleges of the universities. He also appoints professors from a waiting list recognized by university councils and general officers. The President of the Republic accredits ambassadors and special envoys to foreign powers; ambassadors and envoys extraordinary are accredited to him. The President of the Republic is the Commander-in-Chief of the army. He chairs the Defence Council. He declares war with the authorization of the National Assembly. He decrees a general mobilization after consultation with the Prime Minister. He exercises the right of pardon after consultation with the High Judicial Council.

Thus the Prime Minister and his government exercise their functions under the leadership of the President of the Republic.

2. Government

The government includes the Prime Minister, ministers and, where applicable, ministers of state, deputy ministers, and secretaries of state. The position of member of government is incompatible with the exercise of any parliamentary office; any position as a professional

representative at the national level; and indeed any other employment, whether private or public, civil or military, or any other professional activity. Under the authority of the President of the Republic, who chairs the Council of Ministers, the government determines and conducts the policy of the nation. The President heads the civil and military administrations. To this end, he has the administration, the armed forces, and the security forces at his disposal.

The Prime Minister is the head of government. He directs government action and coordinates the functions of the other members. He chairs committees on defense. When necessary, he acts as an alternative to the President of the Republic by chairing other councils set up by the Constitution.

The government is answerable to the National Assembly. Before taking office, the Prime Minister presents his government's national action plan to the National Assembly. The National Assembly lends him its confidence by an absolute majority vote of its members.

B. Parliament

Next to the head of state, sovereignty is exercised by the people's representatives.[19] Article 51, paragraph 1 of the Constitution of 1992, as amended in 2002, stipulates that '[l]egislative power delegated by the people is exercised by a parliament composed of two chambers, the National Assembly and the Senate.' Bicameralism has still not been implemented in Togo, despite the constitutional reform of 31 December 2002. It nevertheless marks a break with the past.

1. The National Assembly

Legislative power is delegated by the people and exercised by an assembly called the National Assembly. Its members hold the title of Member of Parliament (MPs). MPs are elected by direct and secret universal suffrage for a five-year term. They are eligible for re-election. Each MP represents the whole country. They have no binding mandate. MPs also enjoy parliamentary immunity.

Under Article 81, the National Assembly votes on laws and monitors government action. Pursuant to the new Article 98, the National Assembly can challenge the political responsibility of the government by passing a motion of no confidence. The National Assembly may only pass a vote of no confidence on the government by a majority of two

[19] Somali (n 8).

thirds of its members. Such a motion is only admissible if approved by at least one third of members of the National Assembly. If the motion is passed, the Prime Minister resigns along with his government. The President of the Republic then appoints a new Prime Minister. If the motion of no confidence fails, its signatories may not introduce a new one in the course of the same parliamentary session. It should be recalled that the former Article 98 provided for a no confidence motion in the German tradition, stating in its paragraph 2*:* 'for such a motion to be admissible, it must be signed by at least one third of the members of the National Assembly and must indicate the name of the Prime Minister's possible successor. The vote can only be held five days after the motion is filed.' Since the advent of the 1992 Constitution, there has been only one no confidence vote, on the government of Prime Minister Eugene Koffi Adoboli, on 24 April 2000.

2. The Senate

The Senate was created in the constitutional revision of 31 December 2002, but is not yet in operation. Members of the Senate carry the title of Senator. Two thirds of the Senators are elected by representatives of local authorities and one third is appointed by the President of the Republic. Senators are elected for a five-year term.

The Senate must express its opinion before the National Assembly votes on any draft law or proposed legislation relating to the Constitution, all texts relating to the territorial organization of the Republic, and the draft Budget Law. In any case, the Senate is deemed to have given its opinion if it does not react within fifteen days of referral or eight days in case of an emergency procedure.[20]

C. Ordinary collaborative relationship between the Government and Parliament

The Constitution of the Fourth Republic establishes a parliamentary-inspired regime which provides for a collaborative relationship between the government and Parliament. This relationship is regulated by several provisions in the Constitution. First, Article 81 states that the National Assembly wields legislative authority concurrently with the Senate; it has the final vote on laws and monitors government action. In terms of passing laws, the Senate has clearly been overshadowed by the National Assembly.

Furthermore, Article 83 states that '[t]he initiative for introducing legislation lies jointly with Members of Parliament and with the Government'. The Senate therefore cannot introduce

[20] On the question of the second chamber in Togo, see K. Somali, 'Utilité et légitimité des secondes chambres en Afrique', *Revue juridique et politique des États francophones*, 2009.

legislation. In contrast, in the French Constitution (1958), Article 39 provides: 'The initiative for introducing legislation lies jointly with the Prime Minister and with Members of Parliament (...).'

And finally, in accordance with Article 96, 'Members of Government have access to the National Assembly, the Senate and their commissions. They can be heard at their request. They can also be heard for questioning, by the National Assembly, on written and oral questions addressed to them'. Oral and written questions are an essential means for monitoring government action.

It is also noteworthy that the National Assembly has the power to scrutinize government political responsibility. This is a necessary and inevitable counterweight to the executive's power to dissolve the National Assembly. Under Article 97, '[a]fter deliberation by the Council of Ministers, the Prime Minister may engage the responsibility of government before the National Assembly, in the form of a programme of action or a policy statement.' This responsibility can only be challenged by a majority of two thirds of members of the National Assembly. When the Prime Minister loses a vote of no confidence, he must submit the resignation of his government to the President of the Republic.

As for Article 98, it states:

> The National Assembly can call the Government's actions into question through a vote of no confidence. For such a motion to be admissible, it must be signed by at least one third of all members of the National Assembly. Voting can only be held five (5) days after the motion has been filed.

The National Assembly may only pass a vote of no confidence on the government by a majority of two thirds of its members. If the motion succeeds, the Prime Minister resigns, along with his government. The President of the Republic then appoints a new Prime Minister. Looking at Articles 97 and 98, there is no doubt that the 1992 Constitution has the characteristics of the classic parliamentary system. Firstly, all the organs – namely the Head of State, Parliament, and the cabinet of Ministers – exist in the new Constitution. Secondly, Articles 97 and 98 further allow the government to assume political responsibility through a relationship of trust and the vote of no confidence.

IV. Constitutional Adjudication

A. The Constitutional Court

Established by Article 99 of the Constitution, the Constitutional Court is the highest court in constitutional matters. It rules on the constitutionality of laws, guarantees individual fundamental rights and public freedoms, and regulates the functioning of institutions and the activities of public authorities.[21] It plays a fundamental role in the functioning of institutions. The Constitution places it above the Supreme Court in constitutional matters. The Constitutional Court is currently composed of nine judges appointed for a renewable seven-year term, in accordance with Article 100 of the Constitution. This provision was modified in the 2002 constitutional revision process. The former Article 100 stated as follows:

> The Constitutional Court is composed of seven (7) judges: two elected by the National Assembly on the proposal of President of the Republic, one appointed by the President of the Republic, one appointed by the Prime Minister, a magistrate elected by his peers, a lawyer elected by his peers, and a member of the Faculty of Law elected by his peers, all for a non-renewable term of seven years.

The new Article 100 provides:

> The Constitutional Court is composed of nine judges appointed for a renewable term of seven years: – three are appointed by the President of the Republic, one of whom must be a legal expert; – three are elected by the National Assembly by a majority of two thirds of its members. These may not include Members of Parliament. One must be a legal expert; – three are elected by the Senate, by a majority of two thirds of its members. These may not include Senators. One must be a legal expert.

The status of the Constitutional Court is regulated by Organic Law No. 97-01 / PR of 8 January 1997 on the organization and functioning of the Constitution. According to Article 103 of the Constitution, '[t]he duties of a judge of the Constitutional Court are incompatible with the exercise of any elective mandate, any public, civil or military employment, any professional activity as well as any function of national representation'.

The Constitutional Court is the court responsible for ensuring compliance with the provisions of the Constitution. It decides on the legality of referenda, as well as presidential, legislative, and senatorial elections. It rules on litigation emanating from these consultations and elections and on the constitutionality of laws. The Court may therefore be seized *before* or *after* the fact. Referral *prior to the fact* is the preserve of political bodies under Article 104 of the Constitution, which states '[b]efore their promulgation, laws may be referred to the

[21] In this regard, see K. Hounake, *Les cours constitutionnelles dans les régimes en transition démocratique de l'Afrique noire francophone*, Public Law thesis, Université de Lomé, 2012.

Constitutional Court by the President of the Republic, the Prime Minister, the Speaker of the National Assembly or one fifth of the members of the National Assembly.' Referral *after the fact* is the preserve of citizens. During legal proceedings before the courts, therefore, any physical or moral person may, '*in limine litis*', raise the unconstitutionality of a law. When this occurs, the court must stay its proceedings and seize the Constitutional Court accordingly.

The Court renders decisions and opinions. In some cases, the President of the Court may make an Order of the Court. The decisions of the Court are not subject to appeal. They must be carried out by all civil and military authorities. Their effect is *erga omnes*.

It is important to note, however, that although the Constitutional Court has been raised to the pinnacle of the legal order by the Constitution and consecrated as the new watchful and intractable guardian of the bill of rights, its functional development is still fragile. The prevailing view in Togo is that the Constitutional Court serves the political organs of state. This is because its judgments on the constitutionality of laws as well as on matters of electoral disputes are often guided by the political consideration of legitimizing the powers that be.[22] As a result, the Constitutional Court's impact on the monitoring of democratic institutions and the prevention of electoral crises remains weak.[23]

B. The Supreme Court

According to Article 120 of the 1992 Constitution, '[t]he Supreme Court is the highest court in judicial and administrative matters.' Although the Supreme Court existed before the 1992 Constitution, it had neither the structure nor the functioning of the new Supreme Court. The Supreme Court of Togo was reorganized under the new Constitution into two chambers: the Judicial Chamber and the Administrative Chamber.

Each chamber is autonomous within the Supreme Court and is composed of a President and advisers. The President of the Supreme Court chairs the chambers jointly. It should be noted that the judicial chamber of the Supreme Court has jurisdiction to hear appeals against judgments from civil, commercial, social, and criminal courts; challenges against Court of Appeal judges under the provisions of the Civil Procedure Code; criminal proceedings against Court of Appeal judges under conditions determined by the Criminal Procedure Code; and

[22] One simply has to read Constitutional Court judgments, especially arising from presidential elections in Togo, to understand that the Togolese Constitutional Court is closely linked to the political establishment. In this regard, see A. Kpodar, *Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise*, (Lomé : Presses de L'UL, 2007). This is relevant to the elections of 1993, 1998, 2003, 2005, 2010, and 2015.

[23] In this regard, see K. Somali, 'Les élections présidentielles devant le juge constitutionnel. Étude de cas des États d'Afrique noire francophone' (2013) 5 RDP pp. 1291-1327.

requests for the review of judgments and the settlement of conflicts of jurisdiction. On the other hand, the Administrative Chamber of the Supreme Court has jurisdiction to hear appeals against judgments in administrative cases; appeals on the grounds of abuse of authority in administrative acts; litigation emanating from local elections; and appeals against the decisions of disciplinary bodies.

V. International Law and Regional Integration

Togo sets the bar for its international law commitments by declaring, in the preamble of the Constitution, solidarity with the international community and its commitment to resolutely defend the cause of national unity, African unity, and to work towards the realization of sub-regional integration.[24] In doing so, Togo declares its intention to respect international law by participating in international meetings organized by the United Nations and in UN peacekeeping operations.

Apart from multilateral international agreements to which Togo is a state party, it also has bilateral agreements with a number of countries. The President of the Republic determines foreign policy, which is conducted under the authority of the Prime Minister. The responsible government department is the Ministry of Foreign Affairs and Cooperation, through its central services as well as its external services such as diplomatic missions, special envoys, emissaries, and plenipotentiaries. Togo's foreign policy is two-pronged: effective contribution to the preservation of peace and international security, and the promotion of multifaceted cooperation.

Togo's 1992 Constitution also forms part of a process of integration. Integration is a process, a situation that tends to replace the independent state with a new larger unit, with decision-making powers in areas under its competence. Integration organizations have decision-making powers in areas that traditionally fall within the competence of states. These organizations therefore develop clearly defined policies and monitor them. In the case of Togo, this means working for the promotion of regional organizations such as the West African Economic and Monetary Union (WAEMU), the Economic Community of West African States (ECOWAS), the *Conseil de l'Entente* group of nations, the Organisation for the Harmonisation of Business Law in Africa (OHADA), and the African Union (AU). By virtue of the foregoing, Togo is largely involved in the activities and functioning of the ECOWAS Executive Secretariat and the WAEMU Commission.

[24] In this regard, see the proceedings of the 1992 Conference on International Law in the Constitution of Togo, CDP, Université de Lomé, 2012.

VI. Decentralization

In order to break with the former administrative régime of previous Togolese Republics which were hostile to decentralized authority, the 1992 Constitution brought about a shift to a strong and solid state that is not afraid to compete with infra-national authorities. This is an indicator of good economic governance. The basic idea, after all, is to bring the administration closer to the people. It is also a way to revitalize democracy by taking consultative processes closer to citizens and, in so doing, taking the expectations of local populations into account more easily. Local authorities are entrusted with making decisions regarding the daily lives of ordinary citizens, based on an adapted system of local elections.

This is what led the Constitution's drafters to state that '[t]he Republic of Togo is organised into local authorities based on the principle of decentralisation, with respect for national unity.' It states that these authorities are the commune, the prefecture, and the region. Local populations are also able to freely administer themselves through councils elected by popular vote, under conditions prescribed by law. The state ensures the harmonious development of all local authorities on the basis of national solidarity, regional potential, and inter-regional balance.

Finally, there is another provision, Article 38, which states that '[c]itizens and decentralised authorities are entitled to an equitable redistribution of national wealth by the State.' This could be construed as an affirmation that is so full of promises and so fraught with claims that it could occasion a legitimate demand for full equality in the distribution of national resources.

The Constitution also provides in Article 84 that the administration of local authorities, their competence, and resources are determined by law. Law No. 2007-011 of 13 March 2007 on decentralization and local freedoms was adopted in furtherance of the implementation of the principle of decentralization. Within the constitutional framework, giving local authorities a very large field of intervention was an important aspect of the democratization process that began in Togo in 1990. The former single party lost power in the former administrative districts.

Decentralization in Togo is now stumbling, however, because the abundance and generosity of laws is not matched by the necessary political will on the part of the authorities. Decentralization is staggering under the crushing weight of prefects, the lack of municipal elections, and the existence of special delegations to municipalities and prefectures.

VII. Constitutional Revision

'The Constitution is not a tent erected to sleep in.' This formula of Royer-Collard sets the tone for constitutional revision.[25] The Constitution itself provides the mechanisms and modalities for its revision. This is what the Constitution's drafters provided in Title XIII.

Under Article 144 of the Constitution, constitutional revision may be initiated by the executive or the legislature. Once the initiative has begun, the amendment may be entrusted to the same kinds of bodies that were entrusted with drafting it. This means Parliament. In order to be adopted, the amendment must be approved by a majority of four fifths of Members of Parliament. Failing that, the proposal or the draft amendment may be adopted by a majority of two thirds of Members of Parliament and then submitted to the people in a referendum. Thus the people are also involved, and must approve the proposed amendment in a referendum. An analysis of Article 4 paragraphs 1 and 2 on referenda by popular demand suggests that the citizens themselves may propose an amendment to the Constitution. If the initiative originates from the President, the cabinet is required to deliberate the proposal, as is the case in Benin.

There are limitations, both in form and substance, to the exercise of the constitutional power of review. The first concerns constitutional revision during an interim period or a vacancy, or where there is a threat to territorial integrity. Similarly, the republican form and the secular nature of the state cannot be the subject of constitutional revision. Indeed, these are supra-constitutional rules or principles of the Constitution. It is important to note that there have been constitutional revisions made by the executive that run contrary to the letter and spirit of the original drafters, such as the constitutional revision of 31 December 2002. These are instances of veritable constitutional fraud which should be fought at all costs. This is the responsibility of the Constitutional Court as custodian of the Constitution.

VIII. Conclusion

At the end of this study, we can agree with Professor Jean Rivero that

> institutions, unlike satellites, rarely remain in the orbit in which their creator intended them to put them. They slip out of the grasp of the drafters and of the legislators who gave them life. Their trajectory is determined by circumstance, environment, and the personality of the people that embody them.[26]

[25] Quoted in G.H. Colton (ed), *The orators of France* (New York: Baker & Scribner, 1847) 140.
[26] J. Rivero, 'La fin de l'absolutisme', *Pouvoirs*, n°13, Le Conseil constitutionnel, p. 5.

Indeed, since independence, and with the notable exception of the constitutional parenthesis of the Third Republic, the drafters of the Togolese Constitution have established a formal constitutional framework by proclaiming their commitment to the values of the rule of law: that is, a legal system that respects human rights and freedoms and in which public authorities are subject to the rule of law through judicial control. At this point, it is acknowledged that the Constitution gives each organ of state a function that is defined by law and which must be exercised under the law. The rule of law, which depends on the condition of laws, forbids constitutional and legal fraud, the manipulation of laws, *coups d'État*, etc.

In reality, however, Togo has seen a resurgence of institutional conflict, the return of *coups d'État* in all their forms, and human rights violations. Even though evolution takes time, one must concede that democracy, or the true institutionalization of popular power through constitutional practice, is facing difficulties in Togo, despite the impressive legal architecture that heralds a dream union.

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