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What's Wrong with the DRC Constitution?

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Table of Contents

Introduction	4
1. Modify key articles to remain in power?	5
2. Is the current constitution detrimental for the country?	6
3. Academic arguments	7
4. The drafting process of the 2006 Constitution	8
a. Drafted by foreigners?	8
b. A temporary compromise between warring parties?	12
5. Constitution revision or change: why launch the debate at this very moment?	13
6. The roots of Tshisekedi's attitude	14
7. Will the operation succeed?	15
Conclusion	16



Introduction

Within the DRC a fierce debate is raging about President Tshisekedi's ambition to modify or to replace the current constitution. But why? And why now?

The arguments to justify the change are far from clear. During an August 2023 interview, President Tshisekedi pointed at elements of the constitution which allegedly cause malfunctioning of the state.¹ During a speech held in Kisangani on 23 October,² President Tshisekedi qualified the 2006 constitution as "written by foreigners" and "not adapted to the situation of the DRC".

In Lubumbashi on 16 November, Tshisekedi again took up the subject and stated that the constitution's included a provision which, according to the DRC President, "enshrines the sale of our sovereignty to African states" (meaning Rwanda).³

The current constitution was adopted by referendum on 18-19 December 2005 by an 84.3 % majority of the valid votes cast. In the President's view, his election in December 2023 with a score of 72% provides him with the necessary legitimacy to replace or at least to modify it.

Tshisekedi's position on the issue of constitutional change evolved from evoking the possibility to an absolute determination to modify or rather to replace the current constitution. He threatened to bring before justice anyone who tried to "manipulate the population" and create conflicts by criticizing his project – suggesting that "manipulation" meant refusing constitutional change. In fact, the push for a modified or new constitution creates conflicts because many consider that there are currently far more important priorities.

The weakness of the arguments from the President will be discussed below. Many fear that the real objective of constitutional change is for the current regime to remain in power for decades. This does not imply that a debate about constitutional change is meaningless: there are substantial arguments about possible improvements that may be considered. But the current situation of the country, with important problems of governance and security (including the war in East Congo with occupation of national territory) does not allow for a calm and balanced debate about such fundamental issues.

In the following, we will first briefly discuss the previous struggle against constitutional change, the official arguments advanced by the President and the UDPS party, then pinpoint some more substantial proposals for change, before providing an overview of the drafting process of the 2006 constitution in order to check some arguments about the alleged flaws of this process. We try to assess the real reasons for the constitutional change project as well as whether the current context is favourable to do this. Finally, we try to conjecture about its chances of success.

1 See <https://www.youtube.com/watch?v=nMmN5hPIM5c&t=923s> (consulted 09 12 2024)

2 See https://www.youtube.com/watch?v=GslL_SkMyDo&t=17s (consulted 09 12 2024)

3 See <https://www.youtube.com/watch?v=kwxynwV9dI> (consulted 09 12 2024)



1. MODIFY KEY ARTICLES TO REMAIN IN POWER?

To prevent a return to a dictatorship, the 2006 constitution includes the famous art. 220 which says

The republican form of the State, the principle of universal suffrage, the representative form of government, the number and length of the terms of office of the President of the Republic, the independence of the Judicial Power, the pluralism of political parties and trade unions may not form the object of a Constitutional amendment. Any constitutional amendment having as its objective or consequence the reduction of individuals' rights and liberties or the reductions of the prerogatives of the provinces and decentralized territorial entities is formally prohibited.

In January 2011, the 2006 constitution was modified in a speedy procedure by Parliament to allow for a one round instead of the previous two-round presidential election, allowing a candidate to win with a relative instead of an absolute majority of the votes. It also reinforced presidential power over the provinces.

President Kabila was suspected of nurturing the project to modify this art. 220 to allow him to remain in power after his second mandate. An important protest movement against this project was organized, headed by political opposition parties, and pushed by networks of militants, most of whom belonged to the UDPS party. Kabila eventually did not modify the constitution and was not a presidential candidate anymore for the 2018 elections. After the 2018 election marred by many irregularities, Felix Tshisekedi was declared winner, despite the high likelihood that he was the second in row. When Tshisekedi became president, his UDPS party, created in 1982 and having waged a long struggle against the Mobutu and Kabila presidency, became the governing party.

Tshisekedi won a second presidential mandate after the December 2023 elections which were qualified as an “electoral catastrophe”.⁴ If he wants to continue to stay in power, he can either try and modify art. 220 to allow him a further presidential mandate, or simply to replace the entire constitution – an option he currently seems to favour.

Although Tshisekedi himself repeatedly stated that he does not want to remain in power, this is far from clear.⁵ In an interview with the deputy president of the National Assembly and key UDPS official Tshilumbayi the latter said that art. 220 was already⁶ modified in January 2011 when President Kabila reinforced the power of the President towards the provinces, something that is in principle also prohibited by art. 220. He thus clearly suggests that the change of the number and duration of the presidential mandate is no taboo.

A new constitution would set the presidential mandate counter back to zero, allowing the incumbent to continue in power during another two mandates which, according to rumour, would now be extended from five to seven years each.

We turn now to the officially announced reasons to modify or replace the 2006 constitution.

4 CENCO (Catholic Bishop's Conference), “Celui qui se livre à la fraude n'habitera pas ma maison” (Ps 101, 7). *Message des Evêques de la Conférence Episcopale Nationale du Congo à l'issue du processus électoral*, Kinshasa, 16 janvier 2024.

5 Still, in his 23 October Kisangani speech, he made a clear reference to the possibility to modify the presidential two-mandate limitation.

6 <https://www.jeuneafrique.com/1627199/politique/rdc-notre-constitution-a-ete-ecrite-machette-et-kalachnikov-a-la-main/>



2. IS THE CURRENT CONSTITUTION DETRIMENTAL FOR THE COUNTRY?

The arguments for a modification or replacement of the 2006 constitution have been brought forward in presidential speeches, meetings by the UDPS secretary general and interim party president, interviews by UDPS officials and press articles. These arguments do not seem to be the result of a thorough assessment of the value of the constitution but are rather made up for the occasion. They have one objective in common: increased centralization of power.

The constitution blocks the efficient workings of the state. According to President Tshisekedi, the constitution blocks the authorities from governing efficiently, as is exemplified by the extended period between the announcement of the result of the latest elections and the appointment of a new government. Between the announcement of the results (09 01 2024) and the appointment of a new government (29 05 2024) there was indeed a period of 141 days. After the 2018 elections, this was even longer (218 days). But how then to explain that this period amounted to 70 days in 2006 and 103 days in 2011, under the same constitution? Was this because of the constitution or rather because of the difficult transfer of power (2018)? Again in 2024, there were many contestations after fraudulent legislative elections, there was an unnecessary appointment of an “informateur” to establish an already more than obvious majority in the national assembly,⁷ there were the long battles for appointments in parliament which all caused delays unrelated to the constitution. Changing constitutional rules to accelerate the appointment process of a new government would mean increasing the decision-making power of the President towards the National Assembly and to overhaul its ordinary procedures.

Provincial Assemblies are too powerful. President Tshisekedi in recent speeches suggested that the provincial governors are too much dependent from the power of the provincial assemblies. On this issue, he has a point: the legislative work of the provincial assemblies since 2007 has been of low quality⁸ and most often, motions against the Governor of the provincial governments are instruments for extortion.

The governors have two hats: they are politically answerable before the provincial assemblies and representatives of the central state answerable to the national Interior Minister. Tshisekedi wants to abolish the Governor’s responsibilities towards the assemblies and make them civil servants to be appointed by the central government. This, again, would obviously mean a reinforcement of the powers of the central government and be in contradiction with Art. 220. It would reduce the provincial assemblies to consultative entities or possibly in charge of controlling the provincial governments, the Governor excluded.

Safeguards against opportunist practices from the provincial assemblies could be brought about by modifying the organic laws ruling the provincial institutions, and do not necessarily require constitutional change which risks jeopardizing the entire decentralization process.

The constitution is drafted by foreigners. A long-standing argument against the 2006 constitution says that the text has been drafted by foreigners who did not consider local circumstances and customs. The same foreigners, representing their respective countries (meaning the US, France, Belgium), so it goes, forced the voters to approve it by voting yes at the constitutional referendum. Some say even that the constitution was written with the Kalashnikov and machete in their

⁷ <https://7sur7.cd/2024/02/07/rdc-nomme-informateur-kabuya-30-jours-renouvelable-une-fois-pour-identifier-la-0>

⁸ See Balthazar Ngoy Kimpulwa and Pierre Englebert, Ed., *Congo l’Etat en morceaux. Politique et administration au prisme du découpage provincial*, Cahiers Africains 96, MRAC – L’Harmattan, Tervuren-Paris, 2021, pp. 249-267.



hands⁹ or even that the constitution was approved with a gun on our temples.¹⁰ This argument is simply contrary to the truth. To discuss this argument, we try and reconstruct the essentials of the drafting process of the constitution below.

The countries' enemies use the constitution to weaken the DRC. President Tshisekedi went as far as to qualify the “bad constitution” as an instrument used by the enemies of the DR Congo to weaken the DRC. In Lubumbashi, he highlighted art. 217¹¹ by which “these enemies want to force the DRC to transfer part of its sovereignty to neighbouring countries”. Quite evidently, this article simply provides a constitutional basis to transfer some of the country’s decision-making powers to a supra-national organization (as the African Union or the East African Community), in this case in the name of Pan-Africanism. It is even included in the constitution drafted by Mobutu in 1967 (with the help of Felix Tshisekedi’s father) under art. 69.

The DRC President omitted to mention art. 214 al. 2 saying, *No transfer, exchange or addition of territory is valid without the approval of the Congolese people consulted by way of referendum.*

3. ACADEMIC ARGUMENTS

This does not imply that the 2006 constitution is immune to improvements. The debate was opened in 2023 by the eminent historian Isidore Ndaywèl è Nziem who urged to discuss the possibility to adopt a new constitution which would better ensure national unity and cohesion. He suggested adapting where necessary the draft constitution from the 1992 National Conference which, according to him, was thoroughly thought through and elaborated by the best constitutionalists of the country.¹² His initiative takes explicitly its distance from any political initiative from the government to submit a new constitution.

Prof. Ndaywèl criticizes the stranglehold of political parties on all levels of the country’s management, a politicization resulting in neglect of the common good. This evolution was amplified by the carving up of the eleven provinces into the currently existing twenty-six where the same politicization was multiplied. Among other suggestions, he argues in favour of a return to a federal state as provided for in the 1964 Congolese constitution and the draft constitution from the 1992 National Conference. The number of provinces (to be called “regions”) would be reduced to seven, each subdivided into administrative units corresponding more or less to the current provinces. This would foster national unity and allow for large autonomy for the regions as federal units, each governed by their own provincial fundamental law. Prof Ndaywel proposes to organize the several types of elections (national, regional etc.) at different time periods to avoid the current situation where general elections put all levels of power at stake at the same moment; and to allow at the national level only parties with a nation-wide representativity. The president would be elected for a non-renewable 9-year mandate.

These proposals are inputs for a debate about the fundamentals of the Congolese state seen from a historical perspective. They provide a useful contrast with the shallow and opportunistic arguments mentioned above. An opening of a serious debate on this basis would require a much more legitimate forum than is currently present and a much more favourable security, social and governance climate.

9 Interview with Jean-Claude Tshilumbayi in Jeune Afrique 05 novembre 2024.

10 Interview with former minister Germain Kambinga, Kinshasa, 1 November 2024.

11 Art. 217. The Democratic Republic of the Congo may conclude association or community treaties or agreements entailing a partial relinquishment of sovereignty to promote African Unity.

12 Isidore NDAYWEL E NZIEM, *Avant-projet d'une nouvelle constitution de la République Démocratique du Congo (Adaptation du projet de constitution de la Conférence Nationale Souveraine)*, in *Congo-Afrique* (Kinshasa), 574, Avril 2023, p. 330-393 ; ID., *Avant-projet d'une nouvelle constitution de la République Démocratique du Congo (Adaptation du projet de Constitution de la Conférence Nationale Souveraine) (Deuxième partie : la Loi fondamentale régionale)* in *Congo-Afrique*, 575, Mai 2023, p. 474-507.

4. THE DRAFTING PROCESS OF THE 2006 CONSTITUTION

An overview of the drafting process of the current constitution allows us to correct the opportunistic argument that foreigners would have written/imposed it – and thus, so the argument goes, lacks legitimacy.

a. Drafted by foreigners?

Let us first briefly outline the specific context of the 2003-2006 period when the current constitution was elaborated.

It may be remembered that the long 1998-2002 war put the DRC government against two armed rebel movements MLC and RCD (plus its derivatives). Negotiations between the armed actors to end the conflict were held in South Africa (Sun City and Pretoria), joined by the unarmed political opposition (with the UDPS party as its main component) and civil society representatives. An agreement was finally reached to install a transition regime, with a National Assembly and Senate including most of the participants in the negotiations. The transition regime was structured by a transitional constitution. This transition regime was to draft a new constitution and to organize national legislative elections which were eventually held in 2006. The transition senate, according to art. 104 of the transition constitution, was to present the first draft of a new constitution, which was then, according to art. 98, to be approved by the transition National Assembly and voted in referendum.

The 2003-2006 transition was a period of tension and fear for conflicts between the signatories of the transition agreement leading to the breakdown of the transition. RCD military officers indeed started again a military operation in the East and its political leaders threatened to withdraw from the transition in 2004. The politico-military actors in general, and to a lesser degree the “unarmed opposition” and civil society, also tried to push for an outcome of the transition that maximized their chances to conquer or to remain in power. Their principal concern was an electoral victory in 2006 or, for some, a return to arms if this option failed. The so-called international community was primarily concerned with a successful outcome of the transition and avoiding at all costs a resumption of the war.

Within the prevailing climate of tension, the drafting of the new constitution was not a top priority for the actors involved and several issues were debated only within the transition parliament constitutional commissions and a group of constitutionalist experts.

A team of eight senators¹³ finalized in Kisangani in August 2004 a first draft of the constitutional text.¹⁴ This draft was then discussed and further elaborated by the constitutional commission of the Senate from 24 September to 15 October 2004, with the help of an informal and advisory expert team and Congolese academics.¹⁵

The process was accompanied by the South African NGO EISA (Electoral Institute of South Africa) for the coordination of the expert team of (a majority of) national and international experts.¹⁶ Among the latter, the Senegalese professor El

13 Bruno Biango Kekese (PPRD, president) ; Olivier Kilima (MLC), Rapporteur ; Rabi Iluane (civil society), deputy rapporteur ; Camille Kos'Isaka Nkombe (PPRD) ; Marc Lundula pen'Oleka (RCD) ; Charles-Bernard Kinghombe wa Kinghombe (political opposition, MPR/Fait Privé) ; Prof Gervais Chirhalwira (civil society). See *L'avant-projet de la constitution présentée à la presse mercredi*, in *Le Potentiel*, 28 octobre 2004, p. 2.

14 See *L'avant-projet de la Constitution de la III^{ème} République bientôt présenté au Parlement*, *Le Potentiel*, 16 octobre 2004, p. 2.

15 *L'avant-projet de constitution de la III^{ème} République bientôt soumis au Parlement*, in *Le Potentiel*, 16 octobre 2004, p. 20.

16 See EISA 2004 annual report <https://www.eisa.org/wp-content/uploads/2023/03/eisa-annual-report-2004.pdf?x12379> (consulted 05 11 2024) and Jean-Louis ESAMBO KANGASHE, *La constitution congolaise du 18 février 2006 à l'épreuve du constitutionnalisme*, Academia Bruylant, Louvain-la-Neuve, 2010, p. 44-47. This book provides the most complete overview of the drafting process of the 2006 constitution. According to the author, the advisory expert team included seventeen members, eight of whom

Hadj Mbodj seems to have been prominent. This team provided technical support for the drafting process until it was finalized by the political, administrative, and judicial commission from the National Assembly.

The basic guidelines for the constitution were the same as for the transition constitution¹⁷ which in its preamble says that the delegates to the inter-Congolese dialogue of 2002 are determined

“to ensure the permanence of the rule of law based on political pluralism, separation of powers between the legislative, judicial and executive branch, citizen participation in the exercise of power, control of the rulers by the ruled, transparency in the management of public affairs, subordination of the military to the civilian authorities, protection of persons and their goods, guarantees for the full spiritual and moral deployment of each Congolese citizen, and the harmonious development of the national community”

The very first draft of the constitution initially left open fundamental options which were to be submitted to a “popular consultation” process. The senators had to submit a list of five questions to focus groups within their constituencies:¹⁸

1. The state structure,
 - a. Unitary (centralized, devolved, decentralized or unitary decentralized)
 - b. Composed (federal or confederal)
2. The political regime
 - a. Parliamentary (bi-partisan or multi-partisan)
 - b. Presidential
 - c. Semi-presidential
3. Name of the country
4. Territorial subdivisions: number of provinces

The objective of this process was, according to the Senate Deputy Rapporteur, to “elaborate a constitution which is genuinely Congolese, which meets the expectations of the Congolese people, and reflects their aspirations”.¹⁹ Interestingly, he added that “the external partners are not favorable for the idea of the consultation. For them, the people do not have to decide on these issues. But for us Africans, we know that the people have their say and must be involved so that they can make this work their own, for the people when they go to the referendum, to find what they have decided” (id.).

As there were no uniform procedures adopted for this ad hoc consultation, it is impossible to estimate the degree of real participation of the local population. According to an interview with a member of the expert team, senators regrouped according to their province of origin went to their home areas and, after information sessions, submitted written questionnaires to the target associations and groups. Compilation of their written answers provided the results of the consultation process.²⁰ Several press reports exist about the consultation, also revealing the difficulty for the consulted groups to elaborate an informed opinion in such a short time.

had Congolese nationality. Among the nine others, Prof Kabamba had the Belgian nationality but is of Congolese origin.

17 Evariste BOSHAB et. Al., *République Démocratique du Congo : une Constitution pour une Troisième République équilibrée*, in *Fédéralisme Régionalisme. La III^{ème} République du Congo un nouveau régionalisme*, 2004-2005, Université de Liège, 2005, p. 81.

18 RDC SENAT, *Document de référence sur les options fondamentales de la constitution*, Juillet 2004, p. 21.

19 *Le Sénat tient à mettre à la disposition de la RDC une constitution répondant aux aspirations du peuple*, in *Forum des As*, 04 octobre 2004, p. 3.

20 Interview with Jean-Michel Dumont, Expert of the Delegation of the European Commission in DRC in 2003-2006, Kinshasa, 30 October 2024.

Finally, the results of the consultation were presented during an “inter-institutional seminar” on 2-4 February 2005. According to the rapporteur, 1092 target groups in 52 DRC cities and villages were consulted as well as the Congolese diaspora in Canada and Belgium. The results included a preference for a unitary decentralized state; a semi-presidential regime; the name “Democratic Republic of the Congo” and a 53,9 % for the subdivision of the country in smaller provinces, a controversial issue.²¹ These options, with technical observations from the committee of national and international experts,²² were integrated in the draft, as reflected in the report from the senate’s constitutional commission on the draft constitution.²³

It must be underlined that the current art. 220 of the 2006 constitution, which includes the issues blocked against any constitutional review, is already to be found in the initial August 2004 senate’s draft in art. 257: *“The republican state form, the principle of universal suffrage, the number and duration of the presidential mandates, the independence of the judicial power, and the political and trade union pluralism cannot be the subject of any constitutional review. Any constitutional amendment whose purpose or effect is to reduce human rights and freedoms, or to reduce the autonomy of the provinces and local authorities, is formally prohibited.”* (my translation). It was maintained in art. 210 of the final draft of the Senate. One can hardly state that this article would have been “imposed” from the beginning by the “international community”; it formulates a clear safeguard against any effort to transform the constitution into an instrument for a dictatorship.

The draft from the constitutional commission was discussed by the plenary session of the Senate and generally adopted, except for the conditions for the creation of a new province, the protection and promotion of women, and the conditions for the eligibility of a presidential candidate. The latter issue was contentious almost until the end of the drafting process because the minimum required age for a presidential candidate determined whether the young president Kabila would qualify during the 2006 elections.

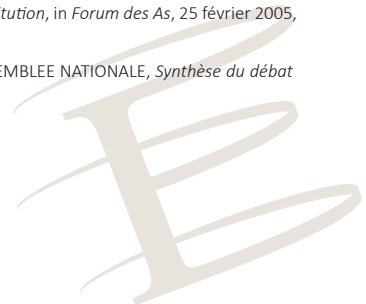
According to Jean-Louis Esambo, the National Assembly’s Political, Administrative and Judicial Commission made some important suggestions for change to the senate’s draft. First, the debate on the state form and the territorial subdivisions (existing provinces at the time or smaller subdivisions) was taken up again, pitting the advocates for a federalist state (mainly the RCD movement) against partisans of a unitary but decentralized form (mainly the PPRD presidential party). The RCD movement advocated for federalism to protect the positions of the Kinyarwanda speakers in East Congo; in May-June 2004, hardly one year before, an armed movement from Kinyarwanda speakers justified its action by the alleged need to protect their community. In the end, the unitary decentralized state form was maintained and the carving up of the provinces accepted but postponed. The debate over the political regime also ended up in a compromise: between a presidential and a parliamentary regime, it was opted in favour of a semi-presidential regime. It may be noted that the UDPS party, although not a member of the transition parliament, advocated with the RCD for a federal state and a parliamentary regime.²⁴

21 REPUBLIQUE DEMOCRATIQUE DU CONGO. PARLEMENT DE TRANSITION, *Le séminaire inter-institutionnel sur le processus électoral et la future constitution de la République Démocratique du Congo*, Kinshasa, février 2005, p. 12. See also *Les acteurs politiques s’engagent à organiser les élections dans les délais*, in *Forum des As*, 3 février 2005, p. 2.

22 The debate about the constitution in the press was led exclusively by the Congolese experts, among whom mainly prof. Kabuya and Prof Mampuya. See ESAMBO, *op.cit.*, p. 50-51.

23 See the report from the constitutional commission in *Voici le rapport de la commission constitutionnelle sur l’avant-projet de constitution*, in *Forum des As*, 25 février 2005, p. 7-10.

24 ESAMBO, *op.cit.*, p. 81. For the contentious issues discussed by the National Assembly’s Constitutional Commission see RDC ASSEMBLEE NATIONALE, *Synthèse du débat general sur l’avant-projet de constitution de la RDC*, Kinshasa, Avril 2005, p. 10.



What does this all mean for the “constitution drafted by foreigners”?

Have foreigners written the 2006 constitution? A conclusive answer to this question would require access to the archives of the 2003-2006 parliament which unfortunately may not be completely available, plus the correspondence of the embassies and international institutions. Interviews with Congolese and non-Congolese members of the expert team²⁵ indicate that any “foreign intervention” was mostly limited to a debate about capital punishment (which was abolished in art. 15 of the first draft dating from August 2004, but no longer mentioned in the February 2005 version, meaning the ineffectiveness of the “foreign intervention”) and the protection of minorities, which was also a key issue for the RCD. From the analysis of the drafting process of the constitution it seems likely that non-Congolese experts did not have a decisive nor important influence on the final text. The argument also uses the fallacy of assimilating “authentic Congolese-ness” with the possession of the Congolese nationality (and vice versa). It is also an open question what the difference would be between an “authentic Congolese” and the current constitution. Would it develop a new genuinely new political model, unlike what exists in other African countries? Does it merely mean a constitution drafted by Congolese nationals? If so, what would be the difference with the current one? Or would it mean a return to the Mobutist ideology of “Authenticity” where the chief listens, consults, and then decides refusing any contradiction?

Or does the insufficient “Congolese-ness” of a constitution means allowing inspiration from western constitutions? The latter may have been a source of inspiration for the Senate and the National Assembly in 2005. According to the National Assembly’s Constitutional Commission, the documents used were the various Congolese constitutions (including the text from the Sovereign National Conference of 1992), the constitutions of France, Germany, and the USA.²⁶ Some analysts indeed have underlined a relatively strong resemblance with the current French constitution, more specifically concerning its institutional set-up.²⁷ However, the same author argues that this DRC constitution is not a mere copy of the French, adapting it to the Congolese context by including safeguards against the lack of democratic culture in the DRC and avoiding copying French constitutional weaknesses.

The influence of the French constitution on African constitutions is certainly not limited to the DRC but there is no evidence that this is the result of foreign pressure and not a sovereign decision by the DRC transition parliament. Moreover, a constitution must be evaluated on its own merits such as efficiency, coherence etc. Jacques Djoli, in a comment published in September 2005, criticizes the draft constitution for its lack of identity: it does not reflect the values and the Congolese vision of power and the common good.²⁸ This is indeed a correct position of principle, but no DRC constitution has realized this ideal situation; it would require a long and probably utopian process of definition of what these shared values and vision are within the national configuration of the DRC; and to set up a commission of constitutionalists having the undisputed legitimacy to transform these values and vision into a draft constitution.

In the end, the constitution was approved by an important majority of the voting population. Given the intrinsic difficulty for ordinary citizens to read and understand a constitution, as well as the limited civic education campaign, this is in itself not a guarantee against hypothetical foreign influences. But it provides the only possible democratic procedure to legitimize a new constitution.

²⁵ For this brief we interviewed Jean-Michel Dumont, Bernard Quintin, Prof Bob Kabamba, and prof Banyaku Luape in October-November 2024.

²⁶ RDC ASSEMBLEE NATIONALE, *Rapport de la Commission Politique, Administrative et Juridique relatif à l'avant-projet de la constitution de la République Démocratique du Congo*, Avril 2005, p. 2.

²⁷ Delphine Pollet-Panoussis, *La constitution congolaise de 2006 : petite sœur africaine de la constitution française*, in *Revue française de droit constitutionnel*, 2008, 75, p. 451-498.

²⁸ Jacques Djoli Eseng'Ekeli, *Problématique de l'identité du projet constitutionnel*, in *Congo-Afrique*, 397, septembre 2005, p. 17-27.



b. A temporary compromise between warring parties?

Another argument questions the legitimacy of the transition parliament as a non-elected body issued from a long and violent conflict between armed movements, to draft a constitution. The text would have been drafted as a compromise between warmongers. This argument assumes that the 1998–2002-armed movements had no legitimacy at all – a questionable position, especially in the case of the MLC, a movement that has been integrated into the current political regime and which was never contested as illegitimate in its constituency. The RCD movement, as was proven by the 2006 electoral results, had a much smaller legitimacy but it did not have an important influence on the content of the 2006 constitution. The non-armed political opposition and civil society were included in the negotiation process precisely because of their shared legitimacy.

The argument also assumes that a constitution necessarily must be drafted by a duly elected body – something that is seldom the case when a new constitution is drafted. None of the previous constitutions of the Congo had this type of legitimacy. In the current situation, when the National Assembly was set up after massive electoral fraud, and the Senate through elevated levels of corruption, one cannot pretend now to be in the presence of a duly representative body with a more important level of legitimacy than the 2003-2006 parliament.

Still, the 2006 constitution is – indeed – a happy compromise, but in a very positive sense. Within the context of the 2003-2006 transition, no party or movement wanted to give any other the opportunity to monopolize power. The 2006 constitution introduces power equilibria at all levels to prevent a return to an authoritarian regime as under Mobutu or Laurent Kabila. This is also the reason the catalogue of human rights and civil liberties is so extensive and detailed. If the constitution is a compromise, the main reason was the setting up of a democratic political system.

Jean-Louis Esambo qualifies the 2006 constitution as “the constitution of compromise”²⁹ between the national actors and between the national actors and the international community. Esambo underlines that the latter compromise concerned mostly the formulation of the articles about the Congolese nationality of origin and the protection of ethnic, cultural, and linguistic minorities. The international community’s main concern, as suggested above, was to successfully end the transition and install a legitimated government, and to avoid any instance of exclusion in the new constitution.³⁰ The 2006 constitution is thus characterized by an important concern for power balance between the various levels of power and between its various branches.³¹

Unfortunately, the problem in the DRC is not a dearth of laws and constitution, but their implementation. Joseph Kabila’s regime evolved towards an increasingly authoritarian modus, in disrespect of many articles of the constitution, when the opposition against his presumed intention to remain in power became stronger. This authoritarian tendency is precisely what the constitution wants the population to protect against.

²⁹ Jean-Louis ESAMBO, *op.cit.*, p. 105.

³⁰ Jean-Louis ESAMBO, *op.cit.*, p. 121.

³¹ Jean-Louis ESAMBO, *op.cit.*, p. 126-158.



5. CONSTITUTION REVISION OR CHANGE: WHY LAUNCH THE DEBATE AT THIS VERY MOMENT?

In sum, there does not seem to be a coherent or justifiable argument for a change of constitution or a constitutional change. President Tshisekedi announced for next year setting up a commission which will prepare a draft constitution (new one or a revision of the current one). However, it is rumoured that a commission to draft a new constitution was set up months ago. This commission allegedly includes constitutional experts as Prof Mbata, a staunch opponent of constitutional change under Joseph Kabila who recently became a strong advocate for the same under President Tshisekedi. The arguments pro and contra constitutional revision under Kabila and under Tshisekedi are almost exactly the same; the difference is that the actors simply switched position according to who is in power. It may be a feature of deeply seated DRC political opportunism to have the same political actors advocate for diametrically opposed positions depending on whom they are allied with.

What does President Tshisekedi want?

As already mentioned above, the arguments used by President Tshisekedi in his recent public interventions (as discussed above) indicate his intention to abolish or seriously reduce the country's decentralization, which is prohibited by art. 220.³² A return to a more centralized political system would require the introduction of a new constitution.

According to rumors circulating in Kinshasa, and the opinion of some well-informed persons, the new constitution would include the indirect election by parliament of the President (as in Angola or South Africa) by the parliamentary majority for a renewable mandate of seven years. The function of prime minister would be abolished and a deputy president appointed. These allegations, of course, must be checked against the final commission's proposal.

Although Tshisekedi never explicitly recognized this, for obvious reasons, the only possible explanation for his move is that he wants to remain in power and centralize the political system. Video and aural recordings of UDPS meetings circulate stating that the Kabila regime stayed in power from 1997 until 2018 and they are thus entitled to remain also in power for at least 21 years. The UDPS secretary general publicly declared that they refuse to abandon power. The rumor goes that Tshisekedi's ethnic community requires him to remain President.

How does he want to proceed?

According to several analysts, the rule of President Tshisekedi is primarily based on family and friends. The influence of his spouse and his mother seem to be particularly important and many recruitments of key persons in his presidential team are done among his friends and acquaintances from his period of exile in Belgium. Just as most political parties in the DRC became unstructured groupings controlled by a more or less powerful individual, the UDPS party as an organization is at shambles, emptied of most of its educated officials and intellectuals who could initiate a substantial debate about the 2006 constitution. Within this constellation, Tshisekedi rules through the informal structures attached to the UDPS youth movement ("jeunesses") as the so-called "Forces du progrès" (forces of progress). When the UDPS party resumed activities after their leader became President in 2019, many Congolese youth joined these informal movements, hoping for opportunities. These movements are currently being turned into militia to intimidate the population. A second instrument is repression. The Military Intelligence Headquarters is prominent among the formal security structures and has been continually active in the arrest of real or presumed opponents, including many military officers from Katangese

³² This position is the opposite of the federal system advocated by Prof Ndaywèl.



origin suspected of sympathy for former president Kabila. A parallel and informal structure is, reportedly, used by the presidential family for arbitrary arrests, imprisonments, and killings.

Thirdly, a vast propaganda campaign has been launched stating that “every Congolese worth the name must approve to change the constitution”³³ – implying not only that the current constitution is not Congolese, but that anyone with a different opinion is a traitor to the country!

Fourth, money. Tshisekedi succeeded in 2020 to buy off a political majority in Parliament which previously supported Kabila. Since then, his political machinery is oiled with vast sums of money. The operation constitutional change will not be an exception and the political strongmen who may have nurtured the ambition to succeed to the sitting president will very probably be bought off with important sums or money. Strongman and Tshisekedi ally Deputy Prime Minister Bemba in an interview already threatened Catholic Bishops for what he called “inflammatory and hate speech” dividing the population, against the alleged intention from President Tshisekedi to remain in power.³⁴

6. THE ROOTS OF TSHISEKEDI'S ATTITUDE

The attitude of Tshisekedi has deeper historical roots. Etienne Tshisekedi was one of the drafters of the 1967 constitution installing the Mobutu regime, which originally included a provision for a two-party system. The UDPS party, created in 1982 and embodying the formal and unarmed opposition to Mobutu, was in the eyes of one of its founders Etienne Tshisekedi meant to be this second party. When Tshisekedi was elected in August 1992 by the Sovereign National Conference as Prime minister, he considered himself to be invested with a degree of legitimacy that made him the uncontested leader of a political movement to overtake power. He considered this to be the basis of his opposition to Laurent Kabila (who refused to share power) and to the military movements which fought the 1998-2002 war, in his opinion entitling him to become the next President of the DR Congo. When the Sun City Inter-Congolese dialogue and the December 2002 Pretoria agreement installed a system of one President and four vice-presidents, one of the latter four to be appointed by the unarmed political opposition, he considered himself to be the only legitimate candidate, if not for President, then for Vice-President. However, Tshisekedi's refusal to follow the election procedure for Vice-President provided the opportunity for his opponents (among whom first of all Joseph Kabila) to marginalize him and to have Zahidi Ngoma elected, a personality with infinitely less political weight. From then on, Tshisekedi and the UDPS refused to participate in the 2003-2006 transition, and the “College of founders” took a decision on 25 June 2003 to formalize this refusal.³⁵

Consequently, the UDPS was not represented in the transition parliament and did not participate in the drafting of the new constitution. Tshisekedi was convinced that he was able to block the transition process³⁶ and called for massive demonstrations in June 2005. This did not occur and, without providing any substantial argument against the new constitution, unsuccessfully called upon the population to boycott the electoral registration process and the constitutional referendum held in December 2005. Following the same logic, the UDPS and Etienne Tshisekedi refused to participate in the 2006 elections, providing thus the perfect opportunity to Joseph Kabila to stabilize his presidential powers and to have his rival Jean-Pierre Bemba arrested by the International Criminal Court in March 2007.

³³ Slogan on publicity billboards in Kinshasa, November 2024.

³⁴ https://www.mediacongo.net/article-actualite-145036_revision_de_constitution_jean_pierre_bemba_met_en_garde_le_cardinal_ambongo_et_olivier_kamitatu.html and the full interview on <https://www.youtube.com/watch?v=XqUN39PKeHI&t=5780s>

³⁵ UDPS, *Gouvernement de transition : le niet de l'UDPS*, 25 juin 2003 in *Le Potentiel*, 26 juin 2003, p. 2.

³⁶ Valentin Mubake : *Il n'y aura pas d'élections sans l'UDPS*, in *Le Potentiel*, 26 août 2005.



Still, Etienne Tshisekedi participated in the 2011 elections – which were also marred by irregularities – and, claiming his victory, pledged a presidential oath on the Bible to respect the constitution he had previously rejected.³⁷ In fact, Tshisekedi wanted at the time to pledge his oath on the transitional constitution adopted by the Sovereign National Conference but was dissuaded by his advisers not to do so.³⁸

The UDPS currently seems to follow the same logic, rejecting the “constitution of warring parties” in the name of Etienne Tshisekedi who, according to the UDPS Secretary-General, promised to modify the constitution when he would be in power.

Needless to say, this reference to history is more an excuse to justify the stabilization of the current regime than a genuine motivation to draft a more legitimate constitution.

7. WILL THE OPERATION SUCCEED?

At the time of writing, no clear leader of a potentially efficient opposition movement has emerged. The political opposition parties merely have twenty-eight deputies (out of 493) and four senators (on a total of 109) in parliament. The parties of the former Kabila regime who organized a press conference against constitutional change do not have the slightest credibility because they currently defend positions diametrically opposed to what they stood for before Tshisekedi came to power. The important mobilization in 2017-2018 against a third mandate for President Kabila was built on a strong network of UDPS militants in the capital and youth movements in the East. The UDPS now switched to the other side of the political spectrum. Due to its long cooperation with civil society movements, they have an intimate knowledge of their workings which they now use against them. Only internal dissent or disagreement with constitutional change could reduce their mobilizing power.

This leaves us with the Catholic Church and its CENCO Bishop’s Conference which is among the few institutions with a coherent vision and position. In a 27 June 2024 memorandum the Catholic Bishops requested the president not to modify the “locked articles” of the constitution.³⁹ In media interviews, CENCO general secretary Mgr. Nshole⁴⁰ argued that it is inappropriate to spend huge sums of money for a referendum when the improvement of the living conditions of the population is a priority; that part of the country is occupied in the East and that it is detrimental to create a supplementary conflict within the country; that the entire process will require huge sums of money to buy off the members of parliament. For the time being, says Mgr. Nshole, the problems mentioned by the President can easily be settled by law or by the justice system without running the serious risk to destabilize the country by efforts to change the constitution. On 24 November, the Catholic Cardinal Ambongo preached in the same vein, underlining that constitutional change is currently not a priority.⁴¹

The UDPS Interim President Kabuya almost immediately reacted against this position denouncing its «threatening and violent” tone.⁴² President Tshisekedi in his Lubumbashi speech attacked the Catholic Church for what he called “manipulation of the population” by refusing the population to reflect about constitutional change, and by suggesting that he would want a third mandate.⁴³ Tshisekedi thus increasingly considers anyone who disagrees with his constitutional

37 <https://www.youtube.com/watch?v=3nZKxNdlpmo> (consulted 27 11 2024)

38 Conversation with his former Director of Cabinet Albert Moleka, 27 11 2024

39 CENCO, *Mémoire de la Conférence Episcopale Nationale de la RDC au Président de la République*, 27 juin 2024, Kinshasa, art. 14-15.

40 See <https://www.radiookapi.net/2024/10/28/emissions/linvite-du-jour/mgr-nshole-la-cenco-dit-non-au-changement-ou-la-revision-de-la>; <https://www.youtube.com/watch?v=nApn8XLYSA8>

41 <https://www.radiookapi.net/2024/11/25/actualite/politique/cardinal-ambongo-comment-peut-degager-beaucoup-denergie-parler-de>

42 See <https://lesvolcansnews.net/2024/11/11/revision-constitutionnelle-augustin-kabuya-denonce-les-messages-de-menace-et-de-violence-de-leglise-catholique/>.

43 If the current constitution is replaced, Tshisekedi will not have a third mandate but the first one under a 4th Republic.



plans as “manipulated” by national and foreign actors.

At the same time, the entire “political class”, majority and opposition, is currently rejected by the population and perceived as collectively corrupt. This creates in principle the ideal situation for a coup d’Etat (which the regime tries to avoid by frenetically arresting anyone suspected of sympathies for Kabila) or for a takeover by the AFC rebel movement in the East. Whether a coup will happen or not is anyone’s guess; whether a coup would solve the main problems of the country is even more uncertain.

The project for constitutional review or – most likely – a new constitution may succeed, but at the price of another important loss of legitimacy for the regime, which may extend to the many UDPS militants and militiamen if they do not get any form of reward for their engagement. It is highly unlikely that this loss of legitimacy will be compensated by good governance of the country more than by intensified repression. Moreover, the organization of a referendum in the DRC may trigger a similar reaction in the territories currently controlled by the Rwanda-backed M23 and AFC movement: the latter will seize the opportunity to proclaim the autonomy or independence they sought after for decades. Finally, art. 219 of the current constitution prohibits any constitutional change during times of war.

CONCLUSION

In sum, there is no real justification to modify the constitution in the current situation of the country. The war in East Congo, the often chaotic and predatory governance, the lack of legitimacy of the regime after the fraudulent 2023 elections, the many corruption scandals, the abysmal living conditions of the population, the rampant insecurity in the urban centers, all seem to be more important priorities.

Although President Tshisekedi underlines that he merely wants a reflection on technical aspects, this is at odds with his own proposals which imply a major constitutional change as well with the scope of the ongoing campaign. Key allies of the UDPS made statements about support for (no more than) technical changes, indicating possible future resistance against a major constitutional overhaul.⁴⁴ Both suggest that any debate must start from the effective proposals from the future commission instead of being based on conjecture.

The ongoing operations to push through a new constitution is very probably meant to stabilize the current regime and the community in power,⁴⁵ by a return to a centralized, authoritarian and necessarily repressive regime. It is not sure at all that the Tshisekedi regime will be able to keep the lid on the brewing discontent with the current governance. The position of observers is divided between those who fear violent reactions against the regime, even implosion of the country, and those who predict apathy because of the population’s disaffection with the entire political system. In any case, the move to modify or replace the constitution seems an extremely risky initiative as long as the war in the East is not ended.

During a conference held on 11 July 2014 in Kinshasa, the late professor Biyoya said that the DRC is governed by bits, and in the end, the rulers always succeed in bringing the bits together and continue. Today this is true more than ever, but it is less than certain that the rulers will be able to keep the bits together. The international and the African community would be wise to try to prevent Tshisekedi to follow a path that may lead to implosion of the DRC.

⁴⁴ Jean-Pierre Bemba during a media interview on 4 December 2024 see <https://www.youtube.com/watch?v=XqUN39PKeHI>; Vital Kamerhe after a meeting with President Tshisekedi on 9 December 2024, see <https://www.radiookapi.net/2024/12/10/actualite/politique/revision-constitutionnelle-vital-kamerhe-attend-les-conclusions-de-la> and <https://www.youtube.com/watch?v=gepwOpgKXJg>

⁴⁵ It is undeniable that the longtime marginalized Kasai community is undertaking a catch-up movement which creates important discontent, especially in the mining provinces in South Katanga.





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