

For a new institutional  
engineering that codifies  
multiple legitimacies

Proposals for  
rebuilding  
the State

*Booklet n°2010-04*





**For a new institutional engineering that  
codifies multiple legitimacies**  
Proposals for rebuilding the State

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- Preface -

The Alliance for Rebuilding Governance in Africa brings together actors committed to both thinking and acting, people committed to promoting—in Africa and across the world—dialogue on the management of public affairs. Since 2003, the Alliance has taken up the torch of an inter-African initiative for dialogue on governance. Its ambition is to contribute to the birth of a governance project deeply rooted in the realities of African societies.

For the Alliance, governance is the art of coherent management of a group's shared affairs. As such, it is a sum of values, principles and methods that cannot be separated. How to govern? How to govern oneself? These are eternal questions that call for specific answers rooted in a particular place and time; they are closely entwined with the culture of the actors involved and the challenges of the moment. To talk about governance we must ask ourselves many questions, including: How do we envision interactions between the group and the individual? How do we envision our relationship with the powers that be? How do we envision our relationship with the public sphere?

The question of governance must thus be approached in terms of an actual context including what must be governed and what institutional, human and financial resources are available to do so. For the Alliance, there is no single, universal, "generic" model of governance. There are, however, shared universal principles that should serve as an inspiration for all models.

Nearly ten years spent collecting and analysing the statements and experiences of a wide variety of actors in public affairs management have led us to believe that the challenge of rebuilding governance in Africa can be met only by:

1- *Placing endogenous values and shared principles at the heart of the debate on rebuilding governance*, because the values and principles on which models of governance are based should be conceived from shared references that are known and recognised by the populations concerned. Crises in governance are fundamentally a reflection of crises in values, in particular moral and ethic values, whose remobilisation is a *sine qua non* condition for proper public action and appeased societies constructed on a strong consensus on how the public sphere should be managed. As a result we prefer the concept of *legitimate governance* because the management of public affairs and associated exercise of power should be in the service of the common good, with the agreement and under the control of those over whom power is exercised.

2- *Putting the experience of actors at the heart of the rebuilding process* because we feel each actor is the best expert on his or her own reality and thus deserves to be listened to; because proposals to reform the management of public affairs should not be imposed from the outside, nor should they result from abstract reasoning. Rather, they should be the fruit of a cross-pollination between aspirations, critical examinations and concrete experiences; these elements should be analysed and used to improve the practices of governance.

3- *Defining unity and the role of diversity—a necessary step in succeeding with a diversity of actors*, because the participation of each individual (or group) in building a nation depends on the importance the group as a whole places on the affirmation and development of his or her (or the sub-group's) identity. For the Alliance, unity is not a denial of diversity: it is a harmonious expression of diversity.

4- *Expressing ranges of governance from the local to the worldwide level instead of boxing off the various levels* because in our assessment the management of public affairs can only be improved by partnerships between territorial levels and a search for complementariness between the roles and responsibilities of actors and the resources available. Further, this cooperation should be based on the principle of active subsidiarity rather than a mechanical division of competences.

5- *Rooting the reconstruction of governance in the local level*, because it is the most strategic level in true decentralisation. The local arena is where new, participative and legitimate ways of managing public affairs—which are vital to development—can be invented and applied. It is also both the ideal place to create endogenous riches and improve people's living conditions and the best level on which to prevent and control conflicts inherent to all societies undergoing change.

The proposals made in this paper were built on an analysis of the statements and concrete experiences of African actors, viewed in light of requirements mentioned above. It is our hope that these proposals will inspire the many and varied reforms in public affairs management that are already in progress or will soon see the light of day in countries all across the African continent.

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## - Foreword -

So much has been said and written about the State and power in Africa. Is there anything that has not already been said? What about the controversy over whether or not States existed in ancient Africa, or the common belief in the error of the post-colonial nation-State transplant—the negative consequences of which are still being denounced? What about the State's fragility, its crisis of legitimacy and efficiency, the changes it is being forced to effect under the iron hand of international financial institutions, etc.? If there is nothing left to say on the subject, is there something left to do to save the African State from its malady? 'Less State, Better State' reducing diets, structural adjustment plans and 1990's recipes for good governance, democracy, human rights, condition-dependent development aid...what more can be done?

So why keep talking about the State in Africa, and what should be done, when after so much discussion and so many prescriptions the State is still ailing? Because as an object of reflection and reform, the issue of the State cannot be dissociated from development and the status of post-colonial Africa. Rebuilding the State is part of inventing a future for Africa, but the issue must be examined with a fresh vision, not mired in dogmatic approaches or boxed in by an existing official model. The Alliance for Rebuilding Governance in Africa has taken up this challenge of reformulating the issue of the State through an initiative on the 'Coexistence of legitimate power structures at the local level'. The very title of the initiative reveals its two underlying hypotheses, which can be summarised as 'pluralism is omnipresent' and 'the local level is the future of the State in Africa'.

The first hypothesis is that the issue of the State should be addressed in a wider perspective and reconciled with its natural corollary: the issue of power and its foundation. Yet when we begin examining these issues, we immediately see that the idea of a unique power with a unique social foundation (postulate of the Nation-State exclusively and solely based on individual citizenship, rationality and legality) is just that—an idea with no basis in reality. Experiences gathered have shown that, on the contrary, African societies are traversed by rivalries, cooperation and conflicts between various powers represented by various authorities whose legitimacy is based on different concepts and practices and a different relationship to power. This pluralism can also be seen in the institutions and standards that regulate social life. It is a reality that reforms and reflections on the State would do well to include. But how can these multiple 'powers' be made to coexist? Instead of treating them as irreconcilable opposites, how can we make them fit together

harmoniously in a modern, Africa-controlled governance system that truly reflects the way in which power is institutionalised and formalised? To do so, we must first do away with preconceived ideas: we need to take inspiration from the past and past ways of organising power, but without demonising the power of the State. We must not, however, approve the State's 'totalitarian' pretensions to power. Some call this the 'between-two' paradigm, as a way of describing the equilibrium on which the African State can establish itself on the basis of its own historicity, while also meeting the challenges of modernity and globalisation, and helping determine the content of the Universal.

The second hypothesis is that State rebuilding in Africa is primarily based on what is being invented on the local scale. At the end of the centralisation period, many hoped that decentralisation policies would provide a means of reconciling the State and societies. In practice, the simple transferral of a model and an 'administration-based' vision have prevented the use of decentralisation as a means of rebuilding the State. Yet concrete experiences—often outside a strictly legal framework—have demonstrated the strong potential for organising and exercising power at the local level, the fruitful cooperation of multiple actors and authorities working towards development and the peaceful coexistence of communities working and living together.

To go even further, these local experiences can certainly serve as an inspiration for the national level. Seen in this light, the current Constitutional crisis in Africa reminds us that reconciling legitimacy and legality is a major challenge and that, in the end, constitutional models can attain their objective, i.e., organise and limit power, only if such models are grounded in the reality they claim to understand. This reality can be seen first and foremost in what actually happens at the local level.

This proposals booklet was produced by combining the two hypothesis on the basis of nearly four hundred experiences in five countries (Benin, Burkina-Faso, Mali, Senegal and Togo). It presents the principle elements of reflection inspired by actors' concrete practices and the teachings that can be gleaned from them in terms of engineering of local and national institutions and in the field of multiple legal and judicial systems.

The methodology used, which is based on concrete, local experiences, shows the importance of the work done in countries where the initiative was implemented. The Alliance's mediators in each country—and their teams—deserve thanks for their efforts. Using the local level as the territorial level for rebuilding the State and governance also required daily consultation with the ARGAs working on the

'Governance, local development and decentralisation' initiative. The 'Coexistence of legitimacies' initiative is in fact a joint initiative of the 'Governance, culture and pluralism' group and the decentralisation group, so the latter and its coordinator Falilou Mbacké Cissé are also at the origin of this booklet.

In addition, we would like to thank all those who directly or indirectly contributed to the creation of this booklet: members of the Alliance's Resource Centre; Prof. Alioune Sall and participants in the Workshop on Constitutions in Africa, organised by the Alliance in May 2008 in Lomé (Togo), the main conclusions of which form the framework for reflection on constitutionalism; Séverine Bellina of the Institute for Research and Debate on Governance (IRG-Paris) for her careful re-reading of the booklet and her support in the framework of the 'Parcours sur la gouvernance en Afrique' (Course on governance in Africa), from which some ideas in this booklet are taken.

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## PART I

### INTRODUCTION AND CONTEXT



## Part I

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### INTRODUCTION AND CONTEXT

#### I.1 – The identity crisis of the African State

*“The myth of the Nation-State as the creator of national unity was merely a tool serving the unity of power.”*

The colonial and post-colonial history of the State in Africa is usually depicted as the unsuccessful transplant of a model that was imported without verifying its compatibility with the historical realities of power and African societies. The transfer of the 'nation-State', in particular, is often cited by political scientists as the reason for the weakness, fragility or even failure of the African State. Other explanations for its failure—such as

those linking the weakness of the State and political institutions to underdevelopment and structural obstacles to capitalism—remain marginal. Without going into the respective merits of these explanations, let it be noted that there is an undeniable absence of linearity between the processes of State-building and society-building in Africa. Because of this lack of linearity, disembodied political institutions are totally disconnected from the social dynamics developing in parallel. This poses the essential problem of the institutionalisation of State power in Africa. In Africa there is an official system based on transferred ideas, standards and regulations and an unofficial system resulting from internal social dynamics. The fact that these systems coexist and even overlap is one of the main reasons for the inefficiency of most reforms undertaken in Africa since the 1980's, because these reforms tried to make the State play the same role in Africa that it assumes in other societies where its institutionalisation is inscribed in a unique historical context.

Colonisation represented a crucial breaking point with the ancient forms of organisation and regulation of African communities; independence was characterised by an increase in the distance between the new States and the social realities over which they were expected to exercise domination. The association between the State and a certain idea of 'the nation' is not without bearing on this disconnection between political institutions and internal social dynamics. According to this association, the State (legal notion and political organisation) necessarily coincides with the Nation (notion of identity, expressing belonging to one group and one group only). In France, for example, this Nation-State association is the result of a gradual and parallel development that lasted nearly ten centuries and was brought to completion with the revolution of 1789 and the founding oath of the Festival of the Federation on 14 July 1790. It is built on the idea of 'the citizen' and a combat against hierarchies, and as a result the promotion of the individual to the detriment of the idea of 'community', since the only acceptable community is the 'national community', i.e. the Nation, composed of its citizens. When the African States became independent, they attempted to construct their existence through assimilation and using the same Nation-State mould. This course naturally met with difficulty because the very idea of a nation formed of a community of citizens living in a certain territory and placed under the sovereignty of a State entity was conceived and implemented on the basis of an artifice of colonisation and the use of politics as a tool at the service of post-colonial power.

An artifice first of all because the borders within which State and Nation were supposed to be associated were simply an accident of history dating back to 1885, i.e. a mere 75 years before the birth of the new States. The history of colonisation and the conditions surrounding the appearance of the new States within territorial limits inherited from colonisation did not permit this Nation-State association because there was no coherence between the 'territory' criteria on which the State is based and the 'shared identity' criteria that is the basis of the Nation. The artifice created a fundamental contradiction because the new States, whose independence was founded on the famous "right of a people to determine its own destiny", denied this right to peoples whose unity had been shattered by colonisation. In fact, it has often been in the name of national unity that the new African leaders have refused any type of self-determination to communities basing their claim on the fact that they form a 'Nation'.

Secondly, the artifice and its con-substantial contradiction have led to the use of repression as the sole means of keeping self-proclaimed Nations within the straitjacket



of the State. The idea of the Nation-State was in fact simply an instrument used to hold on to political power. To construct their legitimacy, the new elite in power had to smother other, competing sources of authority. Their legitimacy was fragile above all because ancient powers had not completely disappeared despite the colonial parenthesis. If we take another look at the French model, we see that the homogeneity of the Nation results simply from the mediation of citizenship, which guarantees—at least in theory—the homogeneity of power, its sources of legitimacy and, as a result, the authority of the State. African States have been built on this theoretical basis from the beginning. In practice, this has led to an obsession with national unity and the conservation of the State's authority and, at the same time, the negation of any other means of legitimating power. This was the leavening for the entire political and social organisation: a single party, a single legal system, unified institutions and a centralised State. The unity of power was supposed to reflect the unity of the people.

*“State reform based on the neo-liberal model has contributed to a loss of legitimacy by drastically reducing the State's capacity to intervene and redistribute resources.”*

But the failure of the African State cannot be attributed to a failed transplant and the subsequent fragility of its foundations alone. Blame must also be placed on policies that have been imposed on the African State since the beginning of the 1980's. Although African States were born during the reign of the Welfare State, they were unable to meet the material needs of their populations and guarantee peace and social stability. As their dependency on outside forces grew, they were subjected to a general trend of the 1980's and 1990's,

which was characterised by a certain wariness vis-à-vis of the State and a drastic reduction in the State's missions and means of intervention.

The liberalisation, deregulation and privatisation reforms undertaken were in fact instruments intended to mould the State according to a neo-liberal model. When looking for reasons for the failure of structural readjustment, international financial institutions in general and the World Bank in particular were inclined to cite factors internal to the States themselves and summarised by the term “poor governance”: weak technical and administrative capacities, lack of transparency, responsibility and

participation, etc. The link between State transformation and the economic reform project based on neo-liberalism should not be underestimated. It follows from a specific conception of the relationship between State and market and the idea that, in the end, the State should not only retreat from some fields to make way for the private sector, but the way in which the market is managed and operates should also be transposed on the State. The State is seen only in terms of its function and as an instrument at the service of a particular conception of development. At its core, this conception of development is based on the fact that the goal of State transformation is not so much to establish the legitimacy of States as to establish the legitimacy of neo-liberal policies. So it is easy to see why the legitimacy of States was diminished by the reforms imposed on them by international financial institutions: States had less power to intervene and redistribute resources, so access to basic public services was drastically reduced. This, in turn, led populations to put more demands on the State, with the resulting risk of States' social and political de-legitimation.

Finally, the fragility of the State in Africa should be attributed to both the artificial nature of the Nation-State and the use of the State as an instrument at the service of an economic project. Without a social foundation on which to build, the State's stability and unity are often threatened by something it stubbornly continues to deny: the diversity of the human communities that constitute it and, as a result, the diversity of standards and institutions that govern those communities. With little capacity for intervention, the State cannot accomplish the missions that strengthen its utility and so, to a certain extent, is unable to establish its legitimacy in the eyes of populations.

## I.2 – Decentralisation policies: a missed opportunity to reconstruct the foundations State legitimacy

*“The historical context of decentralisation policies made them seem an adequate response to the African State’s legitimacy crisis”*

In the 1990's, a number of African states initiated or accelerated decentralisation processes by creating or strengthening territorial authorities. These authorities governed themselves and exercised competences transferred to them by the State. The historical context of the adoption of decentralisation policies might make one imagine that the rediscovery of the local level would provide an opportunity for the State to undergo a profound transformation and rid itself of a 'uniformity at

all costs' idea of the nation. There were, however, two other important developments in the 1990's that should be remembered.

The first is the outcome, in most African countries, of the struggle for democracy. The decade saw the end of single-party governments and several military and/or authoritarian regimes, often through National Conferences and new constitutions that more effectively set up a better distribution of political power, guaranteeing individual and group rights and liberties and political pluralism. With regard to the distribution of political power, decentralisation can be construed as a response to a demand for democracy, or more precisely as a way of deepening democracy by giving the elected officials of local authorities the opportunity to manage local affairs in close proximity with populations and encourage their participation in public action.

The second development that occurred in parallel with increased decentralisation was the increasingly loud call—from international financial institutions and African civil society as well—for 'good governance', the new paradigm on which the intervention of international financial institutions and cooperation and development organisations depended. Structural adjustment policies having failed to produce the desired results, financial institutions stressed 'good governance', and decentralisation was seen as a

part of this good governance since the local level was thought to be the most appropriate territorial level for the supply of certain public services and for encouraging citizen control and transparency in the management of public affairs. These two developments explain why all decentralisation laws expressly include two objectives: strengthen democracy and encourage local economic development.

Yet, two decades later, decentralisation's achievement of these objectives is spotty at best. Local democracy has undeniably developed, with local leaders being freely elected and more citizens participating more fully in the development, implementation and control of local public policies. But the results of decentralisation in terms of provision of public services and support for local economic development remain paltry. It must even be admitted that, while decentralisation was supposed to redistribute State power, it has not in fact fundamentally changed the State's position as the central actor on the local stage.

To explain this weak outcome, it is often pointed out that decentralisation is up against a number of obstacles that hinder its complete and efficient implementation. Local authorities lack the financial, material and human resources needed to carry out their missions properly; the principle of free administration and less State trusteeship have not been effectively implemented because the institutional and regulatory frameworks in place are inappropriate; the central State has remained the primary actor in decentralisation because it provides the financial and human resources, retains its position as trustee and decides when and if territorial authorities become more autonomous.

*“Decentralisation policies have in fact reproduced the defects of the central State at the local level.”*

While these problems cannot be denied, factors other than financial, material, human and institutional difficulties seem to play a part in the failure—or in any case the current breakdown—of decentralisation policies. Decentralisation policies have, from the very beginning, been contaminated by two temptations that States have been unable to resist.

The first, once again, has been the temptation to imitate: most French-speaking African countries have simply adopted the French model of decentralisation. No effort has been made to adapt the model to local realities. A decentralisation model designed for a different context and inscribed in a different historical trajectory has been purely and simply reproduced without questioning—not even in principle—its pertinence in the context of African countries. The transfer of institutions observed after independence has happened again: local institutions, like the State, have been built exclusively on the basis of citizenship, and as a result implicitly on the idea of Nation that came out of the French revolution.

The second temptation, related to the vision underlying decentralisation, was to simply reform the administration. States chose to think of decentralisation as a technique for sharing competences between the central State and territorial authorities, and amongst the latter. This sharing of power should also lead to a sharing of national resources. In short, reforms consisted in taking power and resources from central authorities and transferring them to local authorities; they focused on the rules governing this transfer and the relationship between the State and the new authorities instead of on the meaning of decentralisation. Yet there are two disadvantages to such a vision. First, it cannot help but meet with resistance on the part of those who lose part of their power to intervene on the local level. Nor can such a vision flourish 'by the magic of decree' in countries that have constructed and imposed centralisation since independence, and in which not all the actors involved share an awareness of the advantages and transformations advocated by decentralisation. The second disadvantage of this vision is that it reduces local action to a face-off between the central State and local authorities and as a result does not take into account the complexity of relationships between all actors on the local level. It is paradoxical that an approach initiated to bring power closer to the people over which it is exercised has had so little consideration for

the diversity of the local level. On the contrary, diversity is still insidiously considered a danger to national unity and stability. All local authorities have the same status; each type of authority has the same competences, with no thought given to the specific characteristics of its territory, nor to its capacity and potential for assuming these competences. Likewise, the construction of local institutions has also been uniform: the same institutional structure confronting the same actors has been imposed everywhere.

The dual temptation thus described has generally resulted in the reproduction, on the local level, of all the defects of the central State, particularly as regards ignorance of the pluralism of institutions, powers and standards for regulating societies. In many countries, political parties alone are represented in local assemblies; instances in which other local actors participate have no real power; institutions created by the law remain the only official depositories of local power, as on the level of the central State. Likewise, decentralisation is seen only in its capacity as an instrument at the service of democracy and economic development: States do not see it as a means of reinventing their organisation and relationships with their societies, nor as a means of strengthening their legitimacy by rebuilding themselves in a different way, through the local level.

## PART II

### REBUILDING THE STATE FROM THE LOCAL LEVEL





## Part II

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### REBUILDING THE STATE FROM THE LOCAL LEVEL

How can the African State be rebuilt, using lessons learned from observing the blinding uniformity of the imported 'Nation-State' model, the approach to the State imposed by international financial institutions and the poorly thought-out decentralisation policies of the 1990's? How exactly can the State be institutionalised? These issues need to be placed in the context of an overall governance project whose legitimacy constitutes the paradigm; this legitimacy is intimately linked to its anchorage in African realities and its capacity to respond to the needs of Africans and the challenges of a globalised world. Seen in this light, rebuilding the African State on the basis of its own reality requires, first of all, a perfect understanding of the identity to which the project applies. Defining the African 'Nation-State' in a world organised in Nation-States becomes one of the parameters in defining its therapy. What is important to underline at this point is that the concept of the Nation-State was imposed by necessity and as a result of world development, so the identity of the African State can only be interpreted by attempting to reconcile the State, a form of political organisation, and the Nation, an identity-related notion of belonging to a whole.

Giving the Nation-State in Africa a meaningful definition, a content, is the *sine qua non* condition for determining principles to govern the rebuilding of the State. As such, the principle of pluralism is of capital importance whenever the legitimacy of power is an issue. Since societies cannot be reduced to a single and absolute form of power, all local or territorial authorities must deal with a plurality of political, economic, cultural, religious and regulatory elements whose articulation determines the legitimacy of the State. Recognising the principle of pluralism makes it possible to construct relationships between this inevitable diversity and the unity inherent in the idea of a nation.

Only then can we, in keeping with our vision of governance, re-examine the question of the territorial scale of rebuilding in terms of the relationship between the local and national levels. It is this association of a paradigm, an operating principle and a strategic level for action that makes the project undertaken coherent and provides a key to understanding—in terms of governance—all the proposals whose implementation will serve the single goal of rebuilding the State.

## II.1 – The paradigm: the African Nation-State is both a community of citizens and a community of peoples

*“The Nation-State in Africa cannot be defined on the basis of what it does, how it does it, or how it is. Nor can it be defined in terms of ‘how-it-should-be’ if that definition is based on the history of other societies.”*

Initiatives to reform the State in Africa most often focus on what the State should do, how it does what it does, and its ‘ways of being’. After believing for a time—as people did elsewhere—that the State could do almost everything (Welfare State), we became convinced that it should do less (“less State”). Then, in the wake of the concept of good governance, reforms focused on the way public policies were conducted, particularly with regard to how citizens helped design, implement and control such policies.

These reforms have led to two major lessons on rebuilding the State. The first relates to the fact that we have primarily attempted to define the State in terms of its missions and how it accomplishes them. In other words, the State has been seen in terms of a functional criteria. The second lesson comes to us through the concept of good governance. While insisting on the State's ways of doing and being, governance indirectly points to how the African State ‘should be’. This ‘should be’ is defined on the basis of a panoply of principles (participation, citizen control, transparency, etc.), so-called universal values (Rule of Law, democracy, etc.) and indicators (regularly held

free and transparent elections, independent judiciary, number of political parties, of media, etc.). It also determines policies to be implemented (strengthen civil society, fight against corruption, improve public services, justice system, etc.)

One of the weaknesses of these reforms is that none ask the basic question of what the Nation-State really is in Africa. We feel the answer to this question determines how the State can be successfully rebuilt. From this point of view, the Nation-State cannot be defined by what it does or how it does it, nor even by its way of being. These are not elements of its identity. In addition, since the State cannot be defined on the basis of any pre-established reference, it cannot be defined in terms of what it should be, above all if the content of this 'should be' is determined exclusively from the outside and does not capture African societies in their totality and their specific way of being.

*'The Nation-State in Africa is the fruit of its own specific history, which includes several pre-colonial, colonial and post-colonial periods that have forged multiple identities which influence the processes of legitimization of power.'*

In West Africa in particular, the Nation-State is first of all the fruit of the integration of several periods in history, just as the modern western State is the result of a gradual process lasting several centuries. Western colonisation triggered a break with ancient forms of regulating society and organising power (forms to which Arab colonisation had already added certain elements) and imposed a political model of domination that made a travesty of the ancient regulations and used them as instruments at the service of the colonising power's model of economic exploitation. Independence of African States then crowned this importing of the Nation-State model born of the French revolution. All these periods are part of the history of Africa because we find in

modern Africa and modern African States certain practices and social representations linked to each moment in this history. To analyse the African State, we first have to link these periods, determine what remains of each and how it impacts on current modes of governance.

So it is easy to understand the intellectual inconsistency of any analysis that approaches Africa only through a prism of dogma or criteria developed on the basis of other societies' histories.

The Nation-State in Africa is a community of citizens. This response may seem surprising after all analysts have said about the transplanted model of the Nation-State. Yet after several decades of implementation, this imported model has unquestionably become part of the identity of the African State. Despite States' varying trajectories, citizenship has become rooted in African societies in a relatively short period of time—considering the centuries other societies had to wait for these ideals to triumph. Amongst other factors attesting to the place of citizenship in cementing individuals in the State we may point to democratic conquests, strengthening of the rule of law and the vigour of civil society in all countries and localities across the continent. Contesting the place of citizenship in the name of criticism of an imported model of the Nation-State would indeed be a vain exercise.

The African State, however, is not just a community of citizens; it is also a community of peoples. Members of each people are linked by their ethnic origin, language, religion, territory...in short, a shared history that in most cases pre-dates Arab and Western colonisation. Since independence, this element in the identity of the Nation-State has been denied despite clear evidence of its existence. First it was openly fought against—officially in the name of national unity but in reality to help the new elites remain in power. Now it is repressed because it is considered a taboo. (With extremists going so far as to talk about 'race' it is easy to see why.) The idea of African 'peoples' being part of African identity still raises fears—fed by ethnic, tribal and religious tensions—and leaves one open to criticism. Look simply at the prevailing negative perception of an attachment to past customs, cultures, communities, ethnicities, etc. Yet if we observe African societies we can plainly see a historical continuity that has stretched over time and still persists in communities that have remained homogeneous. These communities are where power and the authority incarnating it are given legitimacy. The feeling of belonging that attaches one to an ethnic group, tribe, religious group or territory is instrumental in determining behaviours and choices that impact on one's relationship to the State, its institutions and its policies. It erases the line between the public and the private sphere, bringing both together and creating a powerful relay between the State and society. Relatively speaking, this can be seen in how community membership influences an election, or the important role religious or traditional leaders play in times of social or political crisis. During colonisation, political authorities used these relays as a means of strengthening their own legitimacy, and that is still the case today.

Addressing the issue of the State in Africa is really a voyage into the arcane complexity of the plural identity of each individual African, who as a result of history is both a citizen and a member of a community. This multiple identity results in a given individual feeling both Serer and Senegalese, Mossi and Burkinabé, Tem and Togolese, Bambara and Malian, Muslim or Christian and citizen...This paradigm brings us back to the question of State legitimacy and power in Africa, a legitimacy that exist only when the power incarnated by the State reflects—through its institutions, rules and mechanisms—the identity and aspirations of those over whom it is exercised. The greatest crisis of legitimacy of the African State results from this identity crisis and not, as the number of reforms would have us believe, from an efficiency crisis that prevents the State from accomplishing its missions. The efficiency crisis, which reinforces an impression that the State is not useful, is an outcome and not a cause of the legitimacy crisis: it in turn nourishes and strengthens the legitimacy of other social powers that take over State prerogatives or contest the State. But the real crisis has its origins in the denial of identity, which often leads people to manoeuvre around, pervert or use for their own ends the criteria, principles, indicators and policies that have come out of the good governance paradigm. From the crisis can be inferred a fundamental question concerning the existence of multiple sources for legitimating power. Legitimacy is not based on legality alone. It is rooted in various authorities carrying with them various normative systems and specific founding values, the articulation of which helps reinforce the State.

Thus any initiative to rebuild the State in Africa should include this dual dimension of its identity: the African State is both a community of citizens and a community of peoples. The State has been chosen as a starting point for rebuilding, but we still must indicate how this dual identity of the State will be put at the service of its governance, i.e., how the relationship between unity and diversity will be constructed. The pluralism principle will be used as a guide in articulating the various means of legitimating power.

## II.2 – Pluralism as the operating principle: 'put differences together in a harmonious whole instead of juxtaposing opposites'

*"In the re-establishment of State legitimacy, the pluralism principle can be used to reconcile unity and diversity because it is capable of differentiating and integrating at the same time."*

The strength of citizenship lies in its capacity to integrate everyone in the national mould through uniformisation and its underlying principle, equality. However, recognising that an individual belongs to multiple groups and translating that into State governance requires a different relationship to diversity. Reconciling unity and diversity has become a vital challenge for most African States which have, since independence, constructed a social and political model based on uniformity. Some States, such as Nigeria, have used federalism as a response to this challenge. Others, like Ghana and South Africa, have tried to reconcile unity and diversity

through their Constitutions and laws (recognition of other social powers, linguistic diversity, etc.). In the former French colonies, the weight of the imported model makes it more difficult to reconcile unity and diversity. Pluralism can be the central operating principle in such a reconciliation because it simultaneously enables differentiation and integration.

Concretely, as we have said, the approach of the African State should combine, on the one hand, the histories and various cultural, religious, social and political references that are a long-term part of the realities of distinct communities with, on the other hand, a strong aspiration for citizenship that connects the individual to the national community. Legitimate governance built around the principle of pluralism would then consist, not in opposing membership in various groups, nor in opposing citizenship and membership in these groups, but in articulating these 'multiple memberships' in a logical whole built on dialogue and complementarity, and in constructing social regulation around this complementarity. Thus, with regard to institutions, for example, the coexistence of citizenship and community membership would be reflected by dual representation. The idea of a State that is a community of citizens would be satisfied by citizens' representation by political parties and civil society—the main vehicles for expressing and exercising citizenship. The idea of a State that is a community of

peoples would also be satisfied by the representation of these peoples outside the channels of citizenship, i.e., not within political parties or organisations representing civil society. In the same fashion, this dual identity of States would guide their legal and judicial policy by striving to combine, insofar as possible and in the areas requiring it, specific law codes and civil law, traditional means of resolving disputes and State justice. As for national languages, not making them official languages will not help build unity. On the contrary, granting them this status would signal a willingness to integrate their speakers in the national community.

What is important in all fields is to give meaning to social regulations and to make sure the rules of the game are known, respected and used by the society as they were intended to be used. There will, of course, be other issues to address: How can communities be represented in institutions? Should there be a single house or separate houses for the different legitimate powers? If separate houses are chosen, what powers will each house have? What is the pertinent level for this dual representation? What is the relationship between houses, between systems of law, between jurisdictions? How are representatives of peoples designated, and according to what criteria? These issues can be resolved; they simply need to be organised around the ideas of complementarity and articulation between citizen values and other social values and not in a manner that opposes them or exaggerates their differences.

*“To re-establish its legitimacy, the State should negotiate a new order in which it agrees to share its regulatory power and admits that its legal character is not the only source of legitimacy”*

Recognising the concept of pluralism leads to in-depth cultural, intellectual, political and psychological transformations. These changes are all the more difficult because, in the beginning at least, the most important soul-searching and the most significant changes must come from the State because the State must admit that it does not regulate society alone. It must also share its regulatory power with other social instances whose authority and legitimacy it recognises. The State is thus called on to negotiate a new order in which it views itself as 'one force in a complex set of forces, a principal actor

regulator, mediator and re-organiser of the society on pluralist foundations'.

Pluralism then poses the fundamental problem of the relationship between legality and legitimacy of power. Our premise is that the legality of power does not guarantee its legitimacy; legality is one source of legitimacy among others. The multiplicity of sources of power can be seen in the multiple authorities that represent these sources and the standards and values on which they are based. The new order of power proposed will thus associate diverse powers and leaders who retain their own specific characteristics but participate in the regulation of communal life.

In any case, the integrating power of the pluralism principle extends beyond the framework of States. It could be helpful in the process of globalisation, in particular in the debate on cultural diversity and dialogue between cultures; With pluralism construed as the complementarity of differences, an inter-cultural perspective could replace the ranking of cultural values; we would be able to go beyond the traditional opposition between universality and relativism and avoid the creation of a model of world regulation based on emphasizing differences.



## II.3 – Territorial scale: using the local level as a space for constructing the State through a new social pact

*“The main challenge confronting States is the need to reconcile the official State pact with unofficial pacts in a new social pact that includes both”.*

Because decentralisation policies are contemporaneous with democratic overtures and the 'good governance' paradigm, they can be associated with the phenomenon of mistrust of a centralised State that is having great difficulty guaranteeing peace and social stability and supporting economic prosperity. As currently conceived of, the Nation-State has not eliminated the risks of dislocation. Nor has it erased local, identity-based histories from the social and political sphere and, finally,

it has not accelerated economic development. On the contrary, the State has exacerbated vague ethnic desires and encouraged the blossoming of democratic demands aiming to loosen the noose on individual and collective freedoms.

With decentralisation, the creation of territorial authorities has necessarily led to a new type of regulation of relations within and with the State. The State has changed its means of intervention by agreeing to share with others the responsibility for defining and implementing public policies and by giving direct control for public actions to populations. Thus decentralisation fundamentally calls into question the State as it has developed since independence. By supporting participation, transparency, citizen control and the obligation for leaders to explain their actions, decentralisation has given a new dimension to the democratic ideal, which is now more frequently implemented by those over whom power is exercised.

In our opinion, however, simply redesigning the relationship between the State and local authorities and technically reinforcing the processes of citizen participation is not enough. Decentralisation needs to be placed in a wider perspective of rebuilding the relationship between the State and social dynamics and, more precisely, of redefining means of governance on the basis of a new societal project.

The disconnection between State and society has caused African States, since independence, to give the impression of the existence, on the one hand, of official

social pacts constructed by the States themselves (under the influence of the international community) and operating in accordance with their own institutions and standards and, on the other hand, diverse unofficial social pacts created by social dynamics, each based on regulatory standards other than those of the 'modern' State.

In reality, the African State is built on a confrontation between these official and unofficial pacts, whose institutions, standards and values can be opposed, tolerated, used as instruments, or combined in complex relationships. Consequently, the major challenge facing States today is to reconcile the State pact with unofficial pacts in a new social pact that integrates both. Pluralism is the operating principle in this reconciliation, while decentralisation—with the rediscovery of the local area that it implies—is the way it can be strategically implemented.

*“The negotiation of a new social pact could be based on local pacts whose coherency is guaranteed by the intermediary of the local territory.”*

The local area is the space where the diversity traversing the social realm is best expressed. A space for citizenship, the local area is also where the specific characteristics identifying human communities are anchored, where the divergent interests of different social categories crystallise. Since the regulation of diversity should be one of the parameters of the reconstruction of the State itself, the new social compact must be constructed with the local area as a starting point.

Another important characteristic of the local area is that it can be a space for integrating differences, for it can potentially federate the interests of all actors sharing that space if a local project can be defined collectively, along with regulations guaranteeing the coexistence of the actors and serving as a basis for unity.

The new social pact could also be constructed on the basis of local pacts whose coherency is guaranteed by the local territory, provided this territory is conceived of as an arena where citizens and their organisations, as well as communities, can express their ideas. Local institutions, standards and regulations could thus be a reflection of the diversity of local actors and their interests. Veritable *local constitutions* could form the basis of a consensus on how the local area is to be lived in and shared. Then, moving from the local to the national level, decentralisation could provide a model for

the State. While each territory defines its local pact, a societal pact on the national level must be based on the diversity of the territories and communities sharing the national space. So forms of political representation should, insofar as possible, combine citizen representation, territorial representation and, indirectly, community representation.

In this manner, the State is built on two dynamics; articulation of the diversity of the local area through the construction of institutions, standards and regulations based on the specific characteristics of each local territory; articulation of local diversity with a national project that reflects as fully as possible the diversity of local territories. On both these levels, the engineering of institutions and standards should combine these specific characteristics with a solid grounding in the individual and collective dimensions of citizenship.

Finally, the manner in which local pacts and the new societal project are defined should not become mired in a current trend which consists in using participation to justify public policies that are in fact unilaterally defined by the State. Local pacts and the national pact should not be the exclusive work of the State; they should be the fruit of projects collectively drawn up by all actors in society through veritable *'local constituting processes'*.



PART III

PROPOSALS



## Part III

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### PROPOSALS

#### III.1 – Set up a new type of institutional engineering that officially codifies multiple legitimacies on the local level

##### 3.1.1 - Legitimacies present and their relationship

The complexity of the local level with regard to the coexistence of different sources of legitimacy is an established fact. Local power is divided amongst various authorities whether we are talking about municipalities and the elected officials that run them, the State, community organisations, NGO's, traditional and religious authorities or even—albeit to a lesser degree—the private sector. The experiences gathered show the existence of relationships based on confrontation, cooperation and instrumentalisation. These relationships are the result of stances actors assume in the public sphere and the way in which public affairs are managed with respect to the interests of the different social categories.

Most conflicts are the result of a confrontation between diverse sources of legitimacy, ambiguity of the roles and responsibilities of each authority in the public sphere or authorities' mistrust of each other. In systems where the State model attempts to absorb the entire political, social and economic organisation, the elective process and State legality as principle sources of legitimacy with regard to local power are often contested. The temporary nature of political and administrative terms of office, and the weakening of local political power as a result of partisan politics, are up against the sacred, neutral, somewhat intangible nature and social recognition of the power of traditional and religious authorities—and the considerable development of the roles of

the latter—who in some cases set themselves up as 'counter powers' and act as an alternative social force in the management of some local affairs. Community-oriented and citizen organisations spew forth demands and paralyse public action when they feel they have not been sufficiently included in the definition and implementation of local policies, or when suspicions arise concerning the appropriate management of local resources. Non-governmental organisations, meanwhile, become more powerful when they show they can address populations' needs in lieu and place of public actors. To all that must be added the fact that relationships between elected officials and citizens are not limited to links of a political nature. Other factors such as religious affiliation, family ties and business-client relationships may have an impact on the transparency of local political dealings, creating conflicts of interest and weakening the consensus on what constitutes the local interest. In addition, local conflicts are not always vertical in nature and do not always pit political actors against social actors; conflicts may also be horizontal, opposing, for example, different ethnic, religious and/or socio-economic groups.

Yet the local area also yields positive experiences, including cooperation amongst and peaceful cohabitation of the various legitimate powers. Local public action becomes more efficient and gains in legitimacy when it is based on the commitment of multiple actors to work together for the common good. This is indeed what happens when means for encouraging the cooperation, involvement and participation of all actors in local policies are formally or informally institutionalised, or when traditional and religious authorities are invited by elected officials and the administration to help prevent or resolve conflicts, particularly with regard to land ownership. The same occurs when social groups are allowed to take over from local authorities or the State in the exercise of certain competencies such as environmental protection or the provision of public services such as health care, education or even security.



Experience sheet: COPIL and COGES cooperatives for public sales infrastructures, the experience of the Swiss Development Aid agency in Burkina Faso (Ouahigouya, Koudougou and Fada N'Gourma)

At the beginning of the 1990's, the State of Burkina Faso launched a territorial development programme called the 'medium city' programme. The purpose of this operational programme was to turn secondary cities into urban development centres capable of organising the economies of their outlying areas. The programme stressed keeping populations in their home territories and giving them more responsibility in the management of local affairs.

Since 1992, the Swiss Development Aid agency has supported this programme as part of its encouragement of decentralisation and the process of democratisation implemented by the State of Burkina Faso since 1991.

Switzerland decided to support the creation of sales infrastructures and equipment to mobilise local financial and human resources. With this goal in mind, a strategy was adopted to give towns a means of directly mobilising funds used for the investment through net rental fees collected from merchants using the infrastructures.

After the first municipal elections in 1995, Swiss support was faced with a number of difficulties related to the appropriation of actions carried out in Ouahigouya at the beginning of 2000. This crisis involving the management of rental fees (amount and use) in fact masked a lack of trust in the technical and political authorities responsible for managing the central market with regard to users' (i.e., merchants') responsibility and obligation to pay fees for use of the infrastructures.

Mediation and intermediation were undertaken with all actors for a period of about two years, to restore a climate of trust and the payment of rents, and to create an appropriate management system involving all local actors in all actions conducted. At the same time, mechanisms and tools had to be developed to get local actors interested and to encourage them to organise their own development actions.

*In the end, the parties involved agreed to work with other actors, who were defined in agreements as non-institutional partners, but were considered to have the same legitimacy as those whose legitimacy was based on regulatory texts defining their power to act in the framework of a local community development process.*

In a pragmatic fashion, and with the help of the decentralisation process in progress—which provided an opportunity for actors to take charge of local development in the

absence of application decrees—the Swiss development aid agency pushed the creation of inclusive frameworks for dialogue. Actors' appropriation of the tool was guaranteed by the local anchorage of the actions, which were planned and carried out in support of local development. The tool, called the COPIL (comité de pilotage de projet, or project steering committee) is for projects that are municipal or regional in scope.

This committee has been set up primarily for projects involving structuring equipment, in particular sales infrastructures. It includes all legitimately known actors whose input has always been sought for this type of project. These sales infrastructures are in fact a local institution that reflects the structure of the society from which it comes and to whose social capital it contributes.

To reflect the image of this society and its commitment to social inclusion in development, the following groups are included in committees:

- The traditional chieftom, known for its role in facilitating the social consensus of the population, and guarantor of social equity,
- Local elected officials: representatives of political parties on whom the management of public affairs has been bestowed through legal elections legitimated by the votes of citizens,
- The beneficiaries (and/or private economic operators) who will be in charge of the operation, recognised by the jobs they perform within the population,
- Technicians (municipal technical services, de-concentrated State services or private service providers) who, on the basis of their fields of competence, have received orders or mission letters instructing them to support or conduct projects,
- Organisations in civil society, because of their social commitment, the ease with which they can be called upon and their representativeness of society.

The tool is based on dialogue, cooperation and a consensus that guarantees the safeguarding of the various interests, and above all the group interest. The organisation of exchanges within the group and the system for reporting back to the social group, for which each committee member is a representative, ensures ongoing communication and appropriation of changes to the project.

This inclusive approach is also applied to the operation of completed infrastructures through co-responsibility for objectives and profit-sharing.

The tool used is the management committee (COGES), within which there is also a balance in the powers wielded by local actors. This committee, based on actors' co-

management, guarantees increasing mobilisation of financial resources and on-going use of the equipment purchased thanks to regular maintenance operations. This appropriation of economic dynamics by local actors guarantees the viability of mechanisms set up for municipalities. The implementation of these suitable mechanisms and tools has allowed us to set up projects that meet the needs of beneficiaries as fully as possible.

This cohabitation of local actors with several sources of legitimacy guarantees harmonious implementation of communities' development actions. With this approach we have also helped establish ongoing dialogue between legitimate powers.

This new and legitimate mechanism for actors has helped create a feeling of trust amongst the actors in development. We noted that the various actors had a good knowledge of the way in which the project was being conducted.

They also felt a high degree of satisfaction stemming from their usefulness and the fact that they were consulted on the implementation of development actions, and this was accomplished within the limits of the competences of the various legitimate powers, co-actors in development.

*There is now a new vision of local development actions which is based on shared responsibility. This new vision brings with it transparency in management and the requirement to report to one's sources of legitimacy.*

Support for the programme has led to an increase of nearly 25% in own capital related to infrastructures.

**Context:** The CAGEC is a service that supports municipal management. One of its missions is to help municipalities set up and manage sales infrastructures created with the support of the Swiss aid agency. This experience was presented by David Barro, programme coordinator at the CAGEC, at a workshop on the cohabitation of legitimacies organised by Burkina Faso's national mediation service in Ouagadougou from 25-26 November of last year.

**Experience sheet authors:** David Barro, Assistant Coordinator of the CAGEC, Ouagadougou, November 2008

### 3.1.2 – Importance of new local institutional engineering

The unofficial nature of actors' interactions, which are not governed exclusively by legally established rules and do not take place in official spaces created for the management of local affairs, reinforces all parties' capacity to use each other as instruments, and encourages the development of conflictual relationships between local power-holders.

Ambiguity in the roles and responsibilities of each actor tends to aggravate conflictual situations when institutional and regulatory frameworks do not take into account the splitting of local power and the multiple actors in whom populations recognise an authority to intervene in local affairs. As a result, 'clandestine' relationships between people in power arouse suspicion and result in a loss of legitimacy for many social regulators caught in webs of occult negotiations to safeguard the interests of each social group they are supposed to represent and defend before the only authorities (i.e. elected officials and administrative personnel) with the legal right to manage public affairs.

Making relationships between power-holders official would make local interactions more transparent and acceptable. It would also make the general interest easier to defend and cut back special categorical interests. Many different types of institutional formulas deserve consideration. Their common denominator is the goal of 'codifying' the cohabitation of legitimacies on the local level, with the main objective being to reinforce local deliberative processes so that decisions taken by local instances are legitimate. With this in mind, we must go beyond populations' traditional, formal participation in the creation of local policies. Rebuilding local governance will depend on our capacity to collectively draft and implement true societal projects on the local level. These projects should include an institutional dimension that places at the heart of local institutions the issue of re-appropriating the means by which local power is conferred, regulated and exercised through the articulation of its multiple sources of legitimacy. The principal change this implies lies in its founding pre-supposition, i.e. that elections are not the only means of conferring power and selecting leaders and different orders of power and leaders can be brought together in a new system of power capable of renewing local democracy and regulating the society in a different way.

### 3.1.3 – Modalities of the new local institutional engineering

In the current situation, politicians have the main responsibility for public affairs and elections are the principal means of choosing leaders. The processes and mechanisms that elected officials and administrators use to make decisions at the local level attempt to take into consideration the viewpoints of other actors by developing participation. The feeble results produced by this system in terms of governance should lead to a search for other solutions. Three institutional formulas are open for debate: merge the current legitimacies into a single assembly, set up a true bicameral system on the local level (similar to the bicameral legislative power exercised in some countries) or more completely formalise the current status quo.

#### MERGE ALL LEGITIMACIES INTO A NEW LOCAL ASSEMBLY

The first institutional formula consists in a radical re-examination of the composition of current local-level institutions. In most countries, local assemblies are made up exclusively of representatives of political parties. People who are not members of a political party are either excluded by eligibility rules or are seldom elected as a result of political realities, in particular the modest material and financial resources they have at their disposal and the lack of an organisation capable of backing up their candidatures and competing with well-structured political parties. So participation in official decision-making instances is generally contingent on membership in a political party. If we accept the fact that local power is often split between several authorities, then *in*

*theory* there is nothing to prevent institutions created by decentralisation from reflecting this reality. Expressed in other words, and more concretely, local authorities with diverse forms of representation could be set up. Political parties would no longer have a monopoly; other legitimate local powers would also be represented.

Such an innovation in institutions, while theoretically possible, is of course not simple and would have consequences that should be examined. First, the specific fields of application of the representation must be determined, by deciding what legitimate powers will make up the new local assemblies. Alongside political parties, there should be non-

partisans (so they should be allowed to present themselves as candidates), organisations of civil society with the exception of supporting NGOs, and the principal ethnic/tribal and religious communities.

Secondly, the way in which representatives are chosen must be determined. A distinction could be made between elected and non-elected legitimate powers. The first category would include political parties, people not members of a political party and civil society organisations. Elections could then be based on quotas attributed to political parties and non-partisans on the one hand and organisations of civil society on the other. Each voter would vote for a representative in each of the two

categories. Representation within these categories could even be further refined by setting obligatory quotas for women, young people and the most important socio-professional groups for each locality. The second category would also have its own quota and would include traditional and religious authorities chosen according to these groups' own means of according power; traditional and religious leaders would choose persons to represent their respective communities themselves.

Finally, decision-making rules in local institutions should favour the search for a consensus rather than a vote, so that local affairs do not crystallise around opposition between a majority and a minority. Voting should be reserved for blocked situations.

#### SET UP BICAMERALISM ON THE LOCAL LEVEL

In most countries, legal texts on decentralisation and regionalisation take into account the pluralistic dimension of the society by providing for local-level instances that include the various segments of the society. However these instances generally do not have any real power; they are reduced to a consultative role and have no real influence on elected assemblies' exercise of power. In addition, most of these instances appear to function

only sporadically due to a lack of resources, leadership or interest.

Another institutional formula is based on this type of instance but goes further. It consists in the coexistence, on the local level, of two autonomous assemblies made up, on the one hand, of representatives of political parties and independents and, on the other hand,

communities. The quota rule would apply in the latter assembly (or 'chamber').

The competences of the second chamber, and its relationship with the chamber of elected representatives, would then have to be determined. A number of different options are possible. The second chamber could be given an overall consultative role, or for specific domains, but this consultation should be obligatory

and in certain pre-determined cases the opinion of the second chamber should be binding on the first, for example in property matters. Or the second chamber could be given the same decision-making powers as the first. In this case, the deliberations of the first chamber would be transmitted to the second and there would be a means of uniting the two instances if their opinions diverged.

## MAINTAIN THE STATUS QUO BUT FORMALISE THE CO-EXISTENCE OF POWERS ON THE LOCAL LEVEL

Creating a new local order that supports a new way of distributing power is a tricky step for States. In a context where political and administrative authorities are the only legally recognised powers, including other types of actors in institutions is not self-evident. Indeed, there are many obstacles. Both political and other actors may resist the idea. The issue of determining the place of traditional and religious authorities in official institutions is one example. Often these authorities—and populations—reject such an idea because they fear a confusion of roles and an erosion of the impartial position these leaders must have if they are to fulfil their mission of social regulation. Their intrusion in political life is often seen as a

factor in their discredit and consequently in their loss of legitimacy. This is why maintaining the current system for attributing power to manage public affairs is seen as the best solution. At most, proponents of the current system say, relations between local elected officials and other actors could be better formalised, with each locality clearly defining spaces and mechanisms to improve all actors' participation in public affairs. There have been some experiments in this area, but all have been developed on the fringes of legality and many depend entirely on the good graces of local elected officials. Improving this system would consist, in particular, in making cooperative frameworks

mandatory, while leaving each local authority free to define the composition and operation of such groups, as well as their powers and competences. Elected officials and other local actors could thus engage in dialogue to determine for what issues the groups should meet and what impact their decisions should have. This flexibility would allow local authorities to require at minimum a mandatory consultation or at maximum decisions that

elected officials would be forced to apply. In 2009, the city of Dakar, Senegal, set up a consultative council for the city and consultative committees for surrounding communities to encourage citizens and local authorities to act as partners. The council and the committees include all categories of actors but are only consultative instances whose opinions are not published but may be placed on the agenda at municipal council meetings.

*Experience sheet: Presentation of the Consultative Council of the city of Dakar and the Consultative Committees of surrounding communities*

For the city of Dakar, municipal action should be closely linked to the participation of citizens, so the Municipal Council wants to set up a partnership between citizens and elected officials and thereby establish an inclusive form of governance. As a result, the city of Dakar, in partnership with ENDA Diapol and the Civil Forum has decided to bestow a Consultative Council on the city and Consultative Committees on the surrounding communities.

Inhabitants' concerns, proposals and projects are formulated in these instances and adopted by the group. The Consultative Council and Consultative Committees were created to encourage dialogue and consultation between inhabitants, associations and elected officials—two things that are indispensable in an active, democratic society.

The Council and the Committees are local, consultative instances, spaces where inhabitants and private sector actors can exchange ideas and express their wishes concerning all aspects of the life of the city.

THE CONSULTATIVE COUNCIL OF THE CITY OF DAKAR: A PARTNERSHIP BETWEEN THE CITY OF DAKAR AND LAREC / CIVIL FORUM.

The city of Dakar has established a partnership with the Civil Forum to facilitate its work on the city's Consultative Council. The Civil Forum will provide the city with experts to support the process. Members of the Consultative Council shall be



designated by their organisations, and leading figures co-opted by the Municipal Council on the basis of their personal or professional qualities.

The city's Consultative Council is made up of: professional organisations; professional orders; employers' organisations (CNP, CNES, UNACOIS, MEDES); labour unions; civil society organisations; youth movements; the Navétane movement; women's associations and groups; organisations of merchants, artisans and other craftsmen; representative of traditional and religious families; representatives of delegates of neighbourhoods, markets and bus stations; the 19 representatives of the Consultative Committees of communities surrounding Dakar; important figures in the city of Dakar.

The Consultative Council gives opinions that are not published, but that may be delivered to the office of the Municipal Council, which decides whether or not they are put on its meeting agenda.

The Council, which is the deliberative body, includes all members and meets four times each year in regular sessions.

The Board is the executive body, which prepares the sessions of the Consultative Council. It meets between the Council's plenary sessions. The Board is composed of a president, two vice-presidents, a general secretary, an assistant general secretary, a reporter, an assistant reporter and two other members.

Five permanent commissions will be created to cover the following fields of competence: territorial development and the environment; education; health and social affairs; economic activities; youths' issues; culture, sports and leisure. Ad hoc commissions could also be created whenever necessary. Commissions can work in inter-commission groups. Members of the Consultative Council serve 5-year terms and do not receive any payment, fees or indemnities for the performance of their functions.

CONSULTATIVE COMMITTEES IN SURROUNDING COMMUNITIES: A DAKAR - ENDA DIAPOL PARTNERSHIP

For support in setting up consultative committees in surrounding communities, the city of Dakar has established a partnership with Enda Diapol, which will provide the city with the following personnel:

- An expert responsible for steering the process;
- A coordinator responsible for implementing the process with a research-action approach, who will coordinate the work of facilitators in the field in cooperation with the mayors of surrounding communities
- Experienced facilitators to manage the approach in each community. These facilitators will be responsible for organising and leading forums and mapping the

needs of each community. They will make sure the approach is as wide as possible. They will also watch over the approach insofar as it is exclusive.

- All components of communities will be included in the consultative committees.

Committees shall include: The representative of the mayor of the city of Dakar; the elected representatives of the surrounding communities; neighbourhood delegates; representatives of neighbourhood committees; local development committees; cultural and sports associations; women's groups; **youth movements**; religious groups; professional groups (mechanics, carpenters, tailors); all other groups present in the community (local civil society).

The Consultative Committee should discuss: living conditions (sanitation, urban planning, streets, territorial development), investment in the framework of the 2010 budget, the Dakar 2020 vision. A wide consensus should be obtained on all issues. Committees will serve as a framework for negotiations for all issues submitted to the town council.

*Main axes around which the work of the Consultative committees is structured:*

- Reciprocal accountability. All actors shall make a commitment, through 'behavioural contracts' (which could later serve as a basis for a local governance charter) to report on their management of any parts of the project for which they have been made responsible;
- Local preference. Whenever operations are required by a project that has been agreed, the socio-professional competences of persons and groups residing in the locality shall be called upon; these persons or groups agree, in turn, to meet certain requirements concerning product quality and the use of young people from the locality for labour;
- Transparency. All financial operations related to projects shall be made available to any authorised representative of any stakeholder in the project;
- Openness and inclusiveness. Representative instances including all the identified families of actors shall be set up to provide overall steering for activities. The process should be open to all actors who become involved and follow the rules of the game;
- Social communication. All project partners are obliged to signal to others any change at their level that might significantly affect the joint project.

*Activities of the consultative committees:* Forums on all issues that are related to competences transferred to the city and that will lead to the choice of flagship projects to be carried out by the city of Dakar in the framework of the program to invest in each surrounding community;

- Social mapping. Workshops on the cooperative development of surrounding communities.

**Authors of the experience sheet:** Assane Mbaye, Senegal, 2009

## III.2 – Incorporate institutional pluralism in Constitutions

### 3.2.1 – The African constitutionalism crisis and the crisis of constitutional legitimacy

*“After the euphoria of the 1990's, constitutionalism is in crisis in most African countries”*

In the 1990's there was a certain effervescence with regard to the Constitution, a state of mind that coincided with the satisfaction of a number of democratic demands for political pluralism, better protection of rights and liberties and a better balance of power in State institutions. Because it was supposed to

reflect the political compromises of the time, many placed their hopes in the Constitution—hopes nourished over the past decades of struggle against single-party systems, dictatorships and restrictions or outright violations of individual and group rights and liberties. There are at least two reasons why such high hopes were placed in the Constitutions adopted during this period. First, the conditions under which the new constitutions were written broke sharply from countries' past experiences. For the first time, constitutions were the fruit of sweeping national consultations known as 'national conferences'. The procedure used to draft and adopt constitutions made people believe—and rightly so—that the constitution was truly a group endeavour involving all the nation's people, that as a result the compromises formalised therein were somewhat intangible, and that this would make the constitution long-lasting and protect it from individuals seeking to pervert its nature for their own ends. Second, and perhaps more importantly, the constitutions of this period are for the most part very prudent. They have proven to be effective instruments in limiting power and subjecting it to a higher standard.

The euphoria that followed democratic victories and the subsequent flourishing of constitutionalism then gave way to more mixed feelings, a sort of 'ebb tide' of perplexity and questioning of democratic systems and institutions deemed ineffective because they have not generally produced the expected results. These democratic systems have become unstable and, paradoxically, provide fodder for crises and conflicts—

some of them violent—instead of regulating them. The constitutionalism crisis has thus become one of the major challenges facing most African States. The crisis often unfurls in the form of constitutional 'revisionism' (often 'tailor-made' and sometimes enacted 'on the run'), an inability to guarantee the peaceful handing over of political power, institutions incapable of providing balanced, wisely distributed and truly monitored power. The constitutionalism crisis has also taken the form of an openly displayed or insidious 'monarchisation' of power in many countries, and of a recurring weakness in constitutional justice.

The constitutionalism crisis has shown us that the Constitution is not an 'axiomatic generator of rigidities' and even less a 'sacred book'. The Constitution is necessarily battered by social and political realities. That is why the distance between the 'metaphysical exaltation' of which it is an object and the practical results it yields in Africa invites us to take a very close look at the causes of the crisis.

*“Since it is a source of power, the Constitution is inevitably faced with the issue of the relationship between legitimacy and legality”.*

For our part, we feel that one of the main causes of the crisis lies in the historical conditions in which formal Constitutions appeared, i.e. at a time when their essence was to justify the uniqueness of the power base and the imperialism of individualistic and egalitarian citizenship to the detriment of collective statuses. Here again, the concept of the Nation-State as received from Age of Enlightenment philosophers may play a role in the problems Africa has had getting its constitutions to take

root in society. This concept pretends that unity of power serves as a justification for societal unity, and not the reverse. It is this idea we find frankly open to debate because it claims that social reality is determined by the Constitution. This is not the case. The Constitution should in fact reflect social reality. This social reality, as we have already shown, is that of a diversity of group identities that cannot be restrained by the corset of formal legality and a preconceived societal unity.

Thus, since it is a source of power, the Constitution is inevitably faced with the issue of the relationship between legitimacy and legality. In fact, we think one of the explanations for the constitutionalism crisis in Africa resides in the poor—or inexistent

—articulation of the various sources that legitimate power, which results from State legality having absorbed all other sources. Current constitutional impasses clearly show that constitutions are incapable of playing their role of limiting power when they are based solely on formal legality. It is paradoxical to believe that only the formal Constitution justifies, limits and structures power, given that we can clearly see it is merely a political instrument at the service of primarily political ends. The paradox resides in the fact that the formal Constitution is the source of power yet is incapable of limiting it.



### 3.2.2 – The importance of pluralism in constitutional matters

*“The legitimacy and indeed the continued existence of Constitutions depends to some extent on a rediscovery of their historical and spiritual dimensions.”*

Reintroducing the idea of group and community identity in the concept of the nation in Africa could be an effective means of renewing constitutionalism. If the Constitution is a reflection of society, it can play its role and claim legitimacy only if it truly reflects social pluralism in its globality, not just in a restricted way, i.e., limited to the existence of multiple political parties and media. The advantages of such a change are capital, and they are practical as well as theoretical.

On a theoretical level, the 'constitutionalist imperialism' that came out of the Age of Enlightenment was the result of a questioning of customary constitutions; it was based

on the founding idea that the Constitution is a rational work 'that institutionalises a unified and homogeneous nation of citizens and their powers' and not the result of a historically and spiritually based tradition. But observation of African societies shows that the rational dimension of the constitution does not necessarily exclude its historical and spiritual dimension. Even though the idea of customary constitutions is now viewed only in terms of historical significance, it must be remembered that the homogeneity of African societies is built on both the ideals of individual citizenship and the historical tradition of statuses. Seen in this light, rediscovery of the 'customary constitution' concept does not seem anachronistic. It appears, on the contrary, to be a *sine qua non* condition for balancing the basis of power and social reality.

Also on the theoretical level, it is plain to see that the enormous stress put on the rational dimension of the Constitution is the basis for the individualist philosophy of human rights, which today claims to be universal, but has come up against relativism and the 'specific characteristics of concrete societies'. Renewing African constitutionalism is in this case the best way to show that the universal cannot be constructed unilaterally, on the basis of a history specific to Western countries. It must result from a 'co-construction' based on a discovery of interfaces between histories and multiple realities, and it must find an acceptable balance between the individualist concept of citizenship and the permanence of group identities and statuses inherent to those groups. In other words, the universal cannot be discovered in a barren confrontation of cultures, nor even in a 'multiculturalism' that superposes opposing realities, but through an 'inter-culturalism' approach used to determine what societies have in common.

*"The renewal of constitutionalism is one of the conditions required for reinventing representative democracy"*

On a practical level, renewing constitutionalism in Africa is one path to renewing democratic systems, because we cannot escape the temptation to establish a link between constitutionalism and democracy. In West Africa, democratic progress was clearly made when constitutionalism was at its heights: constitutionalism feeds on democratic progress and formally translates the latter in its content. Inversely, a decline in

democracy affects constitutionalism and weakens belief in the superiority of the constitutional standard and its function of providing a lasting political system and limiting power. If this link exists, even indirectly, we should not be surprised that the crisis in constitutional models is an aspect of the crisis of the democratic model and in particular of representative democracy. To attenuate the crisis and renew representative democracy, we must attack each symptom of the crisis by looking at how recognition of pluralism could strengthen the legitimacy of formal Constitutions, and how these Constitutions organise the democratic ideal.

It is this bet on pluralism that needs to be tested, for our purposes, in the field of institutional organisation and the anchoring of constitutions in society. Two points should be made here. One is that the triumph of the formal Constitution forces us to have realistic ambitions, because we cannot deny the Constitution's capacity to organise power. So, strategically, what we need to do is progressively rebuild representative democracy in Africa by making it integrate multiple representations on the basis of multiple sources of power. The major temptation in this plan, to which we consciously succumb, is to bring the other powers into the bosom of the State. Yet it must be admitted that this temptation is hard



to resist, for while the creation of a constitutional pluralism is possible only in the long term, at least it is realistic, in the medium term, to introduce pluralism in formal constitutions. In addition, here again the idea is to construct constitutionalism and democracy by starting on the local level and promoting unity in diversity rather than diversity in unity, as was done at the time of independence.

### 3.2.3 – Terms for introducing institutional pluralism in constitutions

In light of the current state of constitutionalism, two types of proposal are conceivable. One type aims at making Constitutions reflect pluralism in the way they are written and revised, as well as in the institutional organisation of power, while the objective of the other type of proposal is to help Constitutions regain credibility through their function of limiting power.

#### ALLOWING COMMUNITIES TO BE REPRESENTED IN PARLIAMENT

The crisis in representative democracy is a crisis in national representation itself, particularly parliamentary representation, and is the best indicator of the influence that representative democracy can have on constitutionalism. Majority rule, and the political practices this leads to, as well as presidential hypertrophy, weaken constitutional principles and guarantees. As proof, one need only look at the facility with which constitutional revisions of doubtful legitimacy are adopted by parliaments solely because they have the support of the party in power and the person incarnating it.

To rebuild national representation, we first need to put forth the premise that such representation does not have to be linked exclusively to the political representation

of citizens through political parties and independent candidatures. Parliaments should reflect the entire spectrum of social diversity and in particular the idea of nationhood, based of course on citizenship but also on group identities, community identities. Communities could be represented in an alternative way. Either we deem that Parliaments can simultaneously include representatives of citizens and representatives of communities, with a quota for each category, or we consider the creation of a second chamber exclusively composed of community representatives. In this case, a link probably needs to be made with the engineering of local institutions, for example through national level representation of local level 'second chambers'<sup>1</sup>.

<sup>1</sup>See p.49 above



This would go beyond traditional bicameral organisations with the existence of Senates that, while they usually represent territories, are most often made up of representatives of political parties and/or personalities designated by the executive branch.

In this second hypothesis, one would still need to determine the powers of each chamber and the relationships between them. The idea of a nation 'community of citizens' and 'community of communities' excludes, in our opinion, any type of hierarchy. At most, it might be conceded that the chamber representing communities would have competences

related to issues touching on the existence of communities, their operating rules or the legal rights accorded by their own normative systems (and to the extent that State law grants them autonomy in matters such as personal status or property rights). But on these issues, the 'communities' chamber would still share equal legislative power with the chamber representing citizens.

Obviously, the creation of multiple forms of representation implies acceptance of multiple ways of selecting leaders and, consequently, the idea that leaders can be chosen by means other than elections.

## SETTING UP NEW WAYS OF DRAFTING CONSTITUTIONS

The democracy crisis also touches on the original constituting power because the procedures used to associate the people with the drafting of the Constitution are mere caricatures. Often the content of the Constitution is debated only by the country's elite, and in a technical manner. The people are invited to express their views only during the referendum phase and at that point, they are asked to say 'yes' or 'no' to a ready-made product rather than to make an enlightened choice on desired changes whose impact and importance they understand. In addition,

while citizens are often asked to vote when Constitutions are adopted, their consultation is often systematically excluded when it comes time to make revisions, no matter what the importance of the modification. The renovation of democratic systems should thus include processes for drafting and changing Constitutions. Procedural innovations could be imagined so that the Constitution, both in terms of content (directions, i.e., values) and form truly belongs to the society that adopts it.

Thus, by taking inspiration from the creation of local pacts for local governance, constituent processes could be totally reversed. First of all, the adoption of the Constitution could be made contingent on the prior adoption of local pacts. Then, secondly, intra-territorial and inter-territorial consultations—with instructions to seek compromise on the rules of living together and a consensus based on an inter-cultural approach to various local pacts—could be used to create an outline of the future Constitution. Only then would the

Constitution be the object of a national constituent assembly and then a popular referendum. The inversion of constituent processes, moving from the bottom up, would reinforce the social base and thus the legitimacy of the Constitution. It would above all enable the construction of national unity on the basis of diversity. Popular participation would not be a means of making legitimate the desires of an individual (often the President of the Republic) but rather the proof of group elaboration of the Constitution's content on the basis of truly inclusive processes.

*Experience sheet: The Malian Assembly of citizens, an experience for use in constituent processes in Africa*

1. From the construction of spaces for dialogue to the construction of perspectives

The Malian Assembly of citizens is an open, participative group construction process to build relationships based on dialogue, the exchange of ideas and cooperation amongst local actors in a community, region or country. These relationships are not hierarchical; they are based on a shared ethic and goal: a Mali built on local perspectives. To achieve this end, spaces for dialogue on joint challenges in the various geo-cultural areas of the country have been set up to share, discuss and pool the various experiences of actors.

The Malian Assembly of citizens brings together a number of actors from different realms: religious and traditional leaders, well-known politicians, company managers, rural and urban producers, leaders of associations and trade unions, students, teachers, scientists, artists, civil servants, etc. The participation of these diverse actors in debates should lead to a shared diagnosis and the construction of consensual proposals and strategies for change.

2. Objectives and expected results

The process of the Malian Assembly of citizens aims to create a dialogue between the perspectives of the various socio-cultural and professional levels present in the country to determine priorities and, most of all, devise mutually agreed strategies to create a foundation for the construction of a collective project in which each and every Malian believes.

The results expected from this project are:

- the identification of shared values, challenges and commitments that are the basis of Malian populations' desire to live together in harmony; a definition of the main changes populations are hoping for; and the construction of shared perspectives for development that respect the geographic and socio-professional diversity of situations and actors' points of view.

The Malian Assembly of citizens, which aims to formulate a collective project for new perspectives, takes place in three phases (circle, region, nation).

Expected products at the end of the process are:

- a proposals booklet for each circle selected, a proposals booklet for each of the regions and the District of Bamako, and a national summary entitled “Building Mali on the basis of local perspectives”.

### 3. Methodology implemented

Since the local level is the most pertinent scale for beginning to set up legitimate governance, the process of the Malian Assembly of citizens will begin on the municipal level, go through the regional level and finish on the national level:

The exercise will involve 48 towns in 22 of the 46 circles in all 8 regions of the country and in the District of Bamako. For the Bamako district, the exercise will involve all 6 towns. The sociological, demographic and cultural characteristics of each circle were taken into account in determining the proportion of rural and urban communities.

The process of the Malian Assembly of citizens will be based on meetings and workshops to be held in the following phases:

#### 1<sup>st</sup> phase: local level (town and circle meetings)

This phase will first be implemented in the towns and then concluded on the circle level with a transversal analysis of what was said at the town level.

#### 2<sup>nd</sup> phase: regional level

The collegial and thematic approaches are both taken into account by including the first in the choice of thematic actors. The inter-local nature of regional development challenges argues strongly for the inclusion of institutional actors (political and administrative) in the creation of regional booklets, particularly for some themes.

#### 3<sup>rd</sup> phase: national level

The national meeting will bring together delegates from national socio-professional committees and thematic groups. Prior to this meeting, a transversal analysis will be made of the diagnoses and proposals from regional meetings and used to organise thematic workshops that include the greatest possible diversity of actors. The national document to be entitled “Building Mali on the basis of local perspectives” will come out of this meeting

#### 4<sup>th</sup> phase: restitution of the document to the circle level

A phase in which the national document “Building Mali on the basis of local perspectives” is returned to the circle level is proposed as a means of providing feedback to local actors and ensuring validation and appropriation on the local level.

5th phase: restitution of the document on the national level

After the document has been returned to the circle level, a phase of restitution will be organised on the national level. Restitution of the document on the national level will bring together district and regional actors.

4. Who organises the process of the Malian Assembly of citizens?

The Malian Assembly of citizens is steered by the Centre Djoliba with the methodological support of the Malian Alliance for Rebuilding Governance in Africa (ARGA/Mali) and technical and financial support from the Foundation for Human Progress (FPH).

The Centre Djoliba is an association under Malian national law created in 1964 and recognised and registered on 22 February 1992 under n°147/MAT/DNAT. Its goal is to strengthen the capacities of Malian and African civil society to support justice, democracy, peace and economic, social and cultural development through information, training, documentation, capitalisation, publication and reflection.

The Malian Alliance for Rebuilding Governance in Africa (ARGA/Mali) is a network for dialogue that brings together actors from Mali and other countries, organisations and resource persons to debate governance issues in Mali and Africa. Created on 1 November 2008 and known under the acronym ARGA/Mali, the Malian Alliance for Rebuilding Governance in Africa was registered on 10 December 2008 under N° 246/MATCL-DNI. Its purpose is to create a space for exchanging and experimenting with initiatives from organisations from civil society to establish democratic governance in Africa.

The Charles Léopold Mayer Foundation for Human Progress is an independent foundation governed by Swiss law.

**Authors of the sheet:** Konaté Néné, Ambroise Dakouo (1 March 2010)

## ESTABLISH A PERMANENT DERIVED CONSTITUENT ASSEMBLY REPRESENTING A FOURTH POWER WITHIN THE STATE

The chronic instability of Constitutions, one of the signs of the constitutional crisis in Africa, is a result of their use as instruments to obtain political ends. Because the Constitution is eminently political in nature, it cannot always escape political contingencies and power struggles or variations in the 'temperature' of the political system and democracy. Yet Constitutions can be made more stable with strong institutional measures and better control of their revisions.

On the institutional level, the creation of a permanent derived constituent assembly separate from parliaments could be envisioned. It is indeed paradoxical that constitutional instability is always instigated and carried out by those whose power it is intended to limit. Experience shows that most constitutional revisions involve the constitutional definition of the designation, status and powers of the President of the Republic, and these changes are facilitated by the fact that the President's party generally holds a majority. Yet in most cases, the President of the Republic—the authority with the most interest in using the Constitution as

an instrument to attain his own ends—is also designated as the guardian of the Constitution. It is this vicious cycle that must be broken with the creation of a permanent derived constituent assembly, whose mission, status and composition have yet to be defined. With regards to its status, the permanent derived constituent assembly could be a fourth power within the State, on the same level as the executive, legislative and judiciary powers. As for its composition, the assembly should reflect the diversity of the society, i.e. its members should represent various legitimate powers: political powers, communities (through territories) and organisations of civil society should all be represented, according to rules yet to be defined.

Finally, with regard to its mission, this institution would be entrusted with 'guarding' the Constitution: the constituent assembly, as well as the constitutional judge, would guarantee the compromises reached in inclusive constitutional creation processes. As such, it would assess the timeliness and pertinence of any initiative to revise the Constitution. If a revision is

proposed, the constituent assembly would have the power to set the procedure in motion. It would also be responsible for conducting the constitutional revision procedure.

This revision procedure in particular should be strictly controlled, with the obligation to hold prior national consultations and use inclusive—not exclusively political—processes when the

revision involves certain issues. Revision by parliamentary channels should be done away with, or else revision should be a long-term process and involve an evaluation of the Constitution as a whole, not just a part, to avoid making hurried revisions on the basis of the current situation and using constitutional revisions as a tool to attain purely political and partisan ends.

## ESTABLISH A CONSTITUTIONAL JUSTICE SYSTEM THAT REFLECTS THE VARIOUS IMPORTANT FACETS OF CONSTITUTIONALISM

Constitutionalism develops when mechanisms to guarantee the superiority of the constitutional standard function properly. Constitutional justice is an essential sign of a healthy Constitution. From this point of view, clear progress has been made in West Africa. States have formally set up control bodies, defined their competences and given them a status that, at least with regard to official texts, guarantees a certain independence. Even though some national jurisdictions, such as Benin's constitutional court, have a reputation for independence, judicial power in general and constitutional jurisdictions in particular are some of the weakest links in the constitutionalism-

chain. There are a number of reasons for this.

The first concerns judges themselves and how they conceive of and accomplish their missions. Judges who have a tendency to limit themselves, to interpret their competences literally and restrictively and judge almost always in terms of form, not content, are perhaps not the most appropriate recourse when the Constitution is under attack. Above all, such judges do not nourish the debate required to enrich the Constitution through interpretation.

The second involves judges' positions in constitutional disputes. Their positions are admittedly complex because, in

quantitative terms, they are frequently asked to serve as referees in political disputes.

As a result, their decisions are systematically contested no matter in whose favour they rule, sometimes for reasons of political strategy, and in particular if they often rule in favour of the dominant political party. So the judge's position is all the more complex because his decisions are likely to be analysed with regard to legitimacy. Since judges are asked to rule on the acts of bodies elected by citizens, they may find themselves accused of succumbing to the temptation of a 'government of judges' and of going against the popular wishes expressed in elected officials' decisions.

Finally, the crisis in constitutional justice is partly a result of the way cases are submitted to the court. The right to submit a case to the constitutional judge is often restricted, but even when it is more widely open to ordinary citizens, little comes out of constitutional jurisdictions because few cases are submitted. This, in turn, can be explained by citizens' attitudes with respect to the law, their preference for settling disputes out of court and, in some cases, by their negative perception of the independence and impartiality of judges.

The social importance of the Constitution leads us to establish a link between constitutional justice and social diversity. The constitutional issues on which constitutional justice may be asked to rule have an impact that goes beyond the strict legal or political framework. These issues may, in particular, touch on social values that underpin the Constitution itself and provide the structure for living together in harmony. This is why we need to determine to what extent this link strengthens the position of constitutional justice. Two measures are proposed.

First, the independence of constitutional justice could be strengthened by changing the way its judges are designated. One means might be to require that non-elected bodies be associated with their nomination according to rules yet to be determined. Another, more drastic means would be to cite the strict separation of powers as a reason for taking away the power of nominating judges from the executive and legislative branches, or even attributing it to the constituent body.

Second, in most countries the composition of constitutional jurisdictions needs to be changed to include people from outside the legal profession because the subjects on which they rule have implications outside the legal and political realms.



### III.3 – Recognise pluralism as a principle for organising law and justice

Rules of law and justice do not exist in a void. They are part of an order that reflects the values of the society. 'Law' cannot be reduced to technical rules applying to a given situation, and in the same manner 'justice' is not simply a judicial organisation, i.e., an institution responsible for interpreting the law. Law and Justice are also a representation of a human community's perception of what is just and unjust. There can be a wide gap between State-vehicled law and certain customs, for example, or between State conceptions of justice and some human communities' conception. This, of course, raises the question of the legitimacy of law and of justice.

#### 3.3.1 - Monism, a legal and judicial policy option of States

In the post-colonial Nation-States, Law was one instrument used to guarantee national unity and State authority; its use is thus political in essence. Belonging to a nation implies the submission of all to a single legal corpus and a unified judicial system. The disappearance of particular statuses seems to be one way of guaranteeing the equality of citizens. But in Africa doing away with statuses raises the issue of the survival of customs specific to each community.<sup>2</sup> Once States became independent, the obvious way to make the law uniform was to get rid of customs or significantly reduce their role through targeted integration in positive law. Thus the first legislation adopted by States succeeded where colonising powers had failed. The latter had decided not to impose a unique judicial order nor do away with local customs, preferring instead a dual status for persons and a dual legal order that allowed for the coexistence of one legal system based on written texts and another on customary law. This legal duality was also extended to the judicial system, with jurisdictions for written law and indigenous

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<sup>2</sup> The term 'custom' is used here for simplification. In fact, it covers various norms: the traditional rules that existed in this region before the arrival of Islam and the religious rules that have become intertwined with them, not to mention the fact that colonising powers transformed certain customs, giving birth to what was called 'Euro-customary law'.

jurisdictions. In this system, the superiority of the coloniser's law was obviously affirmed. Customs were applied only if they respected the principles of French civilisation; French law applied in cases where custom did not settle a dispute, or if the custom was not acceptable, and indigenous jurisdictions were chaired by an administrator assisted by indigenous assessors.

Along with unification, monism has become the trademark of the legal systems of former French colonies. Written law from the State is the single source of law. The mimicry goes even further. One might have thought that the new States, though monistic, would make an effort to understand the principle local customs in order to draft written laws that would of course be uniform, but better adapted to local realities. Such a task must have seemed difficult, first of all because of the number of customs and the many potentially irreconcilable differences between them, along with the subsequent obligation to choose some customs over others with the resulting danger for civil peace and national unity. States had also decided to 'modernise' their legal and judicial systems which—stigmatism of colonisation—meant customs and customary justice had to be done away with because they were considered out of date. So the direction to take was...the French *Code Civil*. This civil code had in its time done away with customs and unified legislation applicable to French citizens. African legislators decreed the pure and simple application of the code of 1804, or adopted rules that were directly inspired by it. Some customs were maintained and changed into rules of positive law which the State adopted, particularly with regard to personal status, marriage and successions. The judicial organisation met with the same fate: customary law jurisdictions were eliminated and western legal systems were used as models. In some countries, such as Senegal and Togo, courts permit the presence of assessors who are asked to give their opinions on issues involving the application of customary rules which are still applicable under positive law. The overall tendency, however, is to eliminate customs and import the norms of the former coloniser.

Eliminating customs with the stroke of a pen seemed surprising or even unrealistic. It was indeed surprising because it managed to achieve, simply by decree and in a few short years, what took the Civil Code—that inspiring model of uniformisation—one century to write (the 15<sup>th</sup>), two to compile (the 16<sup>th</sup> and 17<sup>th</sup>) and one to repeal (the 19<sup>th</sup>). And it was indeed unrealistic because it swept aside models of behaviour and references that have existed for centuries within communities that respect them and ensure their continuation.

In addition, it should be noted that when the new States began moving in this direction they did not have the resources needed for their programme, neither from the point of view of applicable law nor from the standpoint of judicial organisation. Many formidable obstacles prevented society from absorbing and/or using the new system: language, problems with diffusion, distance from jurisdictions, lack of sufficiently trained personnel, corruption, cultural barriers, the continued existence of customary practices and traditional ways of resolving disputes, etc. Because the project was poorly prepared and not sufficiently mature, everything worked against the new judicial order, pushing it toward outright rejection or coexistence with other judicial orders that govern peoples. Observation of changes in legal and judicial systems confirms both the difficulty of the uniformisation undertaken (result of the surprising persistence of obstacles to its achievement) and ambivalence with respect to the result to which the changes should one day lead.

### 3.3.2 – Normative pluralism, an intangible but complex reality

*The State's normative order claims to be exclusive, but non-State normative orders are still alive and well"*

The normative transplant has not been successful, but we need to agree on the meaning of this failure. We can talk about failure only because the objective of States' legal and judicial policy was to eliminate customs in order to establish a single legal system and submit all disputes to State courts. This objective has not been attained because communities have retained and continued to use their various normative references and

extra-State means of resolving disputes.

Minimal social homogeneity and collective agreement on the need for uniformity to preserve civil order are prerequisites for the exclusivity of State law. (Even then, this civil order has to be desired by all of society, not just those whose power it legitimates.) This homogeneity and agreement were both insufficient and based on a purely legalistic artifice of doubtful legitimacy with regard to the political use made of the power it served.

The resistance of extra-State normative orders touches all domains. For example, with regard to marriage, positive law mandates a civil celebration, but normative values still place more importance on traditional or religious celebrations. This explains why all marriages are celebrated according to custom, but not all are celebrated civilly or registered with civil courts. In the area of property rights, the resistance becomes an outright conflict when State legislation contradicts customary rights, whether the problem be with how land is managed, how people gain access to its use, how it is bought and sold or how land rights are transmitted. In addition to the two main areas of personal status and land, customs are still alive and well in other fields such as contracts, trade, etc.

*“To encourage re-appropriation, the State normative order is being deployed in a hybrid form, in combination with extra-State orders”*

At the same time, the failure of the normative transplant does not mean the legal order has been rejected as a foreign body. The only thing being rejected is its claim of uniqueness. State law has in fact been internalised to a surprising level by society and individuals, to the point that it may be considered an essential element in contemporary Africa in three ways. First of all, several decades of producing and applying legal norms have made State law a component in social diversity and, as a

result, in normative pluralism. State law and justice have not been rejected. On the contrary, they coexist alongside customary normative references and traditional means of resolving disputes and are used on several levels. While in some cases State law and justice are circumvented, avoided or improperly used, in other cases they are invoked to the detriment of custom or extra-State justice.

Secondly, people's actions may be guided by their interests. The choice between State law and justice and social mediation is not always a question of representation. It may be part of a strategy determined by the actor on the basis of objectives pursued. Each actor may choose his form of law and his judge on the basis of the expected result. An actor may choose to call upon a State judge if he hopes to win his case on the basis of application of positive law. On the contrary, social mediation may be preferred if the parties (or one of the parties) thinks his claims are fragile with regard to positive law or

realises that the ruling of a State judge may have more negative consequences than the gain it is expected to bring to the party that wins the process. This comparison of advantages determining the choice of actors sometimes results in disputes flowing back and forth between State and extra-State orders. The same conflict, particularly in the area of land and property rights, may be passed from one system to the other if one of the parties is unsatisfied with the outcome. When Senegalese couples decide to declare their marriage to the civil court, their decision may be based less on a feeling of obligation to comply with positive law than on the advantages they may obtain, such as family allowances. While a traditional marriage is legally valid, only marriages celebrated or registered by the civil authority can be brought before the State. In this case, the traditional marriage celebration is the one deemed obligatory by society; civil celebration or declaration is simply an instrument to obtain the objective on which it is based. This example provides an idea of how values in coexisting normative systems could be ranked.

Thirdly, State law, in association with other factors such as education, urbanisation, globalisation, migration, etc., has undeniably been the basis for decisive social progress. The political option of forcing societies to move forward by imposing laws has sometimes produced results. Consider, for example, the progressive disappearance of certain practices justified in the name of custom (excision, for example) or improvements in the conditions of women and children despite strong social resistance. In this process of social transformation, laws originating with the State are sometimes a factor in forcing customary practices to evolve: these practices adjust themselves to the values of positive law to ensure their own continuation. Internalisation involves changes in the custom that integrate some requirements of positive law without completely reproducing them. The coexistence of legitimacies presents one last characteristic that challenges the preconceived idea that the customs/State law opposition mirrors the city/village distinction. Experience shows that this is not the case. Pluralism is everywhere; it does not correspond to classifications based on spatial criteria. Custom-based norms continue to exist in rural areas but also in cities. The internalisation of State law is an urban phenomenon, but a rural one as well. As a result, while normative pluralism may correspond to the coexistence and application of several norms in the same territory, in this case the State territory, today it seems primarily to apply to the fact that an individual may be subject to more than one normative network, so norms are opposed not in a 'representational' logic, but in a logic of interests guiding the choice of actors.

### 3.3.3 – Main axes of an approach to law and justice as an object of legitimate governance

Relationships between so-called 'modern' law and justice and 'customary' law and justice are complex when they overlap and are renewed from day to day, as can be seen in changes since independence. Our diagnosis of legal and judicial systems and proposals to adapt them should integrate four fundamental parameters that take this complexity into account.

The first is that these complex relationships cannot be fully understood if one looks only at the State system and refuses to acknowledge customary references. Decreed monism in no way corresponds to reality, so pluralism must be accepted as an organising principle for law and justice.

And yet—and this is the second parameter—the promotion of pluralism cannot hide the fact that the State order is part of this continuously changing reality. So neither must we lean too far in the opposite direction, which would consist in pretending that this order has not been integrated by societies. Given changes in the world and the State, the State order is a part of pluralism and may even be the engine driving it.

The third parameter is related to the current role of customs and traditional conflict resolution in African societies. This role should not be exaggerated: customs and traditional modes do not account for the entire social and judicial order, and they are not set in stone, but change along with societies. “Coutume se remue” or “Customs budge” we are told. So using customs cannot be equated with looking back at a past that no longer exists; customs should be understood in terms of what they have become in their confrontation with the temporal and spatial data that is causing profound changes in people's ideas and habits.

The fourth parameter involves taking into account changes in the way pluralism is used. In the past pluralism meant norms that were not part of State law and were not widespread or of great importance. But today there appear to be many 'points of judicial activity' led by 'official and non-official operators in inter-organisational relationships' that have an impact on social dynamics, play a part in structured relationships and as a result cause the State to lose influence.

In any case, the parameters described show the delicate balance required by any approach to law and justice based on legitimate governance. They also demonstrate that the call for legitimacy is not a backward-looking perspective in which State order and extra-State orders square off; it is, rather, a modern project in which they are complementary. In the fields of both law and justice, Africa can construct its own modernity by linking past and present and taking into account the development factors of its societies and of the world at large. When law and justice are anchored in the collective memory, they take on meaning for those governed and are 'institutionalised'. At the same time, they must be organised according to current realities in order to be efficient and thus capable of meeting society's demands and expectations. Only by achieving this balance can African legal and judicial systems enter into useful dialogue with the world and help determine the content of the principle that serves as their standard, i.e., the principle of the rule of law.

The successive reforms of the judiciary have had little effect in most States because they have paid no attention to the specific nature of peoples' concepts of justice and its role in the social arena. Reforms have simply focused on eliminating the physical and material barriers to State justice (bringing jurisdictions closer by constructing infrastructures, improving equipment, use of computer tools, etc.) and on magistrates' training, status and salaries. They have not combined all these measures with others to tear down psychological and cultural barriers. The fact that people work around or ignore State justice in some milieus—particularly in rural areas—cannot be blamed solely on long and complicated procedures, far-flung jurisdictions, the language of legal proceedings or high judicial costs. (Although these are indeed important reasons for using social mediation, and the judicial system itself would do well to resolve these problems.) Another reason State justice is left behind is because the judicial 'offer' does not meet psychological and cultural expectations—the satisfaction of which would give people trust in the justice system and State justice.

The same observation may be made of legal policy. The usual choice is to steer the production of norms exclusively in the direction of African integration in a modern world defined exclusively by globalisation and the expectations of 'others'. Meanwhile, we forget to inscribe this production in the lives of Africans. This tendency is clear in both national laws and recent initiatives to bring legislations together, in particular by the Organisation for the Harmonisation of Business Law in Africa (OHADA). While the objective of the OHADA is commendable, it is not more important than the need to



create a legal system that also meets the needs and expectations of African societies.

With all this in mind, it is clear that the solution lies neither in opposing tradition and modernity, not custom and State law. Rather, the solution lies in a realistic pluralism that uses complementariness, builds 'bridges' and becomes operational by 'mixing institutions and legal systems'.

### 3.3.4 – The modalities of pluralism as a judicial policy option: example of social mediation

#### RECOGNISING THE VALUES THAT UNDERPIN SOCIAL MEDIATION

The formal organisation of jurisdictions was not the only part of jurisdictional systems transferred from western to African countries. The transfer also included the function attributed to Justice. In so-called modern States, the judge's mission is to resolve conflicts between persons subjected to the law by interpreting the law. Trials end with the victory of one party (who is vindicated) over the other (who must submit to a sanction as a result of his or her

misdeed). Justice is perceived primarily as a repressive function that sanctions what positive law perceives as a deviation with respect to the norm, an infringement on the rights of others (rights protected by the society) or an act harmful to the collectivity as a whole. Although this litigation function is now deeply rooted, it has been superimposed on—and not taken the place of—the traditional function that many African societies attribute to justice, i.e., a conciliation function. The



just solution that results from the 'trial' is not necessarily the solution derived from the law. It is, rather, a solution that protects the interests of all parties in the dispute and gives them mutual satisfaction. So the decision is more the result of a consensus than that of a sanction the judge imposes on the parties. (This does not mean there are no sanctions, simply that sanctions are primarily symbolic). In this difference in the way justice is viewed, we can see the admittedly schematic distinction between the 'imposed order' characteristic of western societies and the 'negotiated order' of African societies.

The relational character of conflict resolution is all the more evident because the 'trial' evaluates not only the individual interests of the parties, but also contributes to the maintenance of social peace and the balance between the groups to which the principal litigants belong. So what is involved is not a venal transaction from which one of the parties and his social group obtain a patrimonial advantage, but above all and in essence a relational transaction that seeks future harmony rather than 'righting wrongs' from which the victim has suffered. This explains why some very serious conflicts between individuals or groups, which have led to criminal acts normally judged by penal law, are often resolved by social mediation, and not taken before the State

justice system by the parties or communities to which they belong. The result is a tendency to place a great deal of importance on pardon and reconciliation.

In addition, the collective dimension of the interests at stake in the mediation may be related to the object of the dispute and the way the society views it. Marriage illustrates this point well, because it is not just the mutual consent of the bride and groom; it also represents an agreement between two social groups. As a result, the resolution of any conflict arising between the husband and wife affects social cohesion and should take this aspect into account. Divorce, for example, can thus be perceived as not just a rupture of the conjugal link alone, but also of the balance and the relationship between two social groups 'united' by the marriage bonds. Law is thus a part of the fabric of social relations, of which it is but one aspect, and it is these social relations as a whole that steer conflict resolution. Reasoning is reversed: the starting point is no longer an abstract and general rule applied to a specific case to obtain a solution. We start with the concrete case to find a solution through negotiation between various factors, of which positive law is an integral part.

The relational dimension of traditional conflict resolution and the inclusion of all

conflicts—even those between two individuals—in a network of social relations judged more important than the law, obviously influence the choice of the 'judge'. The erudition, wisdom, knowledge of precedents, age, matrimonial status and respect commanded by a judge are all criteria that determine whether or not a specific conflict is entrusted to him. This dual transactional and collective dimension of justice and the moral authority of the instance that exercises it are also determining factors in respect for and application of judges' rulings. This point is extremely important. The understanding or agreement resulting from the mediation is often exteriorised in ceremonies through which the groups concerned are made aware of the understanding or agreement. As a result, the parties to the conflict are obliged to

respect the terms of the agreement. The threat of force associated with the decisions of State judges is replaced with a different type of constraint: parties give their word via the promise contained in the agreement. Not only has each group witnessed the agreement, but each litigant is also committed to not upsetting the social balance through personal fault. The agreement thus becomes definitive and is not questioned. Lack of confidence in State justice can be explained, to a certain degree, by the fact that the existence of several means of recourse may lead to different decisions by different jurisdictions. Thus State justice is often criticised in societies that find it difficult to accept that a person who loses a case may win on appeal or vice-versa, whereas decisions arrived at by traditional means are usually accepted and implemented.

*Experience sheet: How the Témis in Togo settle disputes: punish but above all reconcile*

The Témis are a people of central Togo, who are also found in the neighbouring countries of Benin and Ghana. Témis have a State-based society with a government, an army and a system of justice. Justice is rendered by the king's court, which is in charge of resolving conflicts.

Conflicts are usually resolved on the chief's premises in three phases: settlement of the conflict, reconciliation, and in some cases ceremonies.

- First phase: settlement of the dispute

This phase is devoted to listening to the parties, who are invited to present their claims and develop their arguments. The purpose is to determine who is right and who is wrong. The phase concludes with the punishment which may be, for example, a fine or being lashed with a whip, or both.

- Second phase: reconciliation of the parties

In this phase, the court or the person responsible for resolving the conflict brings the parties to pardon each other so that life can go on without any resentment between them. This is a fundamental characteristic of Tém justice, and indeed of all black Africa: what happens after the trial is a major concern.

The royal court does not just pronounce a sentence and send the parties away. Its objective is to settle the dispute between the parties without creating or leaving behind any social fractures or lesions. The work of the royal court can be thought of as a kind of surgery performed on the social body to remove a diseased part. Once the cancer has been eliminated, the social body needs to be cared for and returned to its initial condition; the dispute needs to be done away with as if it had never existed and the social body restored to the former status quo. This is the whole point of reconciliation: parties in the dispute—and this is extremely important—must begin talking to each other after the trial. If person A and person B come out of a trial and person B does not respond to person A's greetings, person A has the right to take person B back to court for an entirely new and different trial.

How does reconciliation take place after the judgement itself?

Parables are used to calm the winner of the dispute and ask him not to demand too much from the loser or the court. He is told: it's over. For him it's over because it is just, it is right. Family relationships and alliances are used to re-solder links disturbed by the dispute. The winner is shown the importance of cohesion and everyone is reminded, above all, that life goes on. There are parables and words to lift up the

loser, who assumes a low profile at the end of the process. The important thing is that the truth be known without humiliating the guilty party or the loser.

- Third phase: ceremonies

The ceremonies phase is necessary when the invisible world has been disturbed by the transgression or act committed by the defendant or one of the parties to the dispute. For example, if there has been a homicide or one of the persons involved has caused a water source to run dry by committing forbidden acts.

In the first case, a man has been killed (his life has been taken away) and, as a result of this same act, blood has been poured out on the earth. After the guilty person has been judged, the earth needs to be purified and appeased. The sentence includes a fine that covers the cost of the sacrifice or ceremony (a rooster, sheep, steer, length of cloth, etc.)

In the second case (dried-up water source) the population has no drinking water and people are thirsty. The spirits of the water source, offended by inhabitants who have come to draw water with utensils blackened by cooking, need to be appeased.

The guilty parties are sentenced and ceremonies take place at the source in question.

The phases we have just examined, i.e., judgement, reconciliation and ceremonies are all part of the same procedure. These phases take place in succession and complete each other to achieve order, balance, harmony and peace for the visible and invisible worlds which in fact constitute the real Tém world. Life is the same before and after death; reality, whether visible or invisible, is the same because everything is full of energy and energy circulates.

At the end of the trial, after words and parables, reconciliation is sometimes sealed by the parties' sharing a kola nut. (Kola is omnipresent in their culture.) The parties should start talking to each other immediately, and if this is not the case, they must come back.

There is also another phase to support reconciliation that should not be forgotten. It consists in thanks and apologies. After their reconciliation, the parties come back with kola nuts to thank the court and at the same time present their apologies.

The purpose of these apologies and thanks are to honour the court and also to guarantee that whatever happened will not happen again, or in any case not through the fault of the person who lost his case.

**Author of the sheet:** Tikpi Atchadam

The choice of a means for resolving conflicts can be guided by the type of conflict. Analysis of experiences shows that conflicts can be placed in one of three categories<sup>3</sup>: “intra-community conflicts”, “extra-community conflicts in the public domain” (and thus involving the State) and conflicts that fall into both categories, i.e., that “involve relationships between groups, but require a restoration of the social link rather than a State sanction”.

The first category includes minor conflicts that can be resolved with social mediation. These are usually in areas where customs still have a strong hold, such as in land and property rights, but may also include infractions such as witchcraft or minor thefts. Conflicts requiring resolution by State justice are placed in the second category. These include, in particular, serious criminal infractions such as murder or other violent acts. Finally, in the third category we find conflicts that involve, for example, disputes between farmers and herders or conflicts opposing two villages.

Classifying conflicts helps us see more clearly how these categories could be used

<sup>3</sup> This classification was used by E. Le Roy, C. Kuyu and K. Conde in a report on an anthropological study performed in March 1996 for the Justice ministry of the Republic of Guinea. Report published in Paris by LAJP, March 1996, 43 p. appendices.

to coordinate State justice and social mediation. First of all, for conflicts in the first and third categories, social mediation could serve as a sort of 'level one jurisdiction' that disputing parties could call on first. The creation of instances for mediation and the choice of their operating modes would be left up to local populations.

We may also imagine that the State itself could create permanent or ad hoc instances and decide on their composition and rules of operation. This option has been implemented in Mali with the creation of local and communal land and property commissions responsible for “proceeding to reconcile parties to a dispute involving farm land, before they take the case before the competent courts”. Thus the State may, in certain matters, require that the parties first call upon social mediation to resolve their dispute.

Finally, whether prior recourse to mediation is optional or mandatory, the State judge should still have the right to call on it, and if necessary invite the parties to go before the instance he designates or another of their choice.

## MAKE SOCIAL MEDIATION SECURE AND FORMALISE ITS LINKS TO STATE JUSTICE

The coordination of relations between State justice and social mediation should be formally stated so that social mediation can be made more secure and, when necessary, moulded to reflect certain values and basic principles whose defence is the prerogative of the State.

Making social mediation secure consists in guaranteeing respect for the compromises it produces. In most cases respect for and application of these compromises meets with no real difficulty, but some conflicts drag on because the parties misuse the coexistence of the two forms of conflict resolution. This is particularly the case in land and property disputes. Two specific measures can be envisioned to deal with this problem. The decisions of mediation instances could be published, and parties could have the option of obtaining from the State judge a 'ratification decision' that would give permanence to rights obtained through mediation and guarantee execution of the compromise.

Control of social mediation should not be excluded, but its autonomy with respect to State justice should be a founding principle. Mediation could be controlled on two levels. First, when ratification is requested by one of the parties, the judge could briefly inspect the content of the compromise and the conditions under which it was obtained. This minimal control would not consist in re-examining how the conflict was resolved, nor in verifying the conformity of the decision with State law. It would serve simply to identify cases in which the rights, values and basic principles guaranteed by the State have been infringed upon. If, for example, women's and children's right to protection has been violated, the judge could refuse the ratification. At that point, a system of recourse against the decisions of mediation instances should be opened, before a State judge who would favour a new compromise, and thus a new mediation.

*Experience sheet: Settlement of disputes in Gao by customary justice in cooperation with State instances*

The city of Gao is located in the northern region of Mali—the country's sixth administrative region. It has 52,201 inhabitants and, like other localities in the region, is strongly dominated by ethnic groups such as sonrhaïs, touaregs, peulhs, etc.

In the city of Gao, social conflicts are handled dynamically thanks to the involvement of qadis in their peaceable resolution. A qadi is a Muslim judge who settles matrimonial, inheritance, etc. disputes between Muslims on the basis of Islamic rules. The qadi has great influence on Muslims because they consider him a legitimate authority whose decisions should be recognised and accepted. He also leads prayer in the mosque. A qadi may cumulate the functions of judge and marabout. In fact, qadis are often marabouts specialised in conflict resolution.

The responsibility placed on religious leaders has led them to organise an association called 'Muslims for the progress of Islam' (AMPI). The marabouts and qadis of Gao have set up a modern-style court whose goal is to resolve disputes and find upstream solutions to societal problems. This association of religious leaders calls on a number of experts in matrimonial issues, inheritance, etc.

There is close cooperation between the local judicial administration and religious leaders in Gao. A number of the qadis' interventions have been recognised and ratified by the justice system. It should also be noted that the local judicial administration increasingly calls on the qadis to help manage disputes in which judges' decisions would not be respected or applied.

**Comment:** This type of cooperation between modern and local justice should be encouraged because it frees the population from non-binding justice. In many Malian towns there is more and more official cooperation between actors in modern and traditional justice. The problem lies in the legality of the religious institution on the national level: the existence of an Islamic court based on Muslim law is in contradiction with the operating principle of the country's official system of justice.

Notes: This sheet is the result of an interview with Mr Toubaye Kone, President of the Court of (commune IV) and elected member of the superior council of judges.

**Context:** This sheet was drawn up as part of the initiative on the coexistence of legitimacies: from institutional inclusiveness to legal pluralism.

**Author of the sheet:** Ambroise Dakouo, Sociologist, Centre d'Expertise Politiques et Institutionnelles en Afrique (CEPIA) or Centre for political and institutional expertise in Africa / Bamako, Mali, May 2009

*Experience sheet: "Coutume se remue" (Customs budge): when customs adapt to contemporary realities. On women's access to land and cooperation between customary and State justice*

The city of Gao, capital of the seventh administrative region of Mali, is located in the northern part of the country. There are many ethnic groups in Gao, including sonrhais, armas, peuhls, bellas, bambaras, etc. The area's main activities are farming, herding and trading. Islam is the dominant religion, although there are some Christians and animists. In Gao, traditional authorities play an important role in the management of social conflicts because they are 'resource persons' gifted with wisdom and clairvoyance. Faced with the conflicts of society today, they work to find consensual solutions and cooperate with the city's judicial authorities.

In 2001, the leader of a family from Gao died, leaving behind a certain amount of land. The daughters of the deceased man and his brothers did not agree on how to share this inheritance, so they brought the problem before the coordinator of the city's neighbourhood leaders. The daughters of the dead man claimed all the land that had belonged to their father, while his brothers also claimed their part of the inheritance. Tensions arose between the deceased's family and his brothers' families. To resolve the conflict, the coordinator of Gao's neighbourhood leaders called a meeting of his advisers and the imams, and the latter attempted to determine together the rights of the different parties involved. The difficulty of the case lay in the fact that in the songhai tradition, to which the protagonists belonged, women do not inherit land.

This was the argument put forth by the deceased's brothers, but application of the principle was particularly complicated because the deceased had no sons, making it difficult to totally dispossess his three daughters. The coordinator, his advisers and the imams arrived at a solution that took into account the rights of all the parties: two-thirds of the land were given to the deceased man's daughters and the rest to his brothers. The decision of the traditional authorities took into account the fact that the deceased left behind no other material goods. This made it impossible to dispossess his three daughters when dividing up the land. The conciliators' main concern was to arrive at a consensual solution, so all the parties to the conflict were invited into the coordinator's courtyard, where the latter informed them of the decision to which he, his advisers and the imams had come.

The need to preserve family ties, and above all the legitimacy of the actors who judged the affair, meant that the various parties agreed to accept and apply their decision.

Afterwards, the coordinator of the city's neighbourhood leaders sent a letter to the judiciary authorities informing them of the problem and its solution. The agreement between the parties was approved by the judicial authorities, thus conferring legality on



the solution arrived at by the traditional authorities. The dispute was definitively resolved and did not resurface. Thanks to continued mediation by the imams the various parties renewed the family ties that had been severely tested by the conflict.

**Comments:** On the local level, traditional systems provide alternatives to modern justice because they can be used to resolve local conflicts efficiently. But if there is no legal framework to support the existence and worth of such traditional instances, their decisions may be vulnerable. Traditional justice systems should not be ignored because they are very important to local populations. When judicial authorities recognise the decisions of traditional instances—and these decisions have been accepted by the parties to the conflict—then an important step has been taken towards recognition of traditional mechanisms and the coexistence of multiple judicial systems.

**Context:** In the framework of implementation of the initiative on the coexistence of legitimacies, elaborate on: from institutional inclusiveness to judicial pluralism.

**Notes:** This sheet is the result of an interview with Mr Namory Camara, President of the Tribunal de première instance of Gao.

**Author of the sheet:** Ambroise Dakouo, Sociologist, Centre d'Expertise Politiques et Institutionnelles en Afrique (CEPIA) / Bamako, Gao, February 2009



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How can the African State be rebuilt on the basis of lessons learned from observing what has happened in the past? After independence, the new States were blinded by the temptation of uniformity with the imported Nation-State model. An approach to the State set up by colonisation and later imposed by post-colonial powers and international financial institutions was implemented. Then, in the 1990's, came decentralisation policies with con-substantial weaknesses. How can this experience be put to use to rebuild the State? More precisely, how can the African State be institutionalised? This proposals booklet hopes to answer these questions.

The Alliance for Rebuilding Governance in Africa has used this document to explain its vision of African Nation-States, communities of citizens yet also communities of peoples, States that are necessarily traversed by a social diversity that has historically rebelled against their boundaries. This social diversity requires, indeed it demands, that pluralism be the organising principle in the search for unity. And this social diversity is particularly prevalent and important at the local level.

The identity of the Nation-State, the principle of pluralism and local territories are brought together in an approach to governance to implement the programme to rebuild the State in Africa through three major proposals: recognise pluralism and apply it to a new engineering of local institutions that reflect the diversity of power and its foundations; recognise pluralism and incorporate the diversity of local territories and powers in rebuilding constitutionalism; and, finally, use pluralism to organise law and justice by creating bridges between the State order and extra-State orders, in particular and for example by giving social mediation official status in the resolution of conflicts.

*The Alliance for rebuilding governance in Africa brings together African and non-African actors working to promote—on a worldwide level as well as on the level of African citizens—dialogue on the management of public affairs in Africa.*

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