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Always top-down: Constitutional reforms in Angola

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Angola amended its constitution yet again in 2021. In official statements, it was done to "strengthen the democratic principles of rule of law and of separation of powers", but this paper demonstrates that the opposite was achieved. In a process that was again top-own, with little or no participation of citizens or civil society and strongly criticised by the opposition, the effect was a reinforcement of the ruling party's dominant position and a further strengthening of the already omnipotent presidency.

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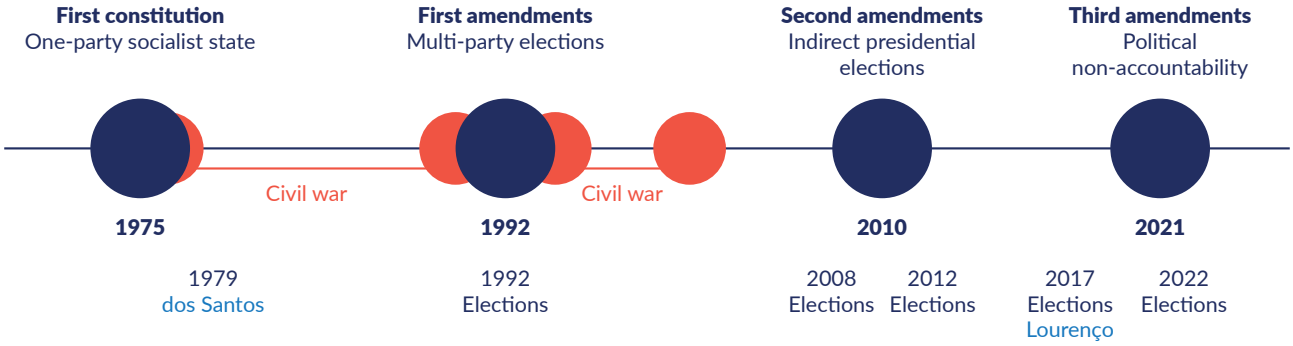
INTRODUCTION

For the third time since independence in 1975, Angola amended its constitution in 2021. Yet again, the purpose and effect of this exercise was seemingly to strengthen Angola's 'imperial presidency' even further, and the process was again top-down with little or no citizen participation or consultation.

In the following, the chronology of the Angolan constitution-making and revision processes are described, updated with information from the press coverage of events and recent debates on the implications of the last revisions. In direct contrast to the official statements, we will demonstrate that the revisions have cemented the ruling party's dominant position and even further reinforced the powers of the presidency.

TIMELINE

Today, Angola has its third republic. The first lasted from independence in 1975 to the watershed events of 1991/92 that led to (a temporary) end of the civil war, the abolition of the one-party *People's Republic* and to the introduction of a multi-party system. The second republic lasted until a new constitution was made in 2010 that abolished direct presidential elections and established an 'imperial presidency'. In 2017, President Eduardo dos Santos stepped down after 38 years in power, and his former Minister of Defence, João Lourenço, took over the presidency. In 2021, the separation of powers was further undermined as the National Assembly could no longer hold the executive politically accountable.



1975 CONSTITUTION AND SINGLE PARTY RULE

In Portugal in April 1974 the authoritarian regime fell in the so-called *Carnation Revolution*, and Portugal embarked on a transition to democracy and the end of Portuguese colonialism. In January 1975 the *Alvor* agreement transferred power in Angola from the colonial empire to a transitional government composed three liberation movements: the *People's Movement for the Liberation of Angola* (MPLA), the *National Liberation Front of Angola* (FNLA), and the *National Union for the Total Independence of Angola* (UNITA). This transitional government immediately fell apart, however, with each of the nationalist factions, distrustful of the others and unwilling to share power, attempted to take control of the country by force.

In July 1975, MPLA forces violently pushed FNLA out of Luanda, and UNITA withdrew to its stronghold in the south. In November, the MPLA leader Agostinho Neto declared independence of the *People's Republic of Angola*, as the Marxist liberation movement MPLA held Luanda, the capital.

To solidify their hold on power, the MPLA government imposed a constitution based on Marxist-Leninist principles and founded a one-party state. The other parties retreated into the countryside and began a 27-year civil war. While the FNLA gave up its armed struggle, UNITA and the MPLA continued to fight until 2002, with a short brake in 1991/92, with the former controlling the countryside and the latter controlling the cities.

The first constitution, the *Lei Constitucional da República Popular de Angola*, established a Marxist-Leninist one-party state in 1975. Its first paragraph established the *Peoples Republic of Angola* as a sovereign, independent and democratic state. The second paragraph, although granting "sovereignty to the people of Angola", established the MPLA as the people's "sole representative." In other words, the first constitution established a single party dictatorship.

During the one-party era, the constitution was revised several times that gave the MPLA a firm grip on power and reaffirmed its socialist goals. Political power was centralised, with the parliament as a subservient *People's Assembly* consisting only of nominated MPLA representatives. The *President of the Republic* was also the president of the MPLA, and in the communist party tradition of the time, the MPLA placed itself above all state institutions as the 'vanguard' party. The constitution granted the People's Assembly no autonomy, and there was no Supreme or Constitutional Court (the Luanda Court of Appeal acted as the country's highest court).

What followed was 25 years of civil war. Angola became a 'hot theatre' in the cold war, until the collapse of the Soviet Union. In 1990, The MPLA abandoned its former Marxist ideology and declared itself a 'social democratic' party. Restrictions on the market economy were reduced, and in May 1991 MPLA reached a peace agreement with UNITA, in the *Bicesse Accords*, that also laid out a transition to multi-party democracy.

1992 REVISIONS AND MULTI-PARTY ELECTIONS

The second republic was the result of a lengthy process of peace negotiations that ended with a negotiated settlement. This process took place in the midst of a wave of democratisation that swept over sub-Saharan Africa in the late 1980s, partly as a consequence of the dissolution of the Soviet Union.

The *Bicesse Accords* and the peace process reflected the relative strength of the belligerent parties, MPLA and UNITA, and they agreed to establish some new, basic rules of the game. For instance, there was to be full demobilisation (which never happened, on the contrary) and power-sharing in a *Government of National Unity* (GURN) with both MPLA and UNITA members.

The first round of constitutional revisions was made in May 1991, with the necessary amendments to open for multi-party elections. It granted all citizens freedom of expression, the right to hold meetings and demonstrations, and to form political parties and present candidates for election. This led to the establishment of many new civil society organisations, independent newspapers and radio stations, and it made UNITA into a legal, political party. A second revision of September 1992 changed the name of the country to the *Republic of Angola* (instead of the *People's* Republic).

These constitutional revisions were not made in any inclusive or consultative manner, however. The revisions were approved by the still single party *People's Assembly* (consisting of MPLA-nominated representatives only), before the multiparty elections. Furthermore, the revisions did not separate power between the executive branch (the President), the legislative branch (the National Assembly) and the judiciary (Supreme Court). The system was called 'semi-presidential' because there was supposed to be a Prime Minister, but it granted the president unilateral authority over appointments to a broad range of key executive, judicial, and other public offices, and empowered the president to bypass the legislature and legislate or govern without the legislature's participation even in non-emergency situations. The revisions furthermore established a 'winner takes all' electoral system.

The 1991/92 constitutional revisions established a strong presidential system (Amundsen et al. 2005: 4). The government (Council of Ministers with ministers and vice ministers) were all nominated and could be dismissed by the president, but the president could not be voted out of office by the parliament. In other words, the parliament could be dissolved by the president, but not *vice versa*.

Furthermore, the president had the exclusive right to appoint and dismiss the government and a long list of other senior state personnel (like the governor of the National Bank of Angola, the attorney general, chief of general staff, chiefs and deputies of staff of the different branches of the armed forces, ambassadors, and provincial governors). As this right also included the Supreme Court

judges, it rendered the Supreme Court dependent on the president and excluded any Supreme Court counter-balancing powers.

As the constitution of Angola dated back to the single party communist era, with only the minimum necessary alterations needed for Angola to be able to hold multiparty elections, with fundamental political rights and freedoms and the basic principles of a market economy added to it, there were many remnants of single party rule within the constitution.

It should also be noted that the aim of the 1991/92 constitutional amendments was – according to the ruling party – to "reflect the country's reality and assure greater stability for the citizens" (Amundsen et al. 2005: 6). This gave an early signal that the MPLA still wanted a strong presidency, in a process that did not include any broad consultation, and a constitution that reflected the *de facto* dominance of the ruling party.

Thus, when the UNITA leader Jonas Savimbi lost the presidential election, he and his UNITA was left with *very* little – and Savimbi and his UNITA forces returned to the bush and restarted the civil war. The resumption of the civil war in the aftermath of Angola's founding elections in 1992 blocked the country's trajectory towards the consolidation of a democratic dispensation, leaving it in "an ambiguous state of transition" (Hodges 2004: 47)

2010 REVISIONS AND INDIRECT PRESIDENTIAL ELECTIONS

After 10 more years of civil war, Jonas Savimbi was killed by the MPLA army, and the UNITA guerrillas were demobilised. UNITA was militarily defeated, it was not a negotiated settlement and no process of reconciliation. MPLA no longer had any serious rivals to power and could consolidate its grip without having to make any concessions to anybody.

In the 2008 elections, the first after the war and the second multiparty elections in the country's history, MPLA won 82 percent of the vote and four-fifths of the seats in parliament. This was a majority big enough to change the constitution even if the entire opposition should vote against it. Thus, in 2010, almost twenty years after Angola's 'democratisation' and after 30 years of President dos Santos in power, Angola got another constitution and a third republic.

The 2010 *Constitution of the Republic of Angola* reflected the unique position of power of the MPLA and its president. The 2010 constitution established what has been called an 'imperial presidency', a term coined by Rui Verde (Verde 2020). This 'imperial presidency' was codified and reinforced, and the possibility of establishing any real counter-power to MPLA's dominance was effectively blocked. The 2010 constitution also paved the way for a smooth transition from dos Santos' rule, but within full control of the MPLA party.

In January 2010, the National Assembly of Angola approved the new constitution, in its entirety, by a 186 to 0 vote. The vote was boycotted by UNITA, claiming that the constitutional process had been flawed and undemocratic. The new constitution had been drafted by a committee of 60 parliamentarians, advised by 19 experts and in a "process of public consultation". However, the opposition and most civil society organisations claimed that the government did not accept any of their many requests to review the constitution and claimed that their contributions had been ignored.

The Preamble to the 2010 Constitution established "the separation and balance between the powers of bodies that exercise sovereign power", and Article 2.1 reads: "The Republic of Angola shall be a democratic state based on the rule of law and on the sovereignty of the people, the primacy of the Constitution and the law, the separation of powers and the interdependence of functions, national unity, pluralism of political expression and organisation, and representative and participatory democracy". In its more than 200 articles, the constitution guarantees a wide range of rights, including the respect for human dignity, social justice, and political participation.

However, despite these good democratic principles declared in the prelude, the further letter of this basic law confirmed and strengthened the powers of the Angolan president. The president simultaneously holds executive power as the Head of State, and he is the Commander-in-Chief of the armed forces and the intelligence apparatus. He can still make key government appointments

including judges to the Constitutional Court, the Supreme Court, and the head of the Court of Audits, which is the body responsible for reviewing public expenditures. He can pardon and commute sentences. He is the only one who can ratify international treaties.

Furthermore, the new constitution replaced the prime minister with a vice president, making the presidency even more directly involved in the day-to-day affairs of state. Also, the constitution granted the president the power to issue "provisional legislative decrees" whenever "necessary in order to defend the public interest", decrees with legal force (2010 Constitution Art. 126). In other words, not only the legislature but also the president can make laws.

At the same time, the president's control of the ruling party was also reinforced (Vines 2019: 93). President dos Santos decided not to stand again for re-election, thus paving the way for a new head of state, his hand-picked successor João Lourenço. He nevertheless retained the post of President of the MPLA.

One much criticised provision of the 2010 constitution was that it abolished the direct election of the president. Under the 2010 constitution, the person heading the list of candidates of the majority party in the assembly automatically becomes president and the second person on the list, vice-president. In other words, the top candidate of the electoral list of the winning party (or coalition) will be appointed President of the Republic. This provision is almost unique to Angola. It allows the biggest party full control of the presidency (allowing the MPLA to retain control should it lose majority, given it is still the biggest party). It also reduces parliamentary control of the presidency: it strengthens the opposite, namely executive control of the legislature.

Thus, there was an embedded contradiction in the 2010 Angolan constitution: it guarantees fundamental rights and constitutionality, at the same time as it extends the presidential powers even further. As there is no limitation of the executive's power, fundamental liberties are at risk. Therefore, the opposition and civil society in Angola have repeatedly called for a constitutional revision to remove the indirect election of the president, to include provisions for establishing elected, local authorities (decentralisation), and for modernising the constitution to grant proper checks and balances and to limit the president's power.

2021 REVISIONS AND POLITICAL NON-ACCOUNTABILITY

When President João Lourenço took the initiative to review some articles of the 2010 constitution, the calls for proper checks and balances and limits to presidential power were probably not what he had in mind. In February 2021, the president surprisingly submitted a bill to amend more than 40 articles of the constitution, without any prior public consultation, raising several questions about its real purposes since the president had strongly rejected earlier requests for revision from the opposition and civil society (Ferreira 2021).

According to the Chief of Staff of the president, the main objectives of the revisions were to "improve institutional relations between the President of the Republic and the National Assembly by clarifying the instruments of political control", to provide for the right to vote for Angolan citizens abroad, to make the National Bank of Angola independent, and to "end the principle of gradualism in the effective institutionalization of local authorities and to set a fixed date for the elections" (ConstitutionNet 2021). The Chief of Staff also stressed that "the proposal does not envisage increasing the constitutional power of the President of the Republic, nor extending his mandate" (Lusa/VerAngola 2021).

The first objective mentioned is of particular interest: to "clarify" the instruments of political control between the president and the parliament.

According to the draft text (with explanations, given in the *Proposta de Lei de Revisão Constitucional 2021* (República de Angola 2021a)), there is a suggested new point of Article 162/3 that will restrict the accountability function of the parliament *in time*. The text reads that "the National Assembly's oversight of the Executive focuses only on and exclusively on facts that occurs in the period

corresponding to the mandate in progress". In other words, the parliament can now only oversee the acts of the executive in its current period (leaving the former president/presidency out of reach).

Furthermore, a new point is Article 120/L on the powers of the president (as "holder of executive powers"). This article grants the president the power to "declare a situation of public calamity" (*Estado de Calamidade*, like for instance in the current Covid-19 pandemic), although only after "consulting" with the parliament. This will add to the president's right to declare a state of emergency and grants him the right to issue executive orders and decrees in a wider range of situations.

No changes were made in these suggested revisions on the election of the president (still indirect) or in the president's wide powers as both holder of executive power and as commander-in-chief of the armed forces. The President of the Republic is the holder of all executive powers (*Titular do Poder Executivo*), he nominates government ministers to assisting him in exercising executive power (and the ministers are answerable only to him), and he holds considerable legislative powers (the parliament is not exclusive in making laws). The president can still suggest new laws at will, whereas the parliament needs the support of a third of the deputies to move forward with a law proposition (a number the combined opposition currently does not have). The president can also instruct the attorney general, and he can 'verify' the constitutionality of laws made by the parliament (Verde 2020).

In addition, the president will still have the exclusive right to appoint presiding and deputy judges of all the highest courts in the country (Constitutional, Supreme, Auditors and the Supreme Military Courts) and to appoint and dismiss the vice-president, attorney general, the military prosecutors, province governors, the commissioners of the Election Commission and a large number of other leaders of state agencies and parastatal entities. The only change is that the president will nominate the Central Bank governor only after his candidacy has been "heard" in parliament.

Two of the amendments (Article 162/G and 162/H) seem to *strengthen* the parliament. First, the parliament, in special committees, can now make interpellations and appeals to ministers and provincial governors, provided that they request these in advance to the president. This comes after the Constitutional Court in 2013 declared *unconstitutional* the provision in the *Rules of Procedure* for the National Assembly that gave the parliament the power to supervise and monitor the executive by making parliamentary interpellations in plenary. Secondly, the parliament can now establish special investigation/inquiry committees.

However, the powers of the special investigation/inquiry committees are very limited. It is immediately specified, in Article 162/2 of the revised constitution, that the "control and inspection mechanisms provided for in the preceding paragraph shall not confer on the National Assembly the power to hold the Executive politically accountable, nor to call into question its continuity in office" (República de Angola 2021: 31). This is the so-called 'political non-accountability clause'. For instance, if a parliamentary committee of investigation finds illegal practices, the parliament cannot demand the resignation of the minister in charge, it can only 'inform' the president of its findings.

This is also stated in Article 162/2 in the revised constitution, which states explicitly that "The control and oversight mechanisms provided for in the preceding paragraphs do not confer on the National Assembly the competence to hold the Executive politically responsible, nor to call into question its continuity in office". This is the so-called *political non-accountability clause*.

Concern has also been raised about some other provisions. For instance, in the words of Paula Cristina Roque, the Angolan opposition that first welcomed the constitutional revisions soon came to realise that they would block some opposition leaders from standing for the 2022 elections. "Two articles, in particular, were aimed at invalidating the running of the opposition's strongest leaders, UNITA's new President, Adalberto da Costa Júnior, and PRA-JA's Abel Chivukuvuku, on the basis that presidential candidates who had renounced their parliamentary seat in the past were disqualified (Chivukuvuku), as were those who had held dual nationality in the decade preceding their candidacy (da Costa Júnior)" (Roque 2021: 199-200).

Besides, the measures that allow asset confiscations and nationalisations raised concerns, and the further limitation of the sovereignty of the judiciary raised great fears (Ferreira 2021). In a public statement, the *Association of Judges of Angola* (AJA) stated that the proposed changes regarding the

judiciary was a "shameful retreat from the democratic state and law and the Constitution" and that they "aimed at a real disintegration of the judicial system" (DW 2021a). In August 2021, the President of Angola's Constitutional Court, Manuel Aragão, resigned, and analysts and politicians were no doubt that he resigned because of political interference in justice and the suggested amendments to the constitution. He had earlier warned of the "suicide of the democratic state and law", considering that the constitutional revision called into question the "separation of powers" (DW 2021b).

Concern has also been raised about the timing and the process. Again, the MPLA currently has the necessary two-thirds majority to approve any constitutional review alone. This might not be the case after the general elections scheduled for 2022, when there is a real possibility that the MPLA will lose its qualified majority and thereby losing its ability to approve the constitution alone. After this 'window of opportunity' it will take at least 5 years to alter the constitution again, as constitutional amendments will from now on now require the approval by *two* parliaments.

Besides, according to the approved *methodology for the constitutional process*, there was supposed to be an extensive public consultation process once the drafting work had been completed. An extensive consultative process was outlined in two documents (*Aprovação dos Princípios para Elaboração da Futura Constituição, Metodologia de Trabalho* (República de Angola 2021b), *Programa de Apresentação e Debate Público Sobre os Projectos de Constituição da República de Angola* (República de Angola 2021c), in which the draft would be opened for "public discussion and consultation" with contributions from "different professional classes and reputable individuals, traditional authorities, non-governmental organisations, religious entities, communities, students, etc." (República de Angola 2021c: 1). Thus, in April 2021 the parliament held consultative meetings with legal experts and representatives of churches and invited ten NGOs (non-governmental organizations) to submit contributions to the constitutional revision.

However, two of the civil society organisations, *Handeka* and *Mosaiko*, declined the invitation saying that the "consultations" were intended to "use" civil society to give credibility to a process that "was born biased" (DW 2021c). The lack of a consultation process prior to the presentation of the suggested revisions to parliament was also heavily criticised by the main opposition party UNITA. The leader of the UNITA parliamentary group, Liberty Chiaka, said that the constitutional revision proposal was not preceded by a broad consultation of society and the most representative political organisations. The UNITA parliamentary group and CASA-CE therefore abstained from voting both on the bill proposing the amendments (Lusa/VerAngola 2021) and the final approval of the revisions (DW 2021c).

Nevertheless, on Tuesday 22 June 2021, the MPLA-dominated parliament approved the amendments to the constitution. The passage of the bill lead to the amendment, wholesale, of the more than 40 articles as suggested by the President. The constitutional revision bill passed with 152 votes in favour (MPLA and some deputies in the opposition), no votes against, and 56 abstentions (UNITA and CASA-CE) (DW 2021d).

In August 2021, the Constitutional Court of Angola (*Tribunal Constitucional*) validated the Constitutional Review Law of 2021, requesting only one revision: the court did not endorse the stipulation that the Superior Courts would have to send annual reports of its activities to the President of the Republic and the National Assembly. This was considered a violation of the principle of separation of powers (Jornal de Angola 2021). The National Assembly then scraped this stipulation, and on 13 August 2021, President João Lourenço promulgated the Constitutional Revision Law.

CONCLUDING REMARKS

The above outline demonstrates three main features of Angolan constitution-making and constitutional amendments:

First, constitution-making and amendments have always been a top-down process. Constitutions and amendments have originated from the presidency, as ready-to-wear garments without any meaningful consultative process. Up until the 2010 revisions, the process was solely in the hands of

the ruling party MPLA. From 2010, both the opposition in parliament and the main civil society organisations have characterised the constitutional process as illegitimate, as "born biased", and the opposition has voted against it or boycotted the vote.

Second, the outcome of the process was never a compromise, it was never the result of a negotiated settlement. As the philosopher Ferdinand Lassalle stated back in 1862, the constitution of a country is an expression of "the relation of forces actually existing in the country", and that "these actual relations of force are put down on paper, are given written form" (Lasalle 1862: 26). A constitution is often the product of one of two political processes. It is either the result of an intense conflict where the main competing and belligerent parties agree to establish some basic rules of the game, to divide and restrict the exercise of power, and to safeguard the rights of the minority. Alternatively, it is the written manifestation of the dominance of one party. Angola's constitution-making has almost exclusively been of the latter kind.

Third, the outcome has been the establishment and a further strengthening of the 'imperial presidency'. In the words of Rui Verde, the 2010 Constitution "served to consecrate an imperial and hyperbolic presidency" (Verde 2021 :27). Although President Lourenço claimed that that the 2021 amendments were meant to "strengthen the democratic principles of rule of law and of separation of powers" (as stated in the background document, República de Angola 2021a: 24), the fears and criticisms of the revisions, outlined above, allows for no other conclusion than the direct opposite.

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