
Democracy and Rule of Law in the Comoros in the Light of the 2018 Constitution

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Abstract

The President of the Republic announced in his speech of 9 March 2018 a constitutional revision. This revision engages the responsibility of the President of the Union of the Comoros for the implementation of the recommendations made by the Assemblies of the National Conferences organized in Moroni from 18 to 22 January 2017. The purpose of this study is to analyze the changes that have occurred (or not) in the constitutional revision of 2018, in relation to democracy and the rule of law. In order to have a clear idea, it is necessary to question the constitutional instruments of democracy and the rule of law. Slowly and progressively, the fundamental law establishes a resolutely democratic regime, since its article 18 stipulates that "the state must guarantee ... the principles of a democratic state governed by law". Thus, the Constitutional Charter of the Union of the Comoros guarantees the political participation of the people. It enshrines the organization of contested elections based on alternation and a multiparty system that constitutes a political opposition. It also recognizes the rule of law based on a balanced separation of powers, guaranteeing the fundamental rights and freedoms of individuals and recognizes constitutional justice.

Keywords: democracy, revision, constitution, rule of law; freedom, Comoros

INTRODUCTION

Democracy and the rule of law feature in the 2018 constitutional revision. The purpose of this study is to analyze, in the 2018 constitutional revision, the changes that have occurred [or not] in relation to democracy and the rule of law. The 2018 constitution is a reform of the 2001 constitution, revised in 2009 and 2013. When a constitution is challenged, it passes from the need for change. Thus, the constitution must adapt to a current situation to issues of political, economic and social conditions.

¹ Steering Committee of the National Conferences, 42 years of independence assessment and perspectives, reference document of the National Conferences of the Comoros, tome1, Moroni, February 2008, p.12.

The revision of 2018 corresponds to the responsibility of the President of the Union of Comoros to make effective the recommendations of the National Conferences of January 2017, which should take stock of the country since its independence. During the workshops of the National Conferences, the Comorian society questions the political, economic and social problems of the country. As a result, the issues of democracy and the rule of law are major debates. "In the politico-institutional situation, it has been specified that democracy and the rule of law are put to the test. Indeed, the actors involved in the debate refer to the respect of democracy and the rule of law.

Thus, the term democracy is constituted by two Greek roots "demos" which means people and "cratos" which means reign, government, power. More concretely, democracy designates a political system in which the power belongs to the people who exercise it through elections and who have the right to challenge it. That is to say, according to Pierre Bourdieu, "There is no effective democracy without true critical counter-power"².

Therefore, democracy is considered to be the power of the greatest number or, according to Abraham Lincoln's formula, it is "the power of the people, by the people and for the people"³. Democracy is therefore direct or representative. Democracy constitutes what is called "political pluralism". According to Jacques Mariel Nzouankeu, democracy emphasizes the existence of a multiparty political system that recognizes the political opposition, the independence of the judiciary, the alternation of power, the organization of free elections, and the recognition of freedom of the press and information⁴. Democracy is also characterized by "two fundamental and inseparable conditions"⁵, the consolidation of the rule of law and the protection of human rights and public freedom⁶.

This said, there is no effective democracy without the rule of law⁷. Thus, defines the rule of law as an institutional system before which the public power, or in some way the organs of the State are subject to the respect of the law. The State submits to the respect of the rule of law. The rule of law must guarantee fundamental rights and freedoms and the independence of justice. It must realize the consecration of the separation of powers. Democracy and the rule of law are principles enshrined in the fundamental law of 2008. In Comoros, before the adoption of this constitutional revision, the constitution of "mechanisms for a democratization of the political system

² Moutaanlim Hassani, "Democratic transition in the Comoros", Master's thesis: international studies, Hassan II University, Casablanca, 2021, p.7.

³ Ibid

⁴ Daouda Dia, "D. thesis in Political Science, Jean Moulin University, 2010 Lyon 3, p.14.

⁵ Éric Olivia, cit.p.34.

⁶ Ibid

⁷ Éric Olivia, Constitutionnel Law, Dalloz, Paris, 2006, p.33.

has gone through other stages" not negligible⁸, including the 2001 constitution revised in 2009 and 2013 "marked by progress or shortcomings.

In fact, the Comorian constituents would not like to replace one regime with another. But it seems to put the Union of the Comoros in the category of modern societies. It should be noted that this process of democratization wisely wanted by the late President Said Mohamed Djohar, after having upset by different regimes, has passed in the early 1990s. The head of state opted after the adoption of the 1992 constitution for the "rule of law, democracy and multiparty system. This new climate in Comorian political history is accompanied by the organization of multiparty elections, the emergence of trade union organizations, "the development of freedom of expression with a demonopolization of the media, the externalization of political awareness at the level of the people, public freedoms and fundamental rights have for the most part constitutionally guaranteed as well as political rights. This hope, in the political history of the Union of the Comoros⁹, is colored by some disappointments, could also be counted, "so-so", by "the institution of the Fundamental Law of December 23, 2001 culminated by the Framework Agreement of Fomboni".

However, beyond this progress, the country is currently experiencing major difficulties in the democratization process (lack of respect for democracy, flouting of political alternation, rights of political organizations, lack of respect for civil and political rights and freedoms, marginalization of the constitution, justice rarely behaves in terms of independence, etc.). This internal situation of obstacles to the democratization process is "currently the subject of serious criticism, not only from opponents of the regime but also from the Comorian lifeblood, in particular trade unions, civil society, NGOs and associations. It seems that in a striking conception of a new era the fundamental law must make happen what society states. The necessary is that the constitution must strengthen and advance what exists. The Union of Comoros should be in the constitutional management to confirm itself in the category of the consolidation of the democratic process. In this context, the constitutional revision of 2018 declares itself faithful as "a constitutionalism of democratic expression" that its preamble affirms: "the Comorian people affirms its determination to establish a state of law based on ... democracy...". Article 18 states that "the state must guarantee the principles of a democratic state based on the rule of law.

Through this preamble, the Comorian people also affirm: "their determination to establish a state based on the rule of law, founded on the

⁸ Abdellatif Benjelloun, "the constitution of July 1, 2011: a new stage in the modernization of the Moroccan political regime, *Revue et droit et d'économie*, n0 :28, université Sidi Mohamed Ben Abdellah, p47-98, 2013, p.47, in Abdelatif Benjelloun: *The process of democratization between the text and the context, Revue des sciences politiques, Toulouse, 2002, p7 and following.*

⁹ CPAN, op. cit., p.24.

principle of the sovereignty of the people and democracy, instituting a range of rights, freedoms and guarantees for citizens and a system of government based on the separation of powers...". Thus, this shows that "taking into account the main recommendations made by the assembly of the National Conferences of February 2018, this constitution aims to put in place an institutional framework for the advent of an era of democratic renewal.

To what extent is the 2018 constitution justified or not to an original consecration for the consolidation of the rule of law that characterizes a democratic regime? In other words, what are the constitutional instruments of the rule of law of democracy? In order to answer these questions, our analysis will be divided into two parts: first, the devolution of political power (I), then the consolidation of the rule of law (II).

I: The devolution of political power

Until democracy, the devolution of power was carried out by "processes of heredity, cooptation" or by way of "violent conquest". The emergence of the modern State wants that this arbitrary practice is put to an end, adopting new rules of devolution of power, it supposes that the people is the unit of the power. Within the framework of such a democratic practice, the constitution organizes the political participation (A) according to the fact that the power constitutes a stake of a political competition (B).

A. Political participation

In this area, the constitutional revision of 2018 takes the opposite approach to the provisions of the old text. Each time it is adopted, the mechanism that allows the people to participate in the exercise of power, either directly or through representation, raises the question of sovereignty.

1. The principle of popular sovereignty

Popular sovereignty is not significantly changed. The draft revision of the constitution adopted in 2018 wisely retains the principle of popular sovereignty, which has been enriched by constitutionalism since independence. It is known that the Union of Comoros has adopted this principle of popular sovereignty since the day after Independence. The constitution of 2001 has been revised several times in its terms: "sovereignty belongs to the people who exercise it, in each island and in the Union as a whole, by their elected representatives or by referendum. No group or individual can claim the exercise of it.

Today, the new text has retained this principle of popular sovereignty in its Article 3. However, the words "in each island and in the Union as a whole" are deleted without changing the vision. In principle, "sovereignty belongs to the people who exercise it through their

representatives...". Thus, popular sovereignty implies certain expressions of democracy.

2. Systems of participation

Generally speaking, these systems of participation result in "direct democracy", "representative democracy" and "semi-direct democracy". But the 2018 constitution incorporates systems of political participation in terms of direct democracy and representative democracy. Thus, Article 36 states, "all citizens have the right to participate in political life, directly or through freely elected representatives."¹⁰ However, "the referendum is a technique of government that does not belong to representative democracy or direct democracy. It is called "semi-direct" democracy". Thus, the same article 3 states: "sovereignty belongs to the people who exercise it by ... the way of the referendum". Now, the outstanding feature of political life is its competitiveness.

B. Political competition

Political competition refers to the system in which several actors, notably parties, compete for power through the democratic process of election. The mechanisms that allow political parties to participate in elections have not been changed. However, the 2018 constitution reveals new that it provides for the status of the opposition, a status that has never been recognized by any rule of law.

1. The electoral system

The election appears as the democratic mode of designation by the people of their governors. "It is an operation by which a majority of voters from among the electoral college designate one or more representatives by means of a ballot. The choice is made with regard to the suffrage.

The new text maintains the electoral system. The new constitutional revision, bearing the same concept as article 4 of the old constitution, requires in article 3 a certain number of modalities and conditions for the election, in the following terms: "the suffrage can be direct or indirect in the conditions foreseen by the constitution and the law". The same article adds: "It is always universal, equal and secret. All Comorians of both sexes enjoying their civil and political rights are eligible to vote, under the conditions determined by law. Article 52 shows in turn that "the president of the Union is elected by direct universal suffrage in two rounds".

Thus, the first-past-the-post system for presidential, legislative and governors' elections is a principle that has been enshrined in all the Comorian constitutions (1977, 1978; 1992, 1996, and the 2001 constitution, revised

¹⁰ Constitutional Law Course, First Year Law Degree, www.cours-univ.fr.

several times). What, by the mention of Uninominal majority vote in two rounds, is to all intents and purposes, a simple formula and advantage to the constitutional reality posed by Title IV of the last constitutional revision of 2018, "of the institutions of the islands, Chapter 1: "of the governors". Thus, Article 100 shows, for example, that "the governor is elected by the voters of the island by direct universal suffrage in two rounds...". In a democratic framework, political competition favors a multiparty political system for the alternation of power.

2. Political parties and groupings

Article 35 of the new constitution confirms the central role accorded to political parties in the functioning of democracy in article 6 of the old constitution. They "contribute to the expression of suffrage and to the civic and political education of the people. The same article adds that "they are formed and exercise their activity freely, in accordance with the law".

Finally, it is specified in this article that political parties and groups "must respect national unity, the sovereignty and inviolability of the borders of the Comoros, as internationally recognized, as well as the principles of democracy.

Article 35 of the new constitution, although more explicit than article 6 of the old constitution, does not allow "the formation of insular, regional or local political parties or parties of a paramilitary nature or resorting to subversive means.

It also adds, in relation to article 6 of the old constitution, that "the law determines the legal status of political parties and regulates the benefits that may be granted to them by the state".

It is clear that the formation of political parties is compatible with certain expressions of political opposition. However, democracy does not tolerate the disregard of the status of the opposition.

3. Recognition of the political opposition

Until the 2018 constitutional revision, the status of the opposition was never enshrined in either the constitution or the law. While the old constitution did not mention the political opposition, the new constitution did recognize it. The 2018 constitutional amendment is new because it enshrines the political opposition, in the words of article 36 "the political opposition is recognized in the Union of the Comoros". This article 36 shows that it "freely exercises its activities within the limits imposed by the law". It finally states that "the law determines the status of the political opposition".

If democracy makes that the individual participates without intermediary in the political life, this practice entails the political competition that different forces demand the alternation of the power. To think of the democratic state is to think of a liberal state. A democratic state is based not

only on political participation, but also takes into consideration a state that human rights and freedoms are guaranteed. There is therefore a link between democracy and the rule of law. Therefore, "democracy is the foundation, the limit and the guarantee of the rule of law. This one finds its origin in the existence of a fundamental law"¹¹.

II: The consolidation of the rule of law

The rule of law is a fundamental value of democracy. It appears as a priority of constitutionalism. The public bodies must adopt a fundamental law in which the rule of law is derived. By means of the mechanisms of democratization that it guarantees, the Constitution thus enshrines the rule of law. The problem is to codify new constitutional rules adopting new instruments of rule of law.

Thus, the preamble to the former fundamental law stated that "the Comorian people solemnly affirm their will to establish new institutions based on the rule of law...". This mechanism of guarantee provided by the old fundamental law is reported by the new constitution of 2018, in the words of the preamble: "the Comorian people, affirms its determination to establish a state of law ...". And even, Article 4 of this new constitution shows that "the state submits to the constitution, respects democratic legality, respects and enforces the laws.

The consolidation of the rule of law is achieved through the recognition of fundamental rights and freedoms (A), the consecration of the principle of the separation of powers (B) and constitutional justice (C).

A: The consecration of Rights and Freedoms

The rule of law must recognize fundamental rights and freedoms and provide mechanisms for their protection.

1. The recognition of fundamental rights and freedoms

"This is the moment to remember that the entire constitutional law is for the guarantee of liberties..."¹². Thus, Article 16 of the French Declaration of Rights and Citizens of 1789 states: "any society in which the guarantee of rights is not enshrined, nor the separation of powers determined, has no constitution.

The Comorian constituent of 2018 is not indifferent to this spirit of the ideology of the said French declaration. The constitutional revision of

¹¹ Stéphane Monney Mouandjo, "Democracy in the South and international election observation organizations in Commonwealth and Francophone countries", PhD thesis in Public Law, University of Reims Champagne Ardenne, Reims, 2008, p.91.

¹² Patrice Rolland, "the guarantee of rights", in *The Constitution of the Year III or l'ordre républicain*, texts collected by J. Bart, J.-J. Clère, Cl. Courvoisier and M. Verpeaux, Dijon, EUD, 1998, pp. 29-84. (Publications de l'Université de Bourgogne, XCIII). Text reproduced with the kind permission of the editor. Constitution of the Union of the Comoros of 23 December 2001, revised in 2009, 2013 and 2018.

2108 makes the fundamental law, a constitution of human rights. It is more advanced than the old text. By this new constitutional revision, the constituent renovates the human rights and fundamental liberties. Before this constitutional revision of 2018, the constitution of the Union of the Comoros, in its preamble provided for the attachment of the Comorian people to international human rights law.

The preamble of the 2001 constitution, revised in 2009 and 2013, proclaimed that "the Comorian people solemnly affirm their commitment to the principles and fundamental rights as defined by the United Nations Charter, the Charter of the Organization of African Unity, the Pact of the League of Arab States, the Universal Declaration of Human Rights of the United Nations and the African Charter on Human and People's Rights, as well as international conventions, particularly those relating to women's rights.

The current revision, which constitutes a progress for human rights, appears as a real pact of "rights and duties of citizens". Thus, it enshrines "Individual, political, social and economic rights and freedoms", from article 20 to 44.

We note for example: the protection of the integrity of the human person; the freedom of thought and expression, of association, of demonstration; the right of access to the administration of the public service; the right to property; the right to instruction, education, teaching; the freedom of information and communication; the right to participate in political life, the right to work, the freedom of association and membership of political and trade union groups; the right to health; the right to strike; the right to an environment; etc.

Article 15 specifies that "the right of access to justice and defense is guaranteed to all citizens...". Article 2 also states that "the Union of the Comoros recognizes the equality of all citizens before the law...". As for article 8, the state must "guarantee the respect of human rights and ensure to all citizens the full exercise of their rights and fundamental freedoms". It is clear that rights and freedoms are only truly guaranteed when the State adopts a protection mechanism.

2. Jurisdictional Protection of Rights and Freedoms

The proclamation of rights and freedoms goes hand in hand with their protection. It is obvious that the judge appears as the best "guardian" of these rights and freedoms.

Article 36 of the 2001 Constitution, revised in 2009, states that "the Constitutional Court, judge of the constitutionality of laws, guarantees the fundamental rights of the human person and public liberties.

In the new constitutional revision of 2018, the institution of the constitutional court in the old version, which was the subject of criticism, has disappeared. Its missions are transferred to the Supreme Court.

Article 29 of the 2001 constitution revised in 2009 showed that: "the Supreme Court is the highest court of the Union in judicial, administrative and accounts matters of the Union and the Islands." The same text adds that "the decisions of the Supreme Court are not subject to appeal and are binding on the Executive and Legislative Branches and on all courts of law in the Union territory".

Article 95 of the new fundamental law adds: "The Supreme Court is the highest court of the union in constitutional and electoral matters.

The function of the constitution is not only to solve the problem of guaranteeing rights and freedoms. It also takes into account the way in which the power will be exercised. To this end, the question of the separation of powers arises.

B. The consecration of the principle of the separation of powers

"Whatever the criticisms levelled at this theory in Western democracies, the separation of powers still has legal relevance and political significance, especially in young democratic states.¹³ The theory of the separation of powers considered as a pillar of democracy is seen as the antithesis of "absolutism and despotism".

"The consecration of the separation of powers in the State, thus translates the idea that the fundamental law, in this case, would be the backbone of the State as a system of organization of powers through various institutions¹⁴.

The constitutional revision of 2018 subtly adjusted the institution of the presidential regime while affirming the theory of the separation of powers in its "original conception" of the division of powers between different organs of the state. The new constitution, although more logical than the old one, eliminates the right to dissolve parliament without any real counter-power.

On the other hand, the principle of the separation of powers is affirmed in the preamble to the new constitution in the following terms. Thus, "the Comorian people affirm their determination to establish a state based on the rule of law and a system of government based on the separation of powers. While affirming the roles and functions of the other branches of government, "the judiciary is independent of the legislative and executive branches.

However, the 2009 constitution instituted a presidential regime with a distortion of the normal rule in a presidential-type regime. For example, Article 12-1 empowers the President to dissolve the Union Assembly. Thus,

¹³ Boissy Xavier, *The separation of powers, a jurisprudential work: On the construction of the post-communist rule of law*, Bruylant, Brussels, 2003, p.35.

¹⁴ Stéphane MONNEY MOUANDJO, *op, cit*, p.92.

"The President of the Union may, after consultation with the Speaker of the Union Assembly, dissolve the Union Assembly.

The constitutional revision of 2018, while establishing a presidential regime, the executive and legislative powers are strictly separated without either one having any leverage. The President of the Union does not have the means to dissolve the parliament and in turn the Union Assembly cannot engage "the responsibility of the President of the Union and overthrow him in case of persistent conflict. Thus, the President of the Union, who is head of state, is "head of government"¹⁵.

The constitution, in order to guarantee the separation of powers, makes the constitutional judge an organ of control of the respect of the power to the constitution so that the constitutional organs do not encroach on their competence. Therefore, the constitutional judge decides on the disputes of the various constitutional bodies.

C. The consecration of constitutional justice

Constitutional justice is in a way "the necessary condition for the existence of a genuine state governed by the rule of law"¹⁶.

The institution of constitutional justice undoubtedly constitutes a change in the new constitutional revision of 2018. While the constitutional judge was, in the old fundamental law the constitutional court, established by Articles 36 to 40.

The Constitutional Court is vested with missions to control the conformity of the laws of the Union and the Islands to the Constitution and "to ensure the regularity of the electoral operations both in the Islands and at the level of the Union, including in matters of referendum, it is judge of the electoral dispute, it guarantees finally the fundamental rights of the human person and the public liberties".

The constitution states that "the constitutional court is responsible for ruling on conflicts of jurisdiction between two or more institutions of the Union, between the Union and the Islands and between the Islands themselves.

The Constitutional Court may be seized by any citizen "on the constitutionality of laws, either directly, or by the procedure of the exception of unconstitutionality invoked in a case which concerns him before a jurisdiction of the Union or the Islands. The latter must stay the proceedings until the Constitutional Court has made its decision, which must be made

¹⁵ André Oraison, the essential characteristics of the constitution of the Union of the Comoros, see : André Oraison (<https://www.temoignages.re/andre-oraison/>) / 1 August 2005, p.6.

¹⁶ André Oraison, the essential characteristics of the constitution of the Union of the Comoros, see : André Oraison (<https://www.temoignages.re/andre-oraison/>) / 1 August 2005, p.6. Article 54 of the draft constitution adopted in 2018. Keutcha Tchapnga, Constitutional law and conflicts political conflicts in the French-speaking States of Black Africa", in RFDC, n° 63, July 2005, p. 468.

within thirty days. The members of the Constitutional Court must be of high moral character and probity as well as of recognized competence in the legal, administrative, economic or social field. They must have a minimum of fifteen years of professional experience. They are appointed for a renewable term of six years.

The members of the court are appointed by the President of the Union, the Vice-Presidents of the Union, the President of the Union Assembly and the Heads of the Executive of the Islands each appoint a member of the Constitutional Court.

However, the institution of constitutional justice that the new constitution sets up is now the responsibility of the former supreme court¹⁷. Article 96 of the 2008 constitution states that "the supreme court is the highest court of the union in judicial, administrative, constitutional, electoral and auditing matters. The same article states that "it shall try the president of the union in cases of high treason. The rest of the article gives details of its decisions: "The decisions of the Supreme Court shall not be subject to appeal and shall be binding on the Executive and Legislative Branches and on all courts in the Union territory.

CONCLUSION

No Democracy without Rule of Law. However, a State of Law does not necessarily have to adopt a democratic regime. In 2018, the Union of Comoros adopted the draft revision of the 2001 constitution revised in 2009 and 2013. The new text is better than the old constitution, particularly in terms of the consecration of democracy and the rule of law. It progresses for the consolidation of the democratic rule of law. It confirms and strengthens in some way the mechanisms of democratization.

The separation of the balanced powers is absolutely a progress. If some would like the constitution to go further in the field of the separation of powers, it results what even new proposals, notably, the recognition of the multipartism which recognizes a political opposition, the consecration of a whole chapter in the matter of the Human Rights and Public Freedom, etc. If the revision of 2018 constitutes unquestionably a progress for the consolidation of the State of law to the democracy, the real challenge for the constitution is well and truly that of its application.

¹⁷ Daouda DIA, *op.cit.*, p. 180.

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