KONRAD ADENAUER STIFTUNG
AFRICAN LAW STUDY LIBRARY

Volume 6

Edited by Hartmut Hamann and Jean-Michel Kumbu

Hartmut Hamann is a partner of the law firm CMS Hasche Sigle and focuses on complex international projects and arbitration proceedings. He is a lecturer on dispute resolution and international law at Freie Universität Berlin and Technische Universität Chemnitz and regularly works in Africa.

Jean-Michel Kumbu is a lecturer in employment law and economic legislation at Université de Kinshasa and other universities in Democratic Republic of Congo. He is a lawyer and focuses on business law. He is an expert in democratic governance by the United Nations Development Program in Kinshasa

Konrad Adenauer Stiftung

Published By:
Rule of Law Program for Sub-Saharan Africa

Konrad Adenauer Stiftung

Office : **Mbaruk Road, Hse, No. 27**
P.O. Box 66471-00800
Westlands, Nairobi, Kenya
Tel: 254 20 272 59 57, 261 0021, 261 0022
Fax: 254 20 261 0023
Email: info.nairobi@kas.de

Head Office : **Klingelhöferstr. 23 D-10785 Berlin**
Tel.: 030/269 96-0
Fax: 030/269 96-3217
www.kas.de

ISBN: 978-9966-021-02-1

Typeset & Printing by:-
LINO TYPESETTERS (K) LTD
P.O. Box 44876-00100 GPO
Email: info@linotype.co.ke
Nairobi-Kenya

TABLE OF CONTENTS

KONRAD ADENAUER STIFTUNG
AFRICAN LAW STUDY LIBRARY

VOLUME 6

FOREWORD

This sixth volume of the "African law studies library" is a collection of works submitted by research assistants and PhD students from the Faculty of Law at the University of Kinshasa. They have been attending a continuing series of seminars on the implementation of structures on the Rule of Law in the Democratic Republic of Congo since 18th November 2008, the date of its inauguration.

These seminars were organised within the framework of the "Rule of Law program in Sub-Saharan Africa" with the support of the Konrad Adenaeur Foundation based in Nairobi. During a seminar held on the 2nd December 2010, which these scientific contributions of various researchers were presented and discussed, at the head office of the Konrad Adenauer Foundation in Kinshasa, , the meeting was graced by the presence of the cultural attaché of the German Embassy in Kinshasa, the Resident Representative of the Konrad Adenauer Foundation and two research supervisors, namely, the Vice-Dean of the Faculty of Law in charge of research and the representative of the Faculty of Law at the Université Libre of Berlin.

Various research papers were written followed by second presentations at workshops and discussions in plenary sessions during the regional seminar on decentralisation and regional integration held in on the 4th and 5th December 2010, with the participation of young research assistants from the University of Kinshasa, Lubumbashi University, the University of Burundi, the National University of Rwanda, all accompanied by their respective supervisors. It is worth mentioning present were representative of the Konrad Adenauer Foundation in Nairobi, two representatives of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Rwanda as well as a special guest in the person of TEACHER Ntumba Luaba Lumu, in his capacity as the Executive Deputy Secretary in charge of programs at the Economic Community of the Great Lakes Countries (ECGLC) otherwise referred to as Communauté Économique des Pays des Grand Lacs (CEPGL).

The concept of Rule of Law can be defined as the state in which political power is institutionalised, as well as the relations between individuals and between rulers and the ruled, being governed by impersonal rules of law properly enacted by a democratically elected authority. It is therefore the submission of all, including the organs and agents of the State, to the law.

One of the foundations of a democratic state is an independent judiciary, a real safety valve which ensures the rights of citizens and is able to punish without impartiality and effectiveness all offences against the law. Building a powerful and independent justice system can contribute concretely to the development of a country. It is for this reason that four works in this volume have been devoted to practical aspects of the Congolese judicial system.

Two papers were dedicated to reforming the army and police who, in a constitutional setting, remain at the service of the State and not the ruling party.

Since no state can operate without the contribution of its people to public office, the last paper recalls the principle of equality of all citizens when it comes to taxation.

We thank the University of Kinshasa authorities for facilitating the project-oriented seminar whose objective is enduring cooperation. We also thank the German Embassy in Kinshasa, the Freie Universitat Berlin and especially the Konrad Adenauer Foundation, which integrated the project as part of its Rule of Law Program for Sub-Saharan Africa.

We owe special gratitude to the participants and their commitment. The views expressed in these papers are those of the authors and not those of the Konrad Adenuer Foundation.

PROF. DR. HARTMUT HAMANN **PROF. DR. JEAN-MICHEL KUMBU KI NGIMBI**

THE ORIGIN OF THE CONGOLESE CONSTITUTIONAL COURT: ORGANISATION AND JURISDICTION

By **BALINGENE KAHOMBO***

INTRODUCTION

The Constitutional Court, established by the Congolese constitution of February 18, 2006, is not an innovation. It is an institution well-known in the constitutional history of the Democratic Republic of Congo (DRC).

The Fundamental Law of 19 May 1960 on the structures of the Congo, as well as the Luluabourg Constitution of 1 August 1964 had provided for it, but to a sufficient degree of varied organization. More precisely, the Basic Law had temporarily entrusted its duties to the Belgian State Council[1]. This is a problem of judicial assimilation between Belgium and its former colony, which originated in the Belgian Law of 15 April 1924[2]. This problem was finally resolved through the Luluabourg Constitution, which entrusted the exercise of the powers of the transitional Constitutional Court to the Leopoldville Court of Appeal (Article 196).

However, as expected, the Constitutional Court did not work: firstly, the proposed constitution of the court was not done. Secondly, the transitional arrangements put in place were ineffective.

Under the Fundamental Law, This situation can be explained: firstly, by the deterioration of diplomatic relations between the new-born state of Congo and Belgium[3], and on the other hand, according to Professor Vunduawe, the Belgian State Council had decided to stop Mahamba in a case of customary succession to power in Walikale (North Kivu). He was incompetent to make a judicial decision on behalf of a foreign independent state[4].

The Luluabourg[5] Constitution on its part did not last long. The judicial legal mechanisms it had put in place was overturned a little over a year after its implementation by the

*Teaching assistant at the University of Goma: PhD student in law at the University of Goma, magistrate appointed to the rank of deputy public prosecutor. ***Tel. : +243994194466 ; e-mail :*** *internationaliste82@yahoo.fr*

1 Jurisdiction vested in the highest administrative court in Belgium, because at that time, Belgium had no constitutional court specialist. It was only established in 1989 under the name "Court of Arbitration", and organized based of the special law of January 6, 1989. But, following the constitutional revision of May 7, 2007, the name "Court of Arbitration" has been replaced by "Constitutional Court "

2 It is this law that extended after the decree of March 2, 1922 abolished the Supreme Colonial Board (itself created by the Decree of April 16, 1889) in its capacity as Supreme Court for the colony and whose headquarters were established in Brussels, the jurisdiction of the Court of Cassation in Belgian-Congo and Belgium. Read about this in KATUALA KABA KASHALA and YENYI OLUNGU, *Cour suprême de Justice et textes annotés de procédure*, Kinshasa, Ed. Batena Ntambua, 2000, p.12. Similarly, the Belgian law of 15 April 1958 extended the jurisdiction of the Belgian State Council, created for the by the Act of December 23, 1946. This judicial assimilation renewed by the Basic Law dealing with structures of the Congo being abolished for the first time by the Constitutional Law of 18 July 1963 and the abolition was finally granted in the Luluabourg Constitution of 1 August 1964. See F. VUNDUAWE te PEMAKO, *Traité de droit administratif*, Bruxelles, De Boeck et Larcier, 2007, p.849.

3 F. VUNDUAWE te PEMAKO, *idem*, p.851

4 *Ibidem*.

5 The general structure of the constitutional text is provided by KAHOMBO Balingen, "The Congolese experience of the federal state: the Constitution of Luluabourg Revisited" http://www.la-constitution-en-afrique.org/, 24 May 2010.

Proclamation of the High Command of the Congolese National Army on 24 November 1965, by which the ANC decided to bring to power the Commander-in-Chief, Lieutenant General Joseph-Désiré Mobutu.

Despite the military coup, the Constitution of June 24 1967 in the spirit of the Luluabourg Constitution, proposed the establishment of the Constitutional Court, alongside a Supreme Court of Justice (SCJ) (Article 59). But, like its predecessors, this 1967 Court was not established. Only two so-called "revolutionary" ordinance-laws were adopted following the judicial reform induced by the Constitution: Ordinance-Law No. 68-248 of 10 July 1968 on the Organization Code and Jurisdiction of Courts (COCJ) and No. 69 / 2, 8 January 1969 relating to proceedings before the Supreme Court of Justice (SCJ).

The Constitutional Court had to be scraped for failure of organization in the middle of an international economic crisis[6], during the constitutional revision of 15 August 1974[7] and its powers were devolved to the SCJ (Article 70, paragraph 2). With its new skills and broadening the electoral base after the February 15, 1978 (Section 101)[8] constitutional amendment, it had to develop new modes of operation for the highest court in the country. It follows the adoption of a share of the Ordinance-Law No. 82-020 of 31 March 1982 with the new COCJ[9] and, secondly, of Ordinance-Law No. 82 - 017, 31 March 1982 relating to proceedings before the renovated SCJ.

The 1974 constitutional review was the first metamorphosis in Congo's constitutional justice. It no longer entailed a specialized justice, inspired by the European model of constitutional justice[10], but by a judiciary that would deliver judicial jurisdiction, much like the American system of a powerful Supreme Court of Justice. Unlike the latter however, the Congolese model did not fit a *"system of diffuse control of constitutionality"*[11] because, even though it is a judicial court, the SCJ formally had the monopoly of administering constitutional justice[12]. We could therefore say that the Congolese model showed a mixed nature, drawing on elements of both the European and the American systems.

It is this model that remained in use, without undergoing any changes, until the promulgation of the Constitution on February 18, 2006. This model allows, in Article 149 (paragraph 2) and 157, the revival of the Constitutional Court in the DRC, while, for budgetary reasons, other countries such as Senegal decided to abandon this form of **specialized** jurisdiction to return to the classic formula of the U.S. Supreme Court of Justice.[13]

The constitution courts' work is based on three objectives: the pursuit of efficiency, specialization and the rapid processing of cases[14]. This therefore became the best response to

---

6 This didn't augur well with the budgetary reasons for the Congolese state.
7 Scope review by the Law No. 74-020 of 15 August 1974.
8 Scope review by the Law No. 078-010 of 15 February 1978.
9 This Ordinance-Law was amended and supplemented by Law No. 83-009 of 29 March 1983.
10 This model of constitutional justice was born in Austria by the creation of the a Constitutional High Court in 1919 and whose first President was Hans Kelsen. It was so widespread in European countries of the Romano-Germanic legal tradition. Read G. DRAGO, *Contentieux constitutionnel français*, Paris, PUF, 1998, p.36 et Ch. EISENMANN, *La justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche*, Paris, LGDJ, 1928.
11 The author explains that this control system is in vogue in the United States of America where each jurisdiction may receive an exception of constitutionality and settle in the treatment of the main proceedings on the merits.
12 Except with respect to the unconstitutionality of legislative acts, which fell under the jurisdiction of the administrative courts
13 St. BOLLE, « Projet de révision constitutionnelle au Sénégal: la renaissance de la Cour suprême», http://www.la-constitution-en-afrique.org/, 23 mars 2008.
14 Explanatory Memorandum to the Constitution of 18 February 2006, paragraph 3.

doctrinal proposals for the devolution of Congolese legal disputes, and more importantly, to infer a second metamorphosis to Congolese constitutional justice.[15] Since the Court set up was well equipped, in its composition and jurisdiction as well as, its powers of originality, distinguishing it from the European system and the earlier model of Congolese constitutional justice. It is this uniqueness that constitutes our main object of analysis.

The Constitutional Court is expected to operate alongside two other separate judicial systems: the administrative courts guided by the State Council and the order of the judicial courts headed by the Cassation Court. Nevertheless, that court is not yet operational. It is the role of the current CFS to implement its transitory powers[16]. In addition, it is not entirely regulated according to the standards. Besides the Constitution, it is expected to be governed by an enabling legislations setting out its organization and operation. However, given that this law has not been adopted and promulgated yet and for purposes of our analysis, we will refer to this proposed enabling law initiated by the Hon. Mohamed Bule, as amended on June 8, by the political, administrative and judicial Commission (the PAJ commission) of the National Assembly.

From the foregoing the Congolese Constitutional Court ends up with a heterogeneous composition, conferred by its controversial status and the complexity of the powers given to it, giving rise to a widespread right to constitutional appeal. (II).

I. THE HETEROGENOUS COMPOSITION OF A REVIVED COURT

According to section 149 of the Constitution of 18 February 2006, the Constitutional Court is part of the judiciary. This is an innovation as other constitutions were passed by a full judicial body[17] and this was the case in the European constitutional justice system. In this system, constitutional courts are composed of a single class of members. However, the Congolese Court is composed of two categories of judges who, in addition, are associated with many other collaborators.

1.1 Why two categories of Constitutional judges?

The assembly ensures a balance between the actual membership of the Constitutional Court judges and the Attorney General. It must be noted that such a composition of bipartisan Court in Congo is unique because no other country in the Romano-Germanic tradition has instituted such a constitutional ministry[18]. What legal safeguards are made in constituting the constitutional judges to avoid compromising their independence attributable to any judicial institution, and therefore guarantee its effectiveness? To answer this question, we should examine each of the actual members of the Constitutional Court and the judges assigned to the Attorney General's Office.

---

[15] Read B.B. MBOYO EMPENGE EA LONGILA, «La mégarde des modèles de constitutions euro-occidentales et l'élaboration d'une constitution zaïroise de développement véritablement intériste», *Annales de la Faculté de Droit*, vol. XXV, Kinshasa, PUZ, août 1996, p. 172 ; KABANGE NTABALA, «Quelle constitution pour la Troisième République face aux réalités zaïroises ? », *Annales de la Faculté de Droit*, vol.XXV, Kinshasa, PUZ, août 1996, pp.98-99.

[16] This transitional period began in 2006, but it is unclear what may be its terminus ad quem, as issues of political and material order seem to arise. First, politically, given the need for the adoption and promulgation of the Organic Law of the revived Court and how politicized the appointment of its new nine members themselves. And then materially, since the establishment of such a distinguished judicial institution requires adequate infrastructure and financial means.

[17] KABANGE NTABALA, «Les innovations projetées dans l'organisation et le fonctionnement de la Cour constitutionnelle», *communication lors de Journées des réflexions sur la mise en place des ordres juridictionnels prévus par la Constitution du 18 février 2006*, Faculté de Droit, Université de Kinshasa, du 29 au 31 janvier 2009, inédit, p.3.

[18] Read: St. BOLLE, «Vers une Cour constitutionnelle à la congolaise», http://www.la-constitution-en-afrique.org/, 24 septembre 2008.

I.1.1. The actual members of the Constitutional Court

> The Congolese Constitutional Court has political overtones. Its members, numbering nine in total, are combination of lawyers and non-lawyers empowered to interpret the law.

In effect Hans Kelsen argued on this that "*It is vitally important to give an appropriate role for professional lawyers in the Constitutional Court,*" not excluding "*the cooperation of members who are there strictly for political Advocacy*"[19]. That combination is apparent from Articles 158 and 159 of the Constitution: 2/3 of the members of the Court must be lawyers, and no person shall be appointed to the Court unless he/she has a "proven track record of fifteen years in the legal or political field"[20].

The criteria for membership of the Constitutional Court are as varied as the distinct roles established for members appointed because of their status as lawyers and the rest.

> Regarding the first composition, in addition to being lawyers, the Constitution requires that two thirds of the members of the Court should be from three different backgrounds: the judiciary, the Bar or a university teaching body (Article 158, paragraph 2). However, regarding the second component, namely, the other members of the Court, they need not be lawyers and if they are, they must have experience in politics. This means that the Constitution does not seem to exclude the possibility that the Court would be composed only of lawyers, to the extent that politicians called to sit in it can also have proven expertise in law. The 2/3 number mentioned above, therefore, seems to be a minimum below which it is permitted to fall.

Unfortunately, neither Bule's proposal nor the National Assembly's Political, Administrative and Judiciary Committee's (PAJ Committee) report specifies in detail the nature of the legal and political roles to be taken into consideration[21]. Both texts simply limited themselves to copying the Constitution. However, the role of organic legislature is to supplement the work of the constitution. Thus, we cannot know if belonging to a university would mean that people should be concerned or teachers or heads of works and any legal matters such as economic and social rights.

The same problem arises with regard to political offices. These involve the same functions they performed only in a political party or, conversely, would it be only ministerial functions or based on elections [22] and at what level of state power? All this requires special attention to establish a court that deals with cases effectively and with specialty.

---

[19] H. KELSEN « La garantie juridictionnelle de la Constitution (La Justice constitutionnelle) », *R.D.P.*, 1928, p. 227.

[20] Article 3, paragraph 2, of the proposed Organic Act as amended by the Commission of the National Assembly PAJ adds a criterion to those provided by the Constitution: The Commission recommends to exclude parents or relatives within the third degree to be at the same time members of the Court "to strengthen the independence of the latter, by making it free from tribalism, cronyism and nepotism." This ostracism may seem welcome. But Stéphane Bolle says that its constitutionality is doubtful, under article169 of the 2006 Constitution which empowers the legislature to fix the organic organization and functioning of the Constitutional Court. This is the lesson we can draw from the constitutional jurisprudence of Benin and, finally, the Decision DCC 05-069 of 27 July 2005 censure of an electoral law adding a condition to participate in the presidential race

[21] Article 34 of the Special Law on the Belgian Constitutional Court would have partially served, nonetheless, as a model for qualifications to be considered. For example, for judges recruited from the university, they must have the rank of full professor, a visiting professor or associate professor of law at a Belgian university.

[22] St. BOLLE, «Vers une Cour constitutionnelle », op.cit.

Moreover, the jurisdiction of appointing members of the Constitutional Court is shared between the President, Parliament and the Supreme Council of Magistracy, each of which nominate three members. Under Article 3, paragraph 2 of the proposed enabling propose Legislation "*Two members appointed by the President of the Republic and one member appointed by Parliament must come from the bar or from higher education.*" It is the elected persons, who, with three others drawn from the judiciary, will constitute the 2/3 of legal members required by section 158 of the Constitution. The question ponders to what degree would the court be independent vis-à-vis of the executive and legislative branches especially if Parliament fell from the presidential majority? Inevitably, there is a risk the court will play to the whims of the governing parties, the balance of the presidential movement, despite the establishment of a fairly rigid system of incompatibilities (Articles 24-29 of the proposed Act organic).

Once appointed, all members of the Court are ultimately appointed by presidential order for a non-renewable term of nine years. They elect the president of the Court for a three-year term renewable once, by a majority vote in two rounds by secret ballot (Article 7 of the draft Organic Law as amended by the PAJ Committee. The duties of the president of the Court are administrative in nature: administration of the Court and its staff. He is also the president of the Supreme Council of Magistracy (SCM)[23]. Knowing that the President of the Constitutional Court may be a political appointee, since no text prohibits this, it is interesting to note that the Supreme Council of Magistracy is also chaired by a politician. The mode of appointment of the Constitutional Court members should be viewed as the invisible hand of the chief executive (President of the Republic) or of Parliament albeit implicitly, contrary to infringing the will of this component which has instituted a system of self-management of the judiciary.

I.1.2. The Prosecutor-General's office at the Constitutional Court

Establishing a Prosecutor-General at the Constitutional Court to exercise the "*functions of public prosecutor in this Court*"[24] may seem incongruous[25]. The National Assembly's PAJ Committee text offers to assimilate it, and thereby to equate this Office to other prosecutors in the administrative or judicial courts.

It must be remembered that this approach has been made positive law by those countries connected to the Kelsenian's model or any European constitutional justice. The 2006 Constitution, in Article 149, paragraph 2, specifically provides that the Constitutional Court, is "*independent of the legislative and executive powers*" (Article 149, paragraph 1) which is a component of judicial power, has a prosecutor in charge for the legislature to regulate its composition of its members and to define their functions.

This office is composed of a Prosecutor-General, the First Advocate-General and two general attorneys attached to the constitutional Court[26]. The President of the Republic appoints magistrates from among the judicial or administrative court judges, those having at least fifteen years experience[27] according to the statute[28] of 10 October 2006, as proposed by the SCM for a renewable term of 6 years, since it is not otherwise mentioned in the text.

---

[23] Article 18 of Organic Law No. 08/013 of 05 August 2008 on the organization and functioning of the Supreme Council of Magistracy
[24] Article 11 of the draft organic law of member Bule, as amended by the PAJ Commission
[25] St. BOLLE, «Vers une Cour constitutionnelle », op.cit.
[26] Article 13, paragraph 1, of the proposed organic law by honourable Bule, as amended by the PAJ Commission
[27] idem, Article 13, paragraph 2.
[28] Organic Law No. 06/020 of 10 October 2006 concerning the status of magistrates

Consequently, some difficulties arose[29].

First, the Attorney General at the Constitutional Court is a member of SCM[30] and he is the First Vice-president[31]. Therefore, is a 6-year term without further specification implied in these conditions? Would the Constitutional Court's Prosecutor-General detach himself from it even though no written rule seems to compel him to? Similarly, the President of the Republic might be able to reject the proposal of extending the mandate of an outgoing senior judge as stipulated by the SCM. In any case, such a judge would lose his independence to the extent that he would be placed under the "*protectorate*" of the President of the Republic to ensure an easy renewal of his mandate. Therefore a valid mandate till retirement or a non-renewable term, as was already foreseen in the original proposal of the Hon Bule[32] would be more appropriate.

Secondly, due to lack of textual evidence to the contrary, it appears that the general public prosecutors at the Constitutional Court, unlike the actual members thereof, shall be subject to the 2006 status of magistrates regarding their rights and duties. Is submission to the status of magistrates compatible with their superior institutional position? How can we know, without questioning the credibility and independence of the Constitutional Court that they are subject to disciplinary proceedings and, if necessary, can be dismissed by the President of the Republic? Yet, the Constitutional Court where they would perform their duties is not a court like any other. On the one hand, it controls the action of the state political institutions; secondly, it has a constitutional supremacy on the orders of courts and administrative judiciaries[33].The Prosecutor-General's mandate at the Constitutional Court fall into four main categories: to assume the role of public prosecution for all criminal cases within the jurisdiction of the Court for constitutional protection of the fundamental rights of the person[34], to attend all hearings with the capacity to make oral submissions, receiving the evidence of the case at hand, within 15 clear days, after the parties' submissions and before the intervention of the Rapporteur[35]. Although this procedure seems to borrow from private law and has already attracted criticism in doctrine, especially from Professor Mampuya[36] is well after the notice to prosecute as the President of the Constitutional Court will refer the matter to a member of the Court for report[37]. This is quite a delicate feature, but for the pursuit of which the public prosecutors- general at the Constitutional Court, as well as actual members of it are supported by a number of collaborators.

1.2 Direct employees of constitutional courts

In this regard, the proposed Organic Law on the Constitutional Court, as amended by the National Assembly PAJ Committee, established three kinds of employees: Councillors

[29] Read also St. BOLLE, «Vers une Cour constitutionnelle », op.cit.
[30] Article 152, paragraph 2, point 2 of the Constitution of February 18, 2006
[31] Article 19, paragraph 1, point 1 of the Organic Law of 05 August 2008 on the organization and functioning of the Supreme Council of Magistracy
[32] Article 12, paragraph 2, of the original proposal of the Organic Law of Bule, member of the Constitutional Court. This article provides for a nine-year non-renewable term.
[33] 33 C. WASENDA-N'SONGO, «Rapport entre contrôle de constitutionnalité et contrôle de légalité : pour quelle relation entre la Cour constitutionnelle et le Conseil d'Etat », *communication lors de Journées des réflexions sur la mise en place des ordres juridictionnels prévus par la Constitution du 18 février 2006*, Faculté de Droit, Université de Kinshasa, du 29 au 31 janvier 2009, inédit, p.10.
[34] Section 58 of the proposed new Organic Law of the Constitutional Court, as amended by the Commission of the National Assembly PAJ.
[35] Article 36 of the same text.
[36] 36 A. MAMPUYA KANUK'A TSHIABO, « **A propos du projet de Loi organique sur la Cour constitutionnelle »,** Quotidien «Le Phare» du 9 avril 2008 ; article rapporté par St. BOLLE, «Quelle Cour constitutionnelle en RD du Congo? », http://www.la-constitution-en-afrique.org/, 16 avril 2008.
[37] Article 38 of the proposed new Organic Law of the Constitutional Court, as amended by the Commission of the National Assembly PAJ.

Referenda, Registrar and Secretary respectively, who keep the Constitutional Court Registry seal and the Secretariat-General of its department.

I.2.1. Referendum advisors[38]

The text reported by the PAJ Committee advocates for the creation of a Belgian model[39] body of referendum advisors who would be under the authority of the President of the Constitutional court[40]. Their number cannot exceed sixty, while in Belgium the *numerus clausus* is set at only twenty-four (Article 36 of the Special Law on the Belgian Constitutional Court).

According to the new Article 21 of the draft organic law as amended by the PAJ Commission, and without giving further details, appointment of this body of advisors on referendum will be done competitively for those *"who hold a bachelor's degree,"*. Does this mean that a degree holder in literature, history, sociology or in economics will become a referendum advisor? The answer seems to be affirmative, since the same article states that three quarters of referendum advisers will be *"lawyers, with a proven experience of at least fifteen years."* What about the remaining quarter? What added value for the proper administration of constitutional justice can be expected from non-lawyers? If non-lawyers are allowed to compete, what kind of test will the candidates undergo? The text is silent on this point and does not further specify the composition of the selection panel who will select candidates. However, the Special Belgian Law that inspired the Congolese legislator seems more accurate (Article 36, paragraph 1). On one hand, twenty-four Belgian referendum advisors should be either doctors or holders of law degrees, on the other hand, instead of requiring a fifteen-year experience as in the DRC, -what area of experience is not clear - only to law candidates who are to play roles in the referendum, it rather sets the entry age to these posts at twenty-five years at least. Why would the legislator require that the Congolese referendum constitutional magistrates and councillors have the same experience, while in all likelihood, the weight of their responsibilities is fundamentally different?

The National Assembly's PAJ Commission regrettably had failed to take on board Article 20 of Hon. Bule's draft organic law article urging the referendum advisers *"to assist the Court in the study and preparation technique of questions submitted to it."* The Commission should not only have corrected the glaring editorial defect, but should also have spelt out the exact role of the referendum advisors. This lack of clarity is particularly unfortunate in that the advisors' eventual intervention at any stage of the proceedings before the Constitutional Court, is not mentioned anywhere. What role then will the 60 referendum advisors and the nine members of the Constitutional Court play, knowing that the text explicitly provides for the use of external experts[41], whether national or international? Will they be assistants attached to the Court membership, parliamentary assistants, or junior constitutional judges, relieving members of the Court of the most boring tasks? It would be wise for the legislature to decide on this once and for all.

I.2.2. The Constitutional Court Registry and the Prosecutor General's Secretariat

The Court Registry was established under the amended Article 18 of the proposed organic law by Hon. Bule. It was to be headed by a chief clerk with the rank of Secretary General

[38] We quote here, almost entirely, the words of Stéphane Bolle, who has made a preliminary review, and in my opinion based on what could become Congolese referendum advisors.Read St. BOLLE, «Vers une Cour constitutionnelle … », op.cit.
[39] Title II, Chapter 2, Articles 35-39 of the Special Law on the Belgian Constitutional Court, adopted on 6th January 1989.
[40] Amended Article 19, paragraph 1, of the draft Organic Law
[41] Amended Article 22 of the draft Organic Law

for Public Administration and appointed, accordingly, by the President of the Republic. Similarly, the Public Prosecutor Secretariat at the Constitutional Court was to be headed by the First Secretary of the same rank, also appointed by Presidential decree (Article 12 of the proposed new amended Organic Law).

Unfortunately, the amended text of the PAJ Commission proposal did not specify on what authority the appointments were to be made; neither does it specify the position of the person with the power to appoint other members of the Registry or the Secretariat. Perhaps this power belongs to the Prime Minister, at least as regards the clerks and secretaries whose grades are lower than those needed to command posts in the Administration[42]. It is also the Prime Minister who by a deliberated decree, was to fix the public organization of the cabinet and operation of the Registry and the Secretariat. However, because of this component of will[43], it was necessary that all this be provided by the Organic Act, so that the respective duties of the Court clerks and the various Secretary-Generals of his department can be already known, instead of detailing them in a separate text.

However, some functions of the Registry are set out in Article 36 of the new Organic Law. It is, indeed, with the Registry that requests to the court are filed. Thereafter, the Registrar registers and assigns order numbers to different files. He also process and present them upon request to interested parties and during Court hearing and shall take the minutes of the hearing. In this case, it is the sitting clerk who signs, behind the bench, with the Constitutional Court judges as part of the panel (in this case at least seven judges, section 41 amended the draft Organic Law), rulings of the Constitutional Court.

All these functions are similar to those performed by clerks in the ordinary courts. Accordingly the Public Constitutional Court secretaries should perhaps be equated with their counterparts in the judiciary. Thus, the Court would have a structure, as it has already been branded, and suitable rules of procedure when it is called upon to rule on constitutional complaints that form the core of public law. What could be more unfortunate!

II ACCESS TO THE RIGHT OF CONSTITUTIONAL APPEAL

What matters can be brought within the jurisdiction of the Constitutional Court? Under what conditions should the Court exercise that power? These are the essential questions we will try to answer in two distinct points: the right of appeal at the Constitutional Court and the conditions for the exercise and its limited jurisdiction.

II.1. The right of appeal to the Constitutional Court

What is referred to here by "*the opening case to the right of constitutional appeal,*" are the various matters coming within the jurisdiction of the Court and which is, legally, the constitutional basis of referral by any party qualified to do so. In this regard, the 2006 Constitution gave the Court a very broad mandate and jurisdiction: very few components, worldwide, agree to confer constitutional jurisdiction[44]. It is therefore necessary, when opening the constitutional

[42] For them, it is the President of the Republic who has the power to appoint (Article 81, paragraph 1, point 4 of the Constitution).

[43] Art. 168 of the Constitution of February 18, 2006: "The organization and functioning of the Constitutional Court are determined by organic law."

[44] NGONDANKOY NKOY-ea-LOONGYA, « De l'organisation de la Cour constitutionnelle congolaise : le Constituant de 2006 induit-il le principe d'une organisation décentralisée de la nouvelle juridiction constitutionnelle », communication lors de Journées des réflexions sur la mise en place des ordres juridictionnels prévus par la Constitution du 18 février 2006, Faculté de Droit, Université de Kinshasa, du 29 au 31 janvier 2009, inédit, p.4.

right of appeal, to see the major parts of the Court's constitutional jurisdiction before we consider a particular problem, namely, that of derived constituent power of judicial review.

II.1.1. The inventories of cases open to the right of constitutional appeal.

The Constitutional Court is expected to carry out three categories of its mandate. It can intervene [45] either as a constitutional authority, or as a criminal court. As a constitutional authority, the Court does not hold a trial to clear a constitutional issue of application or interpretation of a provision in the Constitution. It simply performs a number of activities necessary for the proper functioning of a democratic constitutional state. These activities are specifically listed:

- the extension of an election in case of unforeseen contingencies (article 76, paragraph 4 of the Constitution);

- the announcement of the results of presidential elections and national legislation (Article 72 of the Elections Act March 9, 2006);

- the swearing-in of the President of the Republic (Article 74 of the Constitution) and of the Independent National Electoral Commission (INEC) officers[46]

- the receipt of the written statement of the estate of the President of the Republic and his family, members of the Government (Article 99 of the Constitution) and officers of the INEC[47], and its submission to the Tax Administration;

- the declaration of vacancy in the Presidency of the Republic due to permanent incapacity of the President of the Republic (Article 76, paragraph 1 of the Constitution);

- the declaration in case of conviction, of forfeiture by the President of the Republic or the Prime Minister (Article 167, paragraph 1 of the Constitution).

As a criminal court, the constitutional court holds a real trial, settled mainly by the private law courts. It can judge both, in the first and last instance, the President of the Republic and the Prime minister[48] and their accomplices.

As a Constitutional court, it primarily gives ruling on **electoral disputes** (Article 161, paragraph 2 of the Constitution). With the variable nature of such litigation, the Constitutional Court judge fulfils his capacity as an electoral judge. He does not have monopoly of expertise in this area, as other election judges are at different levels of the judiciary. Five types of electoral disputes should be distinguished: referendum contentions, those on electoral lists[49], proceedings of candidatures[50], of results[51] and of repressive proceedings[52]. This specifically

---

45 This classification is partly borrowed from P. PACTET and F. MELIN-SOUCRAMANIEN, *Droit constitutionnel*, 25ème édition à jour, Paris, Sirey, août 2006, pp.505-507.

46 Article 20 of the organic law n°10/013 of 28 July 2010 on the organization and functioning of the national independent electoral Commission

47 Article 21 de la même Loi.

48 On the criminal status of these two political authorities, read NYABIRUNGU Mwene SONGA, *Traité de droit pénal général congolais*, Kinshasa, Editions Universitaires Africaines, 2007, pp.237-242.

49 Articles 40-44 of Law No. 04/028 of 24 December 2004 concerning identification and registration of voters in the Democratic Republic of Congo.

50 Articles 26-27 of Law No. 06/006 of 09 March 2006 presidential elections, parliamentary, provincial, urban, municipal and local governments.

51 Articles 73 to 76 of the same law

52 Articles 45 to 55 Law n°04/028 of 24 December 24, 2004 for identification and voter registration in the DRC, Articles 79-99 of Law No. 06/006 of 09 March 2006 presidential elections, parliamentary, provincial, urban, municipal and local governments.

relates to the suppression of criminal offences committed in connection with the electoral process. Since this subject relates to the rules and principles of criminal law, it is normally outside the jurisdiction of the Constitutional Court. It is within the powers of the President of the Tribunal or the Peace Court or the jurisdiction of the Customary Court to settle disputes relating to electoral and poll lists. However, the Constitutional Court may rule on other types of litigation. It has the monopoly of referendum litigation (Article 161, paragraph 2 *in fine* of the Constitution), however, it shall act in part on the litigation of applications and results, its jurisdiction being limited to examining litigation related to nominations and challenge to presidential and legislative election results (members of parliament and senate).

The Court shall decide on **jurisdictional disputes** between the legislature and legislative branches between the states[53] and provinces (Article 161, paragraph 3 of the Constitution). This type of conflict can be compared to the conflict of jurisdiction between territories and the judiciary and those of the administrative order. In this case, the role of the Constitutional Court is comparable to the Dispute Tribunal in France. It handles appeals against rulings of the Court of Cassation and the Council of State as they decide on the delivering of rulings in judicial and administrative courts.

The Constitutional Court is also a **court that interprets the Constitution** (Article 161, paragraph 1 of the Constitution). This general jurisdiction is linked to two specific powers. Indeed, it is for the Court to declare, firstly, whether a matter is or is not regulatory in nature (Article 128, paragraph 2 of the Constitution) or if it belongs to the legal domain (Articles 122 and 123 of the Constitution) and, secondly, if the order of the President of the Republic taken in exceptional period (state of emergency or martial law) or not to derogate from the Constitution (Article 145 in fine of the Constitution).

Finally, the Court rules on **conflict of norms**. On this point, the Constitution distinguishes between:

- ✓ the control of the constitutionality of international treaties (Article 216), national laws and acts having been effected by the law (Articles 124, 139 and 160, paragraph 1, 2 and 3) internal rules of the parliamentary chambers of Congress, the Independent National Electoral Commission (INEC) and the Higher Council for Broadcasting and Communication (CONSAC) (Article 160, paragraph 2). These edicts should be added to the provincial acts in accordance with Article 73 of Law No. 08/012 of 31 July 2008 laying down basic principles relating to the free administration of the provinces, although this control issue here, as we will see later, poses a real existence of a legal problem. For national laws in particular, it they obviously are ordinary and basic laws. But one wonders if the component has held, even implicitly, a constitutional review of constitutional laws adopted pursuant to Article 118 *in fine* of the Constitution. This presents a complicated technical problem, and because of its particularity, it will be discussed later.
- ✓ the appeal against the unconstitutionality of laws or regulations, as provided in Article 162, paragraph 2, of the Constitution.

Note the importance of the phrase *"laws or regulations"*, which is included in Article 121 of the Constitution as texts on *"laws and regulations."* The two constitutional provisions also refer to two other previous legal texts. On one hand, Article 6 of Ordinance-Law No. 82-020 of 31 March 1982 on the Code of organization and jurisdiction of courts, which states: *"The*

[53] Articles 122 and 123 of the Constitution of 18 February 2006.

Public prosecutor is responsible for monitoring the implementation of ***legislative acts, regulatory acts*** *and judgements,"* and on the other hand, Article 115 of the Ordinance-Law No. 82-017 of 31 March 1982 on the Procedure before the SCJ, provides: "*The section of law Supreme Court of Justice is seized by request of the competent authority to take* ***legislative or regulatory act*** "*or Article 87, paragraph 3 of the Ordinance-Law, which states that "The Court [administrative division] does not control the l****egislative acts****."*

However, the Constitution,-and no other previous text- does not define these acts.

The term "*regulatory act*" it is not difficult to understand. This is a decision of the Administration, taken outside the field of law[54] and provincial[55] edict, claiming to violate the rights and duties of individuals on matters inclined towards general and impersonal nature[56]. With the unconstitutionality of the regulations, the 2006 Constitution has innovated, as this action was previously within the exclusive jurisdiction of the administrative judge by action and by way of exception. We can therefore say that the constitutional court has become the second Administration judge, next to his fellow directors.

In contrast, the "*legislative act*" is elusive, as it is true that a controversy has been aroused on this subject by the doctrine and jurisprudence of the Supreme Court of Justice. Indeed, for Professor Vunduawe[57], legislation means all declarations of intent by the legislature, in its function of legislating and not controlling executive power, enterprises, establishments and public services[58]-and intended to produce legal effects. According to him, this category includes not only acts of the organic laws and ordinary laws, but also the executive acts with the force of law (ordinance-laws)[59] On the other hand, Marcel Wetsh'Okonda, , espousing the view part of Professor Vunduawe, says that

> *"legislative acts are defined as laws in the strict sense, ordinances-laws otherwise known acts having the force of law and internal rules of the House, Congress and the institutions supporting democracy under the constitution, short of legal acts of constitutional likely before the Constitutional Court."*[60]

In both cases, it should be noted that the list is not exhaustive, since it does not mention another class of important legislative acts that have already been encountered in the present political configuration of the DRC: texts and regulations developed by the provincial assemblies. Moreover, one wonders how the by-laws of the INEC and the CONSAC are legislative acts. Are we not outside the specific context, that is to say, the Parliament and provincial legislatures, where they are supposed to be developed in accordance with Articles 100, paragraph 2 and 197, paragraph 2 of the Constitution[61]?

---

54 Articles 122 and 123 of the Constitution of 18 February 2006.

55 Articles 203 et 204 de la même Constitution ainsi que les articles 35 et 36 de la Loi n°08/012 du 31 juillet 2008 portant principes fondamentaux relatifs à la libre administration des provinces.

56 CSJ, 20 janvier 2004, RL09, avis sur les difficultés d'interprétation des articles 76 et 94 de la Constitution de la transition, *inédit*, pp.3-4 ; la Cour distingue les actes réglementaires des actes individuels qui, quoiqu'étant des décisions administratives, n'affectent que, selon les termes de la Cour, « la situation subjective des individus ». Sur cette définition, lire aussi F. VUNDUAWE te PEMAKO, *op.cit.*, Bruxelles, Afrique éditions, De Boeck et Larcier, 2007, pp. 303-304 et 667.

57 F. VUNDUAWE te PEMAKO, «L'histoire constitutionnelle des actes ayant force de loi au Congo-Zaïre (1885-2005) », in Liber Amicorum Marcel Antoine Lihau, *Pour l'épanouissement de la pensée juridique congolaise*, Bruxelles, Bruylant et Presse de l'Université de Kinshasa, 2006, pp.272.

58 This is our own addition

59 F. VUNDUAWE te PEMAKO, «L'histoire constitutionnelle des actes ayant force de loi… », *op.cit.*, p.272 ; F. VUNDUAWE te PEMAKO, *Traité de droit…op.cit.*, p.857.

60 M. WETSH'OKONDA KOSO SENGA, « La définition des actes législatifs dans l'arrêt de la CSJ N° R.CONST. 51/TSR du 31 juillet 2007 à l'épreuve de la Constitution du 18 février 2006 », *Revue de Droit et de Science Politique du Graben*, n°5, juin 2008, p.27.

61 Article 100, paragraph 2: "Notwithstanding other provisions of this Constitution, Parliament passes laws" Article

On its part, the SCJ, which is the acting Constitutional Court, established a fairly extensive list, covering the term *"legislation"* in its ruling **Judgment R.CONST.051/TSR of 31 July 2007** made in the Treasurer Kapuku Ngoy's case. The leading case recalls the position previously expressed by the same court, sitting in administrative matters, in its ruling **Judgment R.A. 320 of 21 August 1996** delivered in the case of the Prime Minister, Kengo Wa Dondo's swearing-in.

In the latter case, the SCJ ruled on a dispute arising from the application of Article 78 of the Constitutional Act of the Transition (ACT) of 9 April 1994, which stated:

> *"The Prime Minister is the Head of Government. He is introduced after consultation with the political class, by the political family that is not the Head of State within ten days after the enactment of this Act. After this period, the High Council of the Republic-Parliament of Transition [HCR-PT] takes over the case.*

Based on this provision, the HCR-PT proceeded to vote and it led to the election of Leon Kengo Wa Dondo as Prime Minister. The President of the Republic thereafter proceeded, constitutionally, with the swearing-in of the new Prime Minister by Order No. 94/039 of 16 June 1994 and his government team by Ordinance No. 94/042 of 06 July 1994, which challenged Mr. Etienne Tshisekedi Wa Mulumba, political parties and members of the Union of radical sacred opposition (USOR and allies), since they believed they had filed the record of their candidate within the constitutional limit. They held that the SCJ set aside those orders as illegal. Specifically, they were criticized for having endorsed the illegalities committed by the HCR-PT, as he had chosen and presented to the inauguration of President of the Republic a person other than the one that should be and that the election that took place was not foreseen by Article 78 of the ACT, and in doing so, the HCR-PT was used to interpret the ACT, while not invested with such power, while the President of the Republic whose jurisdiction in this case was bound, by signing the orders in question had committed excesses and misuse of power.[62]

Without having to consider the merits of the case, the SCJ, the administrative division, declared itself incompetent to rule there, for two reasons. First, it held that the orders were acts of government, which were beyond there control[63]; on the other hand, it felt that it could not examine the legality of these orders without deciding beforehand on the regularity of the proceedings of the HCR-PT under which they were taken. However, it said, such acts are legislative acts, as they escaped its control by means of an action for annulment (Article 87, paragraph 3 of Ordinance-Law on the Procedure before the SCJ), under the principle of separation of powers[64]. It was therefore necessary, in order not to lose the case at this stage, to hold the Court for having an unconstitutional motion. For the Court, "*the term legislative acts which control is outlawed covers not only the laws in the strict sense or texts having the force of law but also any document or instrument issued or done in the exercise of legislative power*[65]*."*

197, paragraph 2: "It [the Provincial Assembly] is task to legislate by decree. "

62 Subject of the case as reported by the SCJ. Lire CSJ, 21 août 1996, R.A.320, *Bulletin des arrêts de la Cour suprême de Justice*, années 1990 à 1999, Kinshasa, Editions du Service de Documentation et d'Etudes du Ministère de la Justice, 2003, pp.159-160.

63 Pursuant to Article 87, paragraph 2 of the Ordinance-Law No. 82-017 of 31 March 1982 on the Procedure before the Supreme Court of Justice.

64 SCJ, 21 Aug 1996, R.A.320, *op.cit.*, p.161.

65 Idem, pp.161-162.

It is this definition that the same Court has reiterated, this time acting as a Constitutional Court in its ruling **Judgment R.CONST.051/TSR of 31 July 2007**. However, it shines through the illustration it gives to its own definition, by including the motion of no confidence passed by the provincial assembly of Western Kasai against Governor Treasury Kapuku Ngoy. On this basis, the Court therefore had jurisdiction even if it confuses jurisdiction issues here with the admissibility of the request before it by the Governor-challenged to rule on the constitutionality of that motion as an act of law as defined in Article 162, paragraph 2, of the Constitution. That ruling served as precedents for the other two similar cases which occurred following the removal of provincial governors by their respective provincial assemblies. This was the first ruling **Judgment R.CONST.062/TSR of 26 December 2007**, delivered in Case Celestine Cibalonza Byaterana, Governor of the province, dismissed from his government duties through motion of censure voted against him by the South-Kivu Provincial Assembly, dated November 12, 2007. It is also the ruling **Judgment R.CONST.078/TSR of 04 May 2009,** issued in the case of José Makila Sumanda, Provincial Governor, against whom the Provincial Assembly of Ecuador had passed a motion of no confidence dated January 24, 2009.

In short, it should be noted that the definition of *"legislation"* contained in the jurisprudence of the SCJ, appears broad.. It covers, in addition to laws and acts *stricto sensu* with the force of law, of acts that are obligatory in nature (internal regulations of the National Assembly, Senate, Congress and provincial assemblies, motion of censure and no confidence, decision to prosecute members of the executive, validation or invalidation of parliamentary mandates, decisions concerning the election of officers of the Houses of Parliament, assent requested by a provincial government in the provincial assembly, etc..) and those non-binders (recommendations to the Government and various other related resolutions, etc..) as a result of the nature of the body that adopts, namely the legislature, whether national (Parliament) or Provincial (Provincial Assembly). Yet if we accept that the powers of the Constitutional Court are to grant and understand with a strict interpretation, it is difficult to accept the extension given by the SCJ.

Therefore, from our point of view, the only legislative acts, the current Congolese law, are the organic laws, ordinary laws, acts backed by the law and the provincial edicts. These are the only acts by which the legislature has jurisdiction to legislate to deserve being labelled *"legislative acts"*. This power should not be confused with the power of control held by the legislative bodies over executive bodies, commercial enterprises, institutions and public services, nor their jurisdiction to regulate their own internal organization. Acts adopted by the legislature in this context are not legislative acts, but parliamentary acts. When they are non-binding, it is really conclusive that they escape, lack of interest, the mechanism of constitutional complaint under section 162, paragraph 2 of the Constitution cited above. Regarding acts of Assembly which are mandatory, some are eligible for the constitutional review (internal rules of parliamentary chambers and the Congress), but not the constitutional complaint, while others are beyond the power of the Constitutional Court. Only a constitutional amendment will reverse this situation properly so that "*the constitutional court is responsible for any act by the Assembly when it is established that it has clearly violated the civil rights and liberties guaranteed or prejudice that considered as constituting the material protected*"[66]. Otherwise, the case bold but unfounded, the SCJ may very well become permanent.

---

[66] O. NYEMBO-Ya-LUMBU, *La Constitution de la Troisième République est fédérale. Regard critique sur la «décentralisation»*, Kinshasa, Editions Universitaires Africaines, 2009, p.132.

II.1.2. The possible judicial review of the power of the derivative Congolese constitution

We have seen that the Congolese Constitution court can review the constitutionality of organic laws and ordinary laws. The Constitutional Court is also competent to rule on compliance with the Constitution and laws of constitutional revision, adopted pursuant to Article 218 in fine of the Constitution.
This issue was crucial at a time when the Republic faced the first attempts to revise its young Constitution[67]. It may be tempting to think that the Court is the last bulwark against a possible "drift from the parliamentary majority," ready to adopt any constitutional amendment, provided it maintains, or better still, it confiscates, ad infinitum, the state power.

In Comparative Law, the African constitutional jurisprudence is divergent. Some constitutional courts declare their incompetence to monitor compliance with the laws of constitutional reviews. This is particularly true of the Constitutional Court of the Union of Comoros in its ruling, **Judgment n°09-009/CC of 6 May 2009.** The Senegalese Constitutional Council had also adopted the same position in several decisions, especially those of 9 October 1998 and January 18 2006[68]. Very recently, it has reaffirmed its ruling in **Ruling n°2-C-2009 of 18 June 2009**.

In total, it emerges that declaration of incompetence by these constitutional courts is based on strict literal or restrictive interpretation of the law that specify their powers. In other words, there is no question of subjecting the constituent institutions whose powers of legal existence lies within its control. In addition, it is sovereign, except where expressly intended to restrict itself.

---

[67] See Voir St. BOLLE, « RD Congo. Faut-il déjà réviser la Constitution de 2006 », *http://www.la-constitution-en-afrique.org/*, 27 novembre 2007. L'auteur rapporte des propos édifiants que nous citons *in extenso*: Le député Tshibangu Kalala a déposé, le 5 novembre 2007, sur le Bureau de l'Assemblée nationale une proposition de loi constitutionnelle portant révision des articles 110, 152 et 197 de ladite Constitution. Une pétition, signée par 310 députés de l'Alliance pour la Majorité Présidentielle (AMP), est venue appuyer la proposition qui a un triple objet **:** 1) ***revoir le régime des incompatibilités parlementaires*** **:** comme cela est envisagé par Nicolas Sarkozy en France, un député ou un sénateur, nommé à une fonction incompatible avec son mandat, serait temporairement remplacé et, après cessation de cette fonction, retrouverait automatiquement son siège ; 2) ***réformer la composition du Conseil Supérieur de la Magistrature***, dont la présidence serait confiée au Chef de l'Etat, au moment même où la France s'apprête à supprimer cette prérogative ; 3) ***étendre aux députés provinciaux le régime des immunités***, réservé jusque-là aux députés nationaux.
Dans son exposé des motifs, l'auteur de la proposition de loi constitutionnelle soutient que la révision permettra « le renforcement et la consolidation de la démocratie et de l'Etat de droit ». L'argumentaire n'a guère convaincu en dehors de la mouvance présidentielle. Les antirévisionnistes ont bruyamment marqué leur désapprobation : les parlementaires de l'opposition entendent défendre la séparation des pouvoirs mise à mal par la proposition de révision ; le syndicat des magistrats proteste contre une « dictature parlementaire ou une dictature de l'exécutif » qui ruinerait l'indépendance du pouvoir judiciaire, que l'article 220 de la Constitution déclare intangible ; plus de 30 000 citoyens auraient signé une pétition, lancée le 18 novembre 2007 par trois journalistes de la chaîne privée de télévision CEBS, pour s'opposer à une révision précoce qui « menace la survie de la République ».
Déjà, à l'époque, le Professeur **Auguste Mampuya a estimé que pareille proposition de révision constitutionnelle était non seulement immorale, mais également et surtout anticonstitutionnelle, pour violation des articles 149 («** le pouvoir judiciaire est indépendant du pouvoir législatif et du pouvoir exécutif ») et 220 (l'indépendance du pouvoir judiciaire « ne peut faire l'objet d'aucune révision constitutionnelle ») de la Constitution de 2006. Lire **A. MAMPUYA KANUNK'A TSHIABO,** ***Entretien Journal Le Phare*****, novembre 2007, cité par** St. BOLLE, «RD Congo. Faut-il déjà révisé, … », *ibidem*. **Lire aussi Le Potentiel,** Congo-Kinshasa: *controverse autour de la révision constitutionnelle après le dépôt d'une pétition à l'Assemblée nationale*, 7 novembre 2007. En 2010, la volonté de réviser la Constitution de 2006 s'est amplement incrustée. Une commission interinstitutionnelle a été constituée à cet effet pour faire l'évaluation de l'application de la Constitution de 2006. Et sur la base de ses travaux, la révision constitutionnelle projetée porterait désormais sur de nouvelles matières comme la décentralisation, le mode de scrutin pour l'élection du Président de la République et des gouverneurs des provinces ainsi que sur le nombre et la durée du mandat présidentiel.

[68] CENTRE POUR LA GOUVERNANCE DEMOCRATIQUE BURKINA FASO, *Constitutionnalisme et révision constitutionnelle en Afrique de l'Ouest : le cas du Bénin, du Burkina Faso et du Sénégal*, rapport de recherche 2009, p.16.

It is for that reason that, in these two cases on May 6 and May 19, 2009, the Constitutional Court did not hesitate to consistently say that *"the Constitution of the Union of Comoros in Article 31 and the Organic Law No. 04 -001/AU of 30 June 2004 on the organisation and powers of the Constitutional Court made under article 34 of Title IV of the Constitution, the Union of Comoros had* ***strictly limited*** *the jurisdiction of the Constitutional Court"*[69] and that *"****it cannot be called upon to adjudicate in cases and in such manner as the above-mentioned have fixed"***[70]. For its part, the Senegalese Constitutional Council virtually uses the same words, in its decision of 18 June 2009, when he says:

> *"the competence of the Constitutional Council is strictly limited by the Constitution, it is likely to be clarified and expanded by the Constitution or by an organic law which is so consistent that the Constitutional Council cannot be called upon to adjudicate* ***in cases other than those expressly set by these texts."***[71]

As for the cases expressly determined by law, both courts are categorical. For the Constitutional Court of Comoros, *"laws that the Constitution of the Union of Comoros has contemplated in Articles 26 and 31 are the laws passed by* ***organic and ordinary*** *as voted by the Union's Parliament, as well as those of the Assemblies of the autonomous islands"* while the Senegalese Constitutional Council considers that:

> *"the first paragraph of Article 92 of the Constitution and Article I of the Organization Act empower the Constitutional Council to determine the constitutionality* ***of laws and organic laws****; that the Constitutional Council neither keeps these texts under control nor any other provision of the Constitution and the Organic Law, and it does not have the power to rule on a constitutional amendment."*[72]

However, it occurred to the Constitutional Court of Benin to invalidate a law amending the Constitution. To understand this, it is necessary to remember the decision made on July 8, 2006, by which it struck down a constitutional act amending the tenures of members of parliament and governors from four to five year when parliamentarians in Benin tried to implement it on their ongoing mandates.[73]

Mali's Constitutional Court has also produced similar jurisprudence work in its ruling **Judgment n°01-128 of 12 December 2001**[74]. Indeed, it has made *a contrario* interpretation, extensively on Article 88 of the 1992 Constitution, which reads:

> *"Organic laws shall be submitted by the Prime Minister to the Constitutional Court before their promulgation". The other categories of laws before their promulgation may be referred to the Constitutional Court either by the President or the Prime Minister or the President of the National Assembly or one tenth of the members or by the President of the High Council of Collective authorities or one tenth of the National Council or by the President of the Supreme Court."*

---

69 Arrêt du 6 mai 2009, considérant sur le contrôle de conformité à la Constitution du projet de loi référendaire portant révision de certaines dispositions de la Constitution de 1'Union des Comores du 23 décembre 2001 ; arrêt du 19 mai 2009, considérant sur le contrôle de conformité à la Constitution du projet de loi référendaire et de la loi référendaire sur la révision de l'Union des Comores.

70 Ibidem.

71 See the 2nd preamble of this same ruling

72 See the 3rd preamble of the ruling delivered on 18 June 2009.

73 CENTRE POUR LA GOUVERNANCE DEMOCRATIQUE BURKINA FASO, *op.cit.*, p.15.

74 See St. BOLLE, «La Cour Constitutionnelle du Mali invalide en 2001 une loi de révision ad referendum », http://www.la-constitution-en-afrique.org/ , 17 décembre 2007.

For the Malian Court, the Constitutional Amendment Act was not contested as an organic law. It must be regarded as part of "*other categories of laws*" and therefore subject to review in accordance with the country's Constitution[75].

Is there a legal basis to adopt the same reasoning to the interpretation of the Congolese Constitution? Like in the Constitution of Mali, the Congolese Constitution distinguishes the constitutionality of organic laws (Article 124 and Article 160, paragraph 2) and that of laws (Article 139 and Article 160, paragraph 3) without giving any further detail. Thus one can argue that these provisions do not seem, in fact, to exclude constitutional laws from the scope of constitutional review.

By all means, the Constitutional Court in Congo must be warned about the problem that lies ahead. It will have the choice of either following the incompetent decisions of constitutional judges in Comoros and Senegal, with the potential to unleash a frenzy of constitutional amendments, or to make a bold exercise of its judicial function, like the Constitutional Court of Benin and Mali. This would discourage revisionist, sometimes inappropriate and concocted attempts at the expense of democracy and constitutionality. The Court's audacity is in fact justified here, unlike that which it has shown on the definition of "*legislative acts*", especially in view of the breach opened by the Constitution for a broad interpretation of constitutional laws. It is hoped that it exercises its powers judiciously, according to the spirit and letter of the constitution.

II.2. The conditions for conferring powers to the Constitutional Court

Two issues need to be examined at this level: the extension of the right of direct appeal before the constitutional court and the particular problem of the nature and position of the applicant in the assessment of the constitutionality of the appeal.

II.2.1. Extension of the right of direct appeal before the Constitutional Court

Since the Supreme Court of Justice was created in 1974, it is interesting that it has made no ruling as a constitutional court. Several reasons explain this situation.

Initially, the constitutional procedure was organized before the SCJ, albeit belatedly, through the Ordinance-Law No. 82-017 of 31 March 1982. This was because between 1967 and 1982, under normal circumstances, the constitutional justice was unorganized or was totally dysfunctional. 76. The situation is not unique because the DRC had not really had an effective constitutional court since 1960.

Then, from 1982 to 1997, the doctrine denounced the lethargy of the Congolese constitutional justice[77], even "*the contracting of state power*",[78] because of political agreements within the ambit of the transition from 1990 to 1997, which did not warrant the emergence of a genuine constitutional jurisprudence. It just had occasional incursions by the administrative court in constitutional litigation.

---

75 10th preamble on the ruling on 12 December 2001

76 KENGO Wa DONDO, L'évolution jurisprudentielle de la Cour suprême de Justice au Zaïre (1968-1979), Mercuriale du 4 novembre 1978, Kinshasa, CSJ, 1979, p.135.

77 MABANGA MONGA MABANGA, Le contentieux constitutionnel congolais, Kinshasa, Editions Universitaires Africaines, 1999, p.76.

78 D. KALUBA DIBWA, « Le constitutionnalisme congolais : de la démocratie électorale à la démocratie constitutionnelle », http://www.la-constitution-en-afrique.org/, 26 juillet 2010. Il s'agit d'une contribution présentée lors de Journée scientifiques de la Faculté de droit sur le thème général : cinquante ans de constitutionnalisme en RDC, du 24 au 26 juin 2010.

In this regard, we have already encountered the case of Prime Minister Kengo Wa Dondo's swearing-in, which was closed on the basis of a ruling of incompetence of the SCJ, the administrative section. To this end, we can add several other similar cases handled by the same court, including the ruling **Judgment R.A.266 of 08 January 1993**, delivered on the case of "*Jehovah's Witnesses.*" This religious society had succeeded in obtaining the cancellation of the SCJ's Ordinance No. 86-086 of 12 March 1986 by which the President of the Republic had ordered its dissolution. The decision was widely criticized in doctrine[79], particularly on the point that it wanted to know if the Court, the Administrative Division, had jurisdiction to interpret the Constitution and, by doing so, to rule on the validity of two constitutional texts. The 1967 Constitution as amended and the Act concerning the constitutional provisions on the transitional period from 04 August 1992 - on which politicians of the time were deeply divided.

The doctrine raised two fundamental questions underlying this lethargy. The first, being a political one, is based on the nature of the dictatorial political system in vogue during that period. The Head of State was the heart of the whole state apparatus and virtually the sole authority on legislation and other country by order-laws. With that, it was politically impossible, even dangerous, to challenge the President of the Republic on constitutionality or unconstitutionality control mechanisms, at the risk of exposing oneself to the harshness of an alleged injustice against the law on the grounds of subversion[80]. The second reason is of a technical nature. It results from the monopoly of the right to constitutional appeal conferred by the Ordinance-Law on the procedure before the SCJ (Articles 131, 132 and 133, paragraph 4), to the Attorney General (AG), acting either for ex officio or upon request of the President of the Republic or the Office of the former Legislative Council[81], or even to initiate a court hearing on a question of unconstitutionality. This also explains why the first decision of the SCJ as a constitutional court[82], namely the ruling on **Judgment R.C.E.001/96 of 04 February 1997**[83], relates to a case of disputed elections. In this matter, to the advantage of the person concerned, the Ordinance-Law (Article 144) opens an avenue to approach the Court directly and file an appeal against Acts of Parliament that deny the credentials or accepts the resignation of its members.

The interregnum of Laurent Désiré Kabila, first (1997-2001) and subsequently Joseph Kabila (2001-2003), has hardly changed the situation. To the contrary, the President of the Republic was by a legal decree bestowed with three qualities: original and derivative component, chief executive and legislature of the country. This confusion of powers was inherently antithetical to any mechanism for limiting presidential powers, although the Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo does not appear to formally oppose it. Also, the role of a constitutional court, charged with censoring acts of the Head of State, had become practically illusory.

---

79 See F. VUNDUAWE te PEMAKO, « Réflexion sur la validité de l'Acte constitutionnel de la transition au regard du compromis politique global et de l'Arrêt R.A. 226 de la Cour suprême de Justice », *Le Soft de Finance*, n°127, 2 mars 1993 ; MABANGA MONGA MABANGA, *op.cit.*, pp.69-71.

80 E. MPONGO BOKAKO BAUTOLINGA, « Le contrôle de constitutionnalité des lois sous l'Acte constitutionnel de la Transition du 9 avril 1994 », *Annales de la Faculté de droit*, vol.XXV, Kinshasa, PUZ, août 1996, pp.321-355 ; MABANGA MONGA MABANGA, *op.cit.*, p.77 ; D. KALUBA DIBWA, « Le constitutionnalisme congolais : de la démocratie électorale… », *op.cit.*

81 The equivalent nowadays of the national assembly

82 MABANGA MONGA MABANGA, *op.cit.*, p. 67 ; MATADIWAMBA KAMBA MUTU, « De l'originalité du procès en cassation », *Justice, science et paix*, numéro spécial, Kinshasa, juin 2004, p.66.

83 Ruling delivered in the case concerning Mutiri Muyongo. La CSJ dut annuler la décision du HCR-PT portant invalidation du mandat du député concerné pour violation des articles 11 et 63 de l'Acte constitutionnel de la transition, surtout car un critère de perte de mandat de député venait d'être introduit par le HCR-PT, à savoir la notion de « nationalité douteuse ».

The resurgence of the SCJ was achieved during the transition from 2003 to 2006. This was made possible because, after a long war that lasted over ten years, the belligerents agreed to govern the country in a consensual manner, especially since none of them could successfully take over the other by use weapons, and become political partners, the former warring parties have increasingly used the legal argument, so that constitutional law has had to recover a place in the dynamics of the political order established[84] by the Constitution of 04 April 2003. By expanding the right to directly appeal to the constitutional court, the SCJ has been increasingly consulted. So, one does remark, the Head of State had grabbed almost everything[85]. The President of the National Assembly has even required the interpretation of legal concepts before the adoption of the legislation[86]. In addition to this institution by the transition constitution is the constitutional review of organic laws that are obligatory in nature (article 121), the previous rulings of parliament (article 103, paragraph 3) and of the senate (article 109, paragraph 3).

For its part, the Constitution of 18 February 2006 came to boost this trend by extending the right of direct appeal to the Constitutional Court, thereby consolidating the emergence of a rule of law on this specific point of access to justice[87].

The SJC is now in full use. We will report only one of the many rulings, namely, that of **Judgement R.CONST.112/TSR of 05 February 2010**, which it ruled in a matter referred to it for the first time in its history[88], directly by a political authority to the constitutional court, without going through the office of the Attorney Genera l(AG). Indeed, before a request for constitutional review of an international treaty, the Court was asked to say whether membership of the DRC to the Treaty establishing the Organization for the Harmonization of Business Law (OHADA) or is inconsistent with the Constitution. It faced resistance from the PGR which was on the basis of its alleged monopoly of referral to the constitutional court, the inadmissibility of the request by the President of the Republic. However, this did not convince the members of the Court, who rather confirmed, although without motivation, the loss of the monopoly formerly known to the AG.

The study of the quality and direct appeal to the constitutional court remains, nonetheless, very complex. Everything depends on the discretionary powers of the Court. We will limit ourselves to what concerns us, the power in assessing the constitutionality, which poses, in our opinion, a little problem.

II.2.2. The position of the applicant to make the assessment of constitutionality

In terms of the assessment of constitutionality, a distinction must be made between constitutionality and unconstitutionality. Whatever the semantic proximity of terms, the

---

84 D. KALUBA DIBWA, « Le constitutionnalisme congolais : de la démocratie électorale… », *op.cit.*

85 *Voir D.KALUBA DIBWA, La saisine du juge constitutionnel et du juge administratif suprême en droit public congolais : lecture critique de certaines décisions de la Cour suprême de Justice d'avant la Constitution du 18 février 2006, Kinshasa, éditions Eucalyptus, 2007, pp.70-81, cité par D. KALUBA DIBWA, « Le constitutionnalisme congolais : de la démocratie électorale… », op.cit.*

86 M. WETSH'OKONDA KOSO SENGA, « L'avis consultatif de la Cour suprême de Justice n° RL 10 du 13 décembre 2005 sur l'infraction politique : interprétation ou réécriture de la loi ? », *Les Analyses Juridiques*, Lubumbashi, n° 8/2006, janvier-avril, 2006, pp.4-26, cité par D. KALUBA DIBWA, « Le constitutionnalisme congolais : de la démocratie électorale… », *op.cit.*

87 It is a human right yet not really guaranteed by Congolese legal texts, a contradiction with international law. Sur la substance de ce droit, lire B. BIBOMBE MUAMBA, « Le droit à la justice et à un procès équitable, à travers la Déclaration universelle des droits de l'homme et le Pacte international relatif aux droits civils et politiques », *Annales de la Faculté de droit*, édition spéciale, droits de l'homme, commémoration du 59ème anniversaire de la Déclaration universelle des droits de l'homme, Presses de l'Université de Kinshasa, décembre 2007, pp.191-213.

88 Read M. WETSH'OKONDA KOSO SENGA, « L'arrêt de la Cour suprême de Justice n°R.CONST.112/TSR du 5 février 2010 sur l'OHADA », http://www.la-constitution-en-afrique.org/, 04 avril 2010.

difference between these two mechanisms is clearly understood through the constitutional provisions (Sections 124, 139 and 160, paragraph 1, 2 and 3, Article 162, and paragraph 2). The first is to be declared by a court action, a text not yet promulgated or which is not yet in force or not in conformity with the Constitution. This is a priori, a preventive control; on the other hand the second one, which covers material already implemented, necessarily is exercised a posteriori, by action or emergency. This distinction controls the allocation of the various qualities of the Constitutional Court.

As for the constitutional review, the constitution has proven to be accurate, notably where it concerns organic laws. In this case, the Court must be under the President of the Republic. Then, when it relates to other laws, ordinary and perhaps even constitutional, the Court may be under the custody of the President of the Republic, the Prime Minister, Speaker of the National Assembly, the President of the Senate, at least 10th of parliamentarians or the Senate (Article 160, paragraph 2 of the Constitution). Note that the Attorney General at the Constitutional Court, the provincial governors and presidents of provincial assemblies are not authorized to access mechanisms of constitutional custody. Nevertheless, as a stopgap, the latter two categories of authority may become custodians of the Court by requesting for interpretation of the Constitution (Article 161, paragraph 1) or resolution of a jurisdictional dispute between the central and provincial governments (Article 161, paragraph 3).

The constitution finally becomes less and less accurate to the point of becoming virtually vague. It is less accurate in that it does not, unlike the previous one, specify who should be in control of the constitutional review Court for the internal rules of parliamentary chambers (National Assembly and Senate), Congress, the INEC and the CONSAC. The Organic Law of the Constitutional Court must therefore fill that void. Therefore the proposed organic law by Hon. Bule, as amended by the PAJ Commission of National Assembly, provides that the Court should be asked by the Office of the President of the Chamber 89 no more any less. Thus, nothing prevents us from thinking that such a provision will not concern the INEC or CONSAC. Yet it is quite logical that the quality of the Constitutional Court is also vested in this regard, the respective presidents of offices of both institutions to support democracy.

Furthermore, where the constitution is not clear, it is about the constitutionality of acts having the backing of the law. Neither the time to exercise control nor the authority of the one that should appeal to the Court is listed. With that, we believe that it is wrong for the constitution to have included such acts among the texts to be subject to such controls. From our point of view, these acts are possibly a constitutional complaint, since their submission to the constitutional review would be hit by a genuine constitutional impediment.

In reality, these are the executive acts [90] that the Constitution calls for orders, laws, and whose development is foreign to the lengthy legislative process for adopting its laws[91]. These orders, laws are simply deliberated by the Cabinet and shall be valid upon publication (Article 129, paragraph 2 of the Constitution). This is a much abbreviated procedure, consistent with the

---

89 Amended article 50 of the organic law proposition by Hon. Bule

90 Sur la définition des actes ayant force de loi, lire F. VUNDUAWE te PEMAKO, *Traité de droit…op.cit.,* pp.857 ; F. VUNDUAWE te PEMAKO, «L'histoire constitutionnelle des actes ayant force de loi… », *op.cit.*, p.274. Dans cet article l'auteur précise, quoique de manière critiquable, ce qui suit : « Les actes ayant force de loi sont toutes déclarations de volonté émanant de l'exécutif et destinés à produire, en vertu de la Constitution ou des théories des circonstances exceptionnelles (gouvernement de fait, état de siège ou d'urgence), des effets juridiques équipollents à ceux d'une loi ». Lire aussi M. LIHAU EBUA LIBANA, *Droit constitutionnel et institutions politiques*, cours polycopié, Faculté de droit de l'Université de Kinshasa, s.d., n°177, p.86 ; cité par MABANGA MONGA MABANGA, *op.cit.*, p.37.

91 Initiative, dépôt, recevabilité, discussion et amendement, adoption, promulgation éventuellement après un contrôle de constitutionnalité, entrée en vigueur.

urgency that the adoption of such acts (Article 129, paragraph 1 of the Constitution) and antithetical to the dilatory mechanism attached to the constitutional review as to the entry into force of an already adopted legal text. It would therefore be wrong that the legislature would be organic to copy an error contained in the Constitution.

There remains the problem of controlling the constitutionality of provincial regulations. It is simply astonishing that the Law on principles of self-governance of provinces instituted this type of control to Article 73 but failed to determine - perhaps because it is not within its scope- how to exercise it. It should be noted that the proposed organic law by Hon Bule, as amended by the Commission of the PAJ National Assembly, does not organize it either. Instead it includes the edicts in the category of unconstitutionality, and this allows us to conclude that there is no constitutional review, for lack of existing legal strength, organized for provincial edicts in the current state of the Congolese law.

A constitutional complaint may be lodged, in turn, by the Attorney General at the Constitutional Court when a law, edict or regulation violates the fundamental rights of the human being (Article 58 of the proposed new Organic Law by Hon. Bule, as amended by the PAJ Commission of the National Assembly). However, we cannot understand why the organic legislature does not mention among the acts covered by this appeal those with the backing of law and yet are part of the legislative acts referred to in Article 162, paragraph 2 of the Constitution. This case may also be lodged by any person establishing an interest in accordance with law for lodging lawsuits. Again, it is thus a direct action that it will exercise this appeal. When it raises an objection to unconstitutionality before the court, it is this[92], and not the plaintiff of the exception[93], who appeals to the Court, almost as if that court should itself raise the statutory exception. In this case, the jurisdiction entering the court stays the proceedings until the constitutional court will rule on his appeal[94] (). It follows that the appeal ***by way of direct action and that exercised by way of exception*** eventually converge to the unique constitutional court. For this reason, the doctrine questioned the practical relevance of the differentiation of these two types of jurisdictional channels[95]. The question worth asking, especially because in the American model of constitutional justice, when speaking of the objection of unconstitutionality, interest is immediately apparent, since the court which is applied to is responsible for settling in the ruling of the main dispute in depth[96]. It does not return at all, like Congo, to the supreme judge of constitutionality. Although the decision of the judge may not resolve the fundamental problem presented to it, it is possible that it may have limited itself to only examining formal procedures for exercising the constitutional appeal. They include the aspects of residual delays, which make more complex the mechanism of the Congolese Constitutional Court. Given this complexity and the eminence of the place of the said Court in the established political and legal order, it is then entitled to ask whether the current JSC is really more "military" to exercise transiently and effectively many functions and contribute to the drafting of the rule of law in the Democratic Republic of Congo. It is this issue that requires our separate study, which strives to give a review of more or less the five years of the work of the SCJ acting as a Constitutional Court that is from February 2006 to June 2010.

---

92 Article 162, alinéa 3 de la Constitution du 18 février 2006 : « Celle-ci sursoit à statuer et saisit, toutes affaires cessantes, la Cour constitutionnelle ».

93 Article 162, alinéa 3 de la Constitution du 18 février 2006 : « Celle-ci sursoit à statuer et saisit, toutes affaires cessantes, la Cour constitutionnelle ».

94 Article 162, paragraph 4 of the Constitution

95 MABANGA MONGA MABANGA, *op.cit.*, pp.40-41.

96 G. DRAGO, *op.cit.*, p.36.

CONCLUSION

Even though the "Constitutional Court" as an institution is not a creation of the Democratic Republic of Congo, the 2006 Constitution on the other hand, in its organization and powers, has equipped it with great originality.

First, it is the political image of the Court, where six of its nine members at least must be lawyers, the other three members to be political figures. The same redistribution of jobs will be found, in all likelihood, when it comes to the level of referendum advisors, called to assist the judges in the constitutional exercise of their difficult duties.

It should be pointed out at the outset that the institution *"referendum advisors"* borrows heavily from Belgium. However, the opposite of his Belgian counterpart, the Congolese organic legislator appears to have exercised the option in the bill soon to be implemented to include persons who are not lawyers. Therefore, there is reason to doubt the capacity of such persons to assist judges in dealing with constitutional issues, for which they know should handle technical issues in the field of constitutional justice. To correct this absurdity, one would propose the addition of the Attorney General at the Constitutional Court. Such a choice has been made, so far at least, by other countries in the Kelsenian model of constitutional justice.

In terms of power, the Constitutional Court is primarily a constitutional authority in many matters where it should rule without really creating a legal conflict. In other words, we are really facing a "*combination of disputes*"[97]. In this regard, the Constitutional Court is a criminal judge, an election judge, a judge of the administrative and political powers.

As an administration court, its role should be insisted upon. It is because of the unconstitutionality of legislative acts based on Article 162, paragraph 2, of the Constitution, that it is now within the monopoly and jurisdiction of the Constitutional Court. Previous appeals were likely to be brought only before the administrative judge, both by action than by way of exception. Therefore, the Constitutional Court has become, by the will of the constitution, the second judge of the Administration, in addition to administrative courts.

Finally, regarding the implementation of these powers, we stressed that the Constitutional Court is not a closed court, like we had seen in the case the Supreme Court of Justice serving since 1974 as a constitutional court. In terms of the assessing constitutionality for example, it could be seized, in the context of inadmissibility, upon petition of the Attorney General of the Republic, acting either *proprio motu* or at the initiative of some political authorities-President of the Republic and the former Legislative Council, or a trial court. This was the era of the monopoly of the right of direct access to the constitutional court, a miscarriage of justice and a clear violation of human rights at the expense of many Congolese citizens. Also, the case law has reaffirmed its outright abolition, despite attempts at resistance by the Attorney General of the Republic, based on the Ordinance-Law No. 82-017 of 31 March 1982 relating to proceedings before the Court Supreme Justice.

Thus, the two mechanisms established by the component to assess constitutionality, only the diligence of constitutionality remains an open mechanism which is reserved for certain political authorities. However, with the constitutional complaint, there is now an *actio popularis* directly admissible before the Constitutional Court. This reinforces the protection of fundamental rights in a post-conflict country, seeking to establish the rule of law.

---

[97] J. VINCENT, S. GUINCHARD, G. MONTAGNIER et A. VARINARD, *Institutions judiciaires. Organisation. Juridictions. Gens de justice*, 8ème édition, Paris, Dalloz, 2005, p.283.

REFERENCES

A. Legal texts

1. Constitution of 1st August 1964.
2. Constitution of 24 June 1967.
3. Constitution de la transition of 04 April 2003.
4. Constitution of 18 February 2006.
5. Décret-loi constitutionnel n°003 du 27 mai 1997 relatif à l'organisation et à l'exercice du pouvoir en République démocratique du Congo.
6. Loi fondamentale du 19 mai 1960 relative aux structures du Congo
7. Loi n° 74-020 du 15 août 1974 portant révision de la Constitution du 24 juin 1967.
8. Loi n°078-010 du 15 février 1978 portant révision de la Constitution du 24 juin 1967.
9. Loi spéciale belge 6 janvier 1989 sur la Cour constitutionnelle.
10. Loi n°04/028 du 24 décembre 2004 portant indentification et enrôlement des électeurs en République Démocratique du Congo.
11. Loi n°06/006 du 09 mars 2006 portant organisation des élections présidentielles, législatives, provinciales, urbaines, municipales et locales.
12. Loi n°06/006 du 09 mars 2006 portant organisation des élections présidentielles, législatives, provinciales, urbaines, municipales et locales.
13. Loi organique n°06/020 du 10 octobre 2006 portant statut des magistrats.
14. Loi organique n°08/013 du 05 août 2008 portant organisation et fonctionnement du Conseil supérieur de la Magistrature
15. Loi organique n°10/013 du 28 juillet 2010 portant organisation et fonctionnement de la Commission électorale nationale indépendante.
16. Ordonnance-loi n°82-017 du 31 mars 1982 relative à la procédure devant la Cour suprême de Justice.
17. Ordonnance-loi n°82-020 du 31 mars 1982 portant Code d'organisation et de la compétence judiciaires, telle que modifiée et complétée par l'Ordonnance-loi n°83-009 du 29 mars 1983.

B. Jurisprudence

1. Conseil constitutionnel de la République du Sénégal, 18 juin 2009, Décision n°2-C-2009, *Journal officiel du Sénégal*, n° 6475, N – S, 19 juin 2009.
2. Cour constitutionnelle de l'Union des Comores, 6 mai 2009, Arrêt n°09-009/CC, *inédit*.
3. Cour constitutionnelle de l'Union des Comores, 19 mai 2009, Arrêt n°09-012/CC, *inédit*.
4. Cour constitutionnelle du Mali, 12 décembre 2001, Arrêt n°01-128, *inédit*.
5. CSJ, 08 janvier 1993, R.A.266, *Bulletin des arrêts de la Cour suprême de Justice*, années 1990 à 1999, Kinshasa, Editions du Service de Documentation et d'Etudes du Ministère de la Justice, 2003.

6. CSJ, 21 août 1996, R.A.320, *Bulletin des arrêts de la Cour suprême de Justice*, années 1990 à 1999, Kinshasa, Editions du Service de Documentation et d'Etudes du Ministère de la Justice, 2003.
7. CSJ, 04 février 1997, R.C.E.001/96, *inédit*.
8. CSJ, 3 janvier 2007, R.CONST.044/TSR, *inédit*.
9. CSJ, 31 juillet 2007, R.CONST.051/TSR, *inédit*.
10. CSJ, 26 décembre 2007, R.CONST.062/TSR, *inédit*.
11. CSJ, 04 mai 2009, R.CONST.078/TSR, *inédit*.
12. CSJ, 05 février 2010, R.CONST.112/TSR, *inédit*.

C. Doctrine

1. BALINGENE KAHOMBO, « L'expérience congolaise de l'Etat fédéral : la Constitution de Luluabourg revisitée », http://www.la-constitution-en-afrique.org/, 24 mai 2010.
2. BIBOMBE MUAMBA B., « Le droit à la justice et à un procès équitable, à travers la Déclaration universelle des droits de l'homme et le Pacte international relatif aux droits civils et politiques », *Annales de la Faculté de droit*, édition spéciale, droits de l'homme, commémoration du 59ème anniversaire de la Déclaration universelle des droits de l'homme, Presses de l'Université de Kinshasa, décembre 2007.
3. BOLLE St., «La Cour Constitutionnelle du Mali invalide en 2001 une loi de révision ad referendum », http://www.la-constitution-en-afrique.org/ , 17 décembre 2007.
4. BOLLE St., «Projet de révision constitutionnelle au Sénégal: la renaissance de la Cour suprême», http://www.la-constitution-en-afrique.org/, 23 mars 2008.
5. BOLLE St., «Quelle Cour constitutionnelle en RD du Congo? », http://www.la-constitution-en-afrique.org/, 16 avril 2008.
6. BOLLE St., «RD Congo. Faut-il déjà révisé la Constitution de 2006», http://www.la-constitution-en-afrique.org/, 27 novembre 2007.
7. BOLLE St., «Vers une Cour constitutionnelle à la congolaise», http://www.la-constitution-en-afrique.org/, 24 septembre 2008.
8. CENTRE POUR LA GOUVERNANCE DEMOCRATIQUE BURKINA FASO, *Constitutionnalisme et révision constitutionnelle en Afrique de l'Ouest : le cas du Bénin, du Burkina Faso et du Sénégal*, rapport de recherche 2009.
9. DRAGO G., *Contentieux constitutionnel français*, Paris, PUF, 1998.
10. EISENMANN Ch., *La justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche*, Paris, LGDJ, 1928.
11. KABANGE NTABALA, «Les innovations projetées dans l'organisation et le fonctionnement de la Cour constitutionnelle», *communication lors de Journées des réflexions sur la mise en place des ordres juridictionnels prévus par la Constitution du 18 février 2006*, Faculté de Droit, Université de Kinshasa, du 29 au 31 janvier 2009, inédit.
12. KABANGE NTABALA, «Quelle constitution pour la Troisième République face aux réalités zaïroises ? », *Annales de la Faculté de Droit*, vol.XXV, Kinshasa, PUZ, août 1996.

13. KALUBA DIBWA D., « Le constitutionnalisme congolais : de la démocratie électorale à la démocratie constitutionnelle », http://www.la-constitution-en-afrique.org/, 26 juillet 2010.

14. KALUBA DIBWA D., *La saisine du juge constitutionnel et du juge administratif suprême en droit public congolais : lecture critique de certaines décisions de la Cour suprême de Justice d'avant la Constitution du 18 février 2006*, Kinshasa, éditions Eucalyptus, 2007.

15. KATUALA KABA KASHALA et YENYI OLUNGU, *Cour suprême de Justice et textes annotés de procédure*, Kinshasa, Ed. Batena Ntambua, 2000.

16. KENGO Wa DONDO, *L'évolution jurisprudentielle de la Cour suprême de Justice au Zaïre (1968-1979)*, Mercuriale du 4 novembre 1978, Kinshasa, CSJ, 1979.

17. MABANGA MONGA MABANGA, *Le contentieux constitutionnel congolais*, Kinshasa, Editions Universitaires Africaines, 1999.

18. MAMPUYA KANUK'A TSHIABO A., « **A propos du projet de Loi organique sur la Cour constitutionnelle »,** Quotidien «Le Phare», 9 avril 2008 .

19. MATADIWAMBA KAMBA MUTU, « De l'originalité du procès en cassation », *Justice, science et paix*, numéro spécial, Kinshasa, juin 2004.

20. MBOYO EMPENGE EA LONGILA B.B., «La mégarde des modèles de constitutions euro-occidentales et l'élaboration d'une constitution zaïroise de développement véritablement intériste», *Annales de la Faculté de Droit*, vol.XXV, Kinshasa, PUZ, août 1996.

21. MPONGO BOKAKO BAUTOLINGA E., « Le contrôle de constitutionnalité des lois sous l'Acte constitutionnel de la Transition du 9 avril 1994 », *Annales de la Faculté de droit*, vol.XXV, Kinshasa, PUZ, août 1996.

22. NGONDANKOYNKOY-ea-LOONGYA, «De l'organisation de la Cour constitutionnelle congolaise : le constituant de 2006 induit-il le principe d'une organisation décentralisée de la nouvelle juridiction constitutionnelle », *communication lors de Journées des réflexions sur la mise en place des ordres juridictionnels prévus par la Constitution du 18 février 2006*, Faculté de Droit, Université de Kinshasa, du 29 au 31 janvier 2009, inédit.

23. NYABIRUNGU Mwene SONGA, *Traité de droit pénal général congolais*, Kinshasa, Editions Universitaires Africaines, 2007.

24. NYEMBO-Ya-LUMBU O., *La Constitution de la Troisième République est fédérale. Regard critique sur la «décentralisation»*, Kinshasa, Editions Universitaires Africaines, 2009.

25. PACTET P. et MELIN-SOUCRAMANIEN F., *Droit constitutionnel*, 25ème édition à jour, Paris, Sirey, août 2006.

26. VINCENT J., GUINCHARD S., MONTAGNIER G. et VARINARD A., *Institutions judiciaires. Organisation. Juridictions. Gens de justice*, 8ème édition, Paris, Dalloz, 2005.

27. VUNDUAWE te PEMAKO F., « Réflexion sur la validité de l'Acte constitutionnel de la transition au regard du compromis politique global et de l'Arrêt R.A. 226 de la Cour suprême de Justice », *Le Soft de Finance*, n°127, 2 mars 1993.

28. VUNDUAWE te PEMAKO F., «L'histoire constitutionnelle des actes ayant force de loi au Congo-Zaïre (1885-2005) », in Liber Amicorum Marcel Antoine Lihau, *Pour l'épanouissement de la pensée juridique congolaise*, Bruxelles, Brylant et Presse de l'Université de Kinshasa, 2006.

29. VUNDUAWE te PEMAKO F., *Traité de droit administratif*, Bruxelles, De Boeck et Larcier, 2007.

30. WASENDA-N'SONGO C., «Rapport entre contrôle de constitutionnalité et contrôle de légalité : pour quelle relation entre la Cour constitutionnelle et le Conseil d'Etat », *communication lors de Journées des réflexions sur la mise en place des ordres juridictionnels prévus par la Constitution du 18 février 2006*, Faculté de Droit, Université de Kinshasa, du 29 au 31 janvier 2009, inédit.

31. WETSH'OKONDA KOSO SENGA M., « L'arrêt de la Cour suprême de Justice n°R. CONST.112/TSR du 5 février 2010 sur l'OHADA », http://www.la-constitution-en-afrique.org/, 04 avril 2010.

32. WETSH'OKONDA KOSO SENGA M., « L'avis consultatif de la Cour suprême de Justice n° RL 10 du 13 décembre 2005 sur l'infraction politique : interprétation ou réécriture de la loi ? », *Les Analyses Juridiques*, Lubumbashi, n° 8/2006, janvier-avril, 2006.

33. WETSH'OKONDA KOSO SENGA M., « La définition des actes législatifs dans l'arrêt de la CSJ N° R.CONST. 51/TSR du 31 juillet 2007 à l'épreuve de la Constitution du 18 février 2006 », *Revue de Droit et de Science Politique du Graben*, n°5, juin 2008.

THE SUPREME COURT OF JUSTICE AS A CONSTITUTIONAL COURT. RESULTS IN THE FIRST FIVE YEARS UNDER THE REIGN OF THE CONGOLESE CONSTITUTION OF 18TH FEBRUARY 2006

By **BALINGENE KAHOMBO***

INTRODUCTION

The Constitutional Court established by the Constitution of 18 February 200698is not yet operational. It is the responsibility of the current Supreme Court of Justice (SCJ) to exercise its powers transiently99. It is nearly five years, from February 2006 to November 2010 since the Supreme Court has acted as a Constitutional Court. Therefore, it is timely to take stock of its judicial activity, especially since the first legislature of the Third Republic come to an end.

Has the court during the past five years performed its duties to its best? What judicial work is involved in the interpretation of the rule of law in the Congolese state?

In this regard, it should be pointed out that the Court has had to pronounce itself in an attempt to develop extensive case law, but in a questionable manner. The institution itself has not been spared criticism. Its "capacity" to play in its current status, the role of the Constitutional Court in future is doubtable. It also seems to have lost its credibility and legitimacy among litigants, in such a way that it does not inspire confidence at all; perceived as being biased and prejudiced, so that it no longer corresponds to the philosophies and rationale of constitutional justice, particular to resolve conflicts within the political class and protect minorities against the abuse of the majority[100].

However, this is not to say that its records have been entirely negative. Indeed, the court has also made good decisions whose legal relevance deserves review. We must therefore bear in mind the two sides of the coin to objectively assess its work. Hence why this paper is going to demonstrate, first, that the shortcomings of the Supreme Court of magistracy led to the loss of confidence in the constitutional court (I), but, on the other hand, its judicial work remains a legal and academic windfall, contributing to jurisprudential progress, albeit limited, in the elaboration of the Congolese rule of law (II).

I. LOSS OF CONFIDENCE IN THE CONSTITUTIONAL COURT: ANALYSIS

The experience of nearly five years shows that the **SCJ** is a very common jurisdiction. However, its credibility with litigants has been substantially reduced for several reasons.

* Teaching assistant at the University of Goma: PhD student in law at the University of Goma, magistrate appointed to the rank of deputy public prosecutor. ***Tel. : +243994194466 ; e-mail :*** *internationaliste82@yahoo.fr*

98 Article149, paragraph 2, and 157.

99 This transitional period began in 2006, but it is unclear what may be its *terminus ad quem*, as issues of political and material order seem to arise. First, politically, given the need for the adoption and promulgation of the Organic Law of the Court resurrected and how the appointment of its new members themselves has been politicized. Then materially, since the establishment of such a distinguished judicial institution requires adequate infrastructure and financial means.

100 L. FAVOREU, « Brèves réflexions sur la justice constitutionnelle en Afrique », in G. CONAC (dir.), *Les cours suprêmes en Afrique. II. Jurisprudence : droit constitutionnel, droit social, droit international, droit financier*, Paris, Economica, 1989, p.43.

Firstly, it was observed that its institutional architecture is, in all likelihood, inadequate t to deal with duties of a constitutional court. Although as will be demonstrated in this paper, the court has dealt

I.1. The inappropriateness of the institutional architecture of the Supreme Court of Justice to the duties of a constitutional court

There exists a cause and effect relationship between the role that the Court was intended to play and its institutional architecture or composition.. Technically, the SCJ remains a court of law whose mandate is was spelt out since 1982, following the constitutional revision of 1974[101] and 1978[102]

This important period was unfortunately dominated by a dictatorial political regime, which probably had no interest in having, at its head, a powerful SCJ, to judge the actions of those in power politically. Nevertheless, especially since the year 2006, a new legal order, now on a politically democratic way, was installed. Meanwhile, the SCJ, expected to judge the action of the new political institutions, has unfortunately undergone no fundamental reform in its organization and mode of operation. In fact, the argument that it would present institutional weaknesses which would make it inefficient in temporarily filling the delicate mission entrusted to the Constitutional Court, does not seem unfounded to warrant special attention.

I.1.1. The delicate mission of the Constitutional Court

Here, it is not about revisiting the powers of the constitutional judge[103], but to actually see what sanctions are linked to the achievement if its primary mission of monitoring the movement of political power. This is a delicate task, because one can imagine that the judge is regarded as the political rival and the latter might, for fear of the government reprisal[104], prove unwilling to submit to the dictates of its decisions.

The sanctions that relate to the accomplishment of the mission of the Constitutional Court are varied. However, it all depends on the jurisdiction exercised. We will limit ourselves here to two aspects[105]: assessing constitutionality and electoral disputes.

On the question of Constitutionality, the Constitution of February 18, 2006 provides that "Any act declared incompatible with the Constitution is null and void (Article 168, paragraph 2). Logically, this sanction is valid only for an act already in force. This void corresponds to the sanction of a constitutional complaint. What happens then to the penalty attached to constitutional review[106], where the mechanism is of a completely different nature?

---

101 Révision portée par la Loi n° 74-020 du 15 août 1974.

102 Révision portée par la Loi n°078-010 du 15 février 1978

103 These functions are the subject of a separate study entitled: "L'originalité de la Cour constitutionnelle congolaise ressuscitée".

104 P. PACTET et F. MELIN-SOUCRAMANIEN, *Droit constitutionnel*, 25ème édition à jour, Paris, Sirey, août 2006, p.75.

105 Let us not forget one important case that orders made under section 145 of the Constitution, which states: "In case of emergency or martial law, the President of the Republic takes, by orders deliberated in Council of Ministers, the necessary measures to cope with the situation. These orders are, upon signature, subject to the Constitutional Court, all other business, declare whether or not they purport to this Constitution. "If they deviate from the Constitution, they can be implemented (see Article 52 *in fine* of the amended proposal Organic Law of the Constitutional Court). It is clear that this contrasts with the statement of Professor Vunduawe, that these orders "the Head of State may amend the Constitution *de facto*" Read, F. VUNDUAWE te PEMAKO, «L'histoire constitutionnelle des actes ayant force de loi au Congo-Zaïre (1885-2005) », in Liber Amicorum Marcel Antoine Lihau, *Pour l'épanouissement de la pensée juridique congolaise*, Bruxelles, Brylant et Presse de l'Université de Kinshasa, 2006, p.281.

106 Do not confuse this constitutional review mechanism (Article 216, sections 124, 139 and 160, paragraph 1, 2 and 3 of the Constitution) with that of the constitutional complaint (Article 162, paragraph 2, of the Constitution). See our separate study entitled "The originality of the revived Congolese Constitutional Court."

Indeed, it is necessary to explain the answer. When there is an international treaty, no problem arises. The treaty can be ratified or approved, if it contains a clause contrary to the Constitution or revised it in accordance with Article 216.On the other hand, regarding the other acts subject to constitutional review (organic laws, ordinary laws, possibly constitutional laws, internal rules of parliamentary chambers of Congress, the Independent National Electoral Commission (INEC) and the Higher Council of Audiovisual and Communication (CONSAC), the Constitution is silent. In any case, it seems logical to consider that a law declared either unconstitutional may not be promulgated, or implemented.

However, although not in the Constitution, there is also a possibility for a judge to order the severance of the sanctions envisaged above which is without doubt in comparative law. The severance is also provided for in Articles 22 and 23 of Ordinance No. 58-1067 of 7 November 1958 Organic Act of the French Constitutional Council. It is also planned in Benin where the Constitutional Court has once made a pronouncement in its **Ruling DCC 05-069 of 27 July 2005.** In that case, the Court was asked to rule on the constitutionality of the Act on special rules for the election of the President of the Republic. The Court decided that the articles in question could not be separated from the whole Act.[107]. On the contrary, it can be deduced that there was no room, to apply the rule of severability.

In general, where texts, are unconstitutional, they are **inseparable** from the entire document. Its anti-constitutionality and sanction affect the whole text. Contrary to this hypothesis, only the provisions being challenged are applicable, by either invalidity, or by non-enactment, or simply by the non-implementation. These are solutions that are provided in the proposed Organic Law of the Congolese Constitutional court[108], as amended by the Commission of the National Assembly PAJ. Separation does not, however, work when it comes to the constitutionality of international treaties, since it is clearly excluded by section 216 of the Constitution cited above.

Regarding electoral disputes, especially on the results, the Constitutional Court is not the judge of the legality of electoral transactions[109].Therefore the mere violation of the law does not necessarily lead to the cancellation of the election result[110].It adjudicates on the accuracy and fidelity to the election result. This means that the Court has a choice, basically, between the confirming and terminating the elections. The latter penalty may be imposed only if the irregularities had a decisive influence on the result. Otherwise, even including cases of clerical error, the Court confirms the election, subject to correction of the incorrect results[111]. Thus, the decision of the Court may confer or withdraw political power. It can also destroy the action of political power by preventing the production of legal effects of the actions undertaken. It is precisely at this level where we see the crucial role that the judge can play in constitutionalism and upholding the rule of law. A court like the current CFS can have difficulties, because of its institutional shortcomings, to effectively perform such a delicate mission in more than one way.

---

107 Article 4 de la Décision DCC 05-069 du 27 juillet 2005

108 Proposal by the Hon. Mohamed Bule Gbangolo Basabe.

109 E.R. TINKAMANYIRE Bin NDIGEBA, *Le rôle du juge électoral*, audience solennelle et publique de rentrée de la CSJ, discours du Premier Président, Kinshasa, 2008, p.17.

110 *Ibidem*. Read also KATUALA KABA KASHALA, *La jurisprudence électorale congolaise commentée*, Kinshasa, The Carter Center, RD Congo, novembre 2007, p.33.

111 Lire article 75 de la Loi n°06/006 du 09 mars 2006 portant organisation des élections présidentielles, législatives, provinciales, urbaines, municipales et locales.

I.1.2 Institutional shortcomings of the current Supreme Court of Justice

The current SCJ is organized and divided into three sections[112]: Judicial, Administrative and Legislation divisions. With the exception of the latter, each section includes one or more sub-sections. Each bench consists of three judges, while each section in joint session, except that there are five judges sitting during joint sessions[113]; and seven sitting judges during the Court session when all the sections are combined.

The judicial division practically plays the role of a Court of Cassation, while the administrative division plays the role of Advisor to the State. The legislation section provides advisory opinions on draft or proposed legislation or regulatory actions that are submitted, as well as the difficulties of interpreting texts (Article 159 of COCJ). All sections of the Court work concurrently during constitutional matters[114].

It follows that the SCJ alone focuses on, the court litigation of judicial, administrative and constitutional law. In this regard, Matadi Nenga Gamanda, a lecturer, considers that such concentration is not a problem in itself because of the small number of Administrative and constitutional complaints[115].However, Professor Mboyo Empenge argues that this concentration of power in the *"hands"* of the SCJ "*remains a serious error and prejudicial to the administration of fair, safe and proper administration of justice"*[116]. Professor Kabange Ntabala agrees and believes that the separation of judicial, administrative and constitutional disputes is beneficial for the handling of both qualitative and quantitative cases[117].

For our part, we believe that these last two points of view are more defensible than the former. The opinion of Matadi Nenga Gamanda does not seem convincing because it seeks to exclude, from the minimization of the number of submissions to the SCJ under the administrative or constitutional disputes. The disadvantages related to the internal organization such as its small, records do not deserve to have a qualitatively adequate attention. In addition, this minimization is not justified. On the one hand, the explosion of the constitutional jurisprudence since the transition from 2003 to 2006 is further proof, , that administrative and constitutional disputes will not cease to grow, given the dynamics of human rights and the new territorial decentralization of the DRC.

The first problem that arises from the internal organization of the SCJ is the lack of expertise in the handling of cases despite a boasted from the 2006 Constitution. The same judges adjudicate all cases brought before other Courts. Being predominantly drawn from private practice, as noted by Professor Mampuya[118], these judges do not necessarily have the

---

112 Read articles 54, 55 et 56 de l'Ordonnance-loi n°82-020 du 31 mars 1982 portant Code d'organisation et de la compétence judiciaires (COCJ), telle complétée par l'Ordonnance-loi n°83-009 du 29 mars 1983

113 Aux termes de l'article 118 de l'Ordonnance-loi n°82-017 du 31 mars 1982 relative à la procédure devant la CSJ, « Le dossier est examiné par les magistrats de la Cour suprême de Justice et du Parquet général de la République réunis en assemblée mixte ; toutefois l'avis ne sera valablement donné qu'à la majorité des magistrats présents à la séance ».

114 However, subject to what the law provides for election of 09 March 2006, which provides that the LSB statue three judge at least in electoral matters (Article 27 in fine and 74, penultimate paragraph).

115 MATADI NENGA GAMANDA, Droit judiciaire privé, Louvain-La-Neuve et Kinshasa, Brylant-Academia s.a, Droit et Idées nouvelles, 2006, p.501.

116 B.B. MBOYO EMPENGE EA LONGILA, «La mégarde des modèles de constitutions euro-occidentales et l'élaboration d'une constitution zaïroise de développement véritablement intériste», Annales de la Faculté de Droit, vol.XXV, Kinshasa, PUZ, août 1996, p.172.

117 KABANGE NTABALA, «Quelle constitution pour la Troisième République face aux réalités zaïroises ? », Annales de la Faculté de Droit, vol. XXV, Kinshasa, PUZ, août 1996, pp.98-99.

118 A. MAMPUYA KANUK'A TSHIABO, «**A propos du projet de Loi organique sur la Cour constitutionnelle »,** Quotidien «Le Phare» du 9 avril 2008 ; article rapporté par S. BOLLE, «Quelle Cour constitutionnelle en RD du Congo? », http://www.la-constitution-en-afrique.org/, 16 avril 2008

competence in adjudicating public law issues. Therefore, bad habits develop; which makes the court prone to negative reviews that lend credibility.

The second problem comes from the backlog of cases, especially given the small number of judges. The former First President of the SCJ, Roger Etienne Tinkamanyire Ndigeba Bin (2008-2009), openly admitted this in his speech at the solemn public hearing re-entry court of the High Court in October 2008[119].This disadvantage can easily be overcome; by new appointments, thereby increasing the number of judges to that court, especially when the texts do not allow him[120].

The last problem, and certainly the most radical of our point of view is the lack of independence of the Court vis-à-vis the political system. First, judges are subject to the status[121]of magistrates as at10 October 2006, which means they are simply appointed and dismissed by the President of the Republic on recommendation of the **SCJ**. Such status seems to be inconsistent with the high level of the institutional position of a constitutional court, the role it should play in the state. It results in instability of judges. This problem appears even more chronic, in the sense that, within less than four years, in addition to general appointments, the SCJ has been headed, in succession, by the first three presidents. The **permanence** or security of tenure of judges is not recognized. Yet for the United States, although the Supreme Court judges are appointed by the President of the Republic, with the approval of the senate, the opportunity to resign at any time is no longer appropriate. Given that these judges are appointed for non-renewable terms of nine years and their termination before the expiry of the mandate may take place, besides reasons such as resignation, death or complicated **impeachment** procedure[122].This gives a great "**judicial power**" and a clear institutional independence to the judges of the U.S. Supreme Court. However, in the DRC, the instability of the judges encourages them to let themselves dragged around in laps of political power, for they want to retain their permanent positions. Thus, the doctrine continues to condemn the fact that the SCJ often behaves like "*a judicial chameleon that very often switches to political colors of the hour*"[123], *because of its isolation in a logic of appeasing political authorities*.[124]

In addition, there is the abuse of senior magistrates, whose survival depends ultimately, if not by the "charity of individuals"[125] at least their poor remuneration allocated by political power.

In these circumstances, how can the SCJ avoid criticism and accusations of bias, especially from members of the political opposition? We saw this elsewhere in November 2006, with the exception of some politicians, the continued challenge of the results of the second round of the presidential election on October 29, 2006, having opposed Jean Pierre Bemba, the Union pour la Nation (UN) candidate, to Joseph Kabila Kabange, the outgoing President, on behalf of the Alliance for the Presidential Majority (AMP). Not only has the court

---

119 E.R. TINKAMANYIRE Bin NDIGEBA, *op.cit.*, p.12

120 L'Ordonnance-loi n°82-020 du 31 mars 1982 portant COCJ ne fixe pas un *numerus clausus* des juges à la CSJ. Par conséquent, ce nombre doit être variablement fixé, selon les besoins, par le Président de la République, qui nomme et révoque les magistrats

121 Loi organique n°06/020 du 10 octobre 2006 portant statut des magistrats.

122 E. ZOLLER, *Grands arrêts de la Cour suprême des Etats-Unis*, Paris, PUF, 2000, pp.21-23.

123 J.-P. KILENDA KAKENGI BASILA, *L'Affaire des 315 magistrats de Kinshasa, une purge néo-mobutiste*, Paris, L'Harmattan, p 145, cité par M. WETSH'OKONDA KOSO SENGA, « L'arrêt de la Cour suprême de Justice n°R.CONST.112/TSR du 5 février 2010 sur l'OHADA », http://www.la-constitution-en-afrique.org/, 04 avril 2010.

124 *Idem*, p 146.

125 The phrase is a euphemism for, basically, it can take a form that affects the illegality, such as corruption. It seems that for the High Court, there is a day dedicated to this "charity of individuals that would be called the "Good Friday".

pronouncement been set ablaze by supporters of candidate Bemba, but the ruling of **RCE. PR.009 of 27 November 2006**[126]**,** resulted in the proclamation of the outgoing President, for the ruling of **Judgment R.E.006 of 27 November 2006**, as the winner of the contested election with 58.03% of votes cast. It involved in a highly tensed atmosphere, a sharp contrast to the serenity that ought to characterize the outcome of legal proceedings. In addition, we must deplore the elementary jurisprudence of the Court, especially since it realized that they can cause a real constitutional crisis, as was precisely the case in 2007.

I.2. The faltering jurisprudence of the Supreme Court of Justice

Such faltering was predictable. As demonstrated, the SCJ rhymes rather with an environment rather than a constitutional court established under the rule of law. It is therefore appropriate to illustrate this theory by giving a sample of a few mistakes the Court has made during the handling of recent court cases in public law, before returning to the institutional crisis that occurred in 2007 following a challenge to its rulings on Proceedings of the election of members of parliament.

I.2.1. The erring ways of the Court in the recent trials of public law

Several criticisms were made against the SCJ, especially about the broad definition that it gave to the concept of "l*egislative acts*"[127], and the delays in the delivery of its rulings, especially in electoral matters.

Critics have also fused on the interpretation, of its ruling of **R.CONST.051/TSR of 31 July 2007** pronounced in the case known as Treasor Kapuku Ngoy, on the inauguration of a provincial governor and the start of his term in office.[128]

On its part, the Court could only be effective as soon as its program of action was approved by the provincial assembly though a governor already invested by a presidential order (Article 80 of the Constitution).[129] There was strictly a literal interpretation of Article 198, paragraph 6, of the Constitution, which states: "*Before taking office, the Governor submits its agenda to the government of the Provincial Assembly.*"

Nevertheless, in constitutional law, inaugurations by the President of the Republic is considered authorization for the governor to form his government[130].It is from that moment on that he acquires, albeit in a restrictive way, the power to exercise his duties. Otherwise, it would be difficult to appreciate how a governor who is not yet in power would fall within the framework of governance, and establish provincial government: identification of political figures and especially their appointment of the by-laws.

In addition, once appointed, the Governor presents his agenda, before the Provincial Assembly. Under the constitution, it is investing, not the Governor because he cannot

---

126 It is the decision by which the Court ruled on the election protest on the merits, and in which it rejected all requests by the Mouvement de Liberation du Congo (MLC), the applicant.

127 Our separate study on "The originality of the revived Congolese Constitutional Court"

128 See J.-L. ESAMBO KANGASHE, *La Constitution congolaise du 18 février 2006 à l'épreuve du constitutionnalisme. Contraintes pratiques et perspectives*, thèse de doctorat en droit public, Université de Paris 1-Panthéon-Sorbonne, Université de Kinshasa, présentée et soutenue publiquement le 17 juin 2009, pp. 120-123 ; O. NYEMBO-Ya-LUMBU, *La Constitution de la Troisième République est fédérale. Regard critique sur la «décentralisation»*, Kinshasa, Editions Universitaires Africaines, 2009, pp.133-135.

129 CSJ, 31 juillet 2007, R.CONST.051/TSR, inédit, deuxième feuillet.

130 O. NYEMBO-Ya-LUMBU, op.cit., p.134.

logically be a double-nomination, but rather the provincial ministers (Article 198, paragraph 7). It follows that that provision and paragraph 6 of section 198 of the Constitution cited above complement each other and should not be interpreted, therefore, in isolated from one another. This was precisely the mistake made by the SCJ. Thus, the motion of no confidence that it held against the Governor Treasurer Kapuku Ngoy was premature and therefore unconstitutional.

However, we must now focus on another aspect of the problem related to the procedure, to demonstrate that the Court has struggled, in recent years to divorce itself of the tendency to "*privatize public law trials*". Indeed, a public law trial (constitutional or administrative) is a lawsuit against an act, unless the applicant also assumes, in addition to the cancellation of the said act and its effects, the allocation of his benefit or benefits other forms of compensation for the damage suffered. It is only in this case, however exceptional, that the trial becomes full litigation. Thus, in public law, there is, in principle, no plaintiff and defendant in private law. Only the petitioner and the contested act that will appear before the judges.

However, the Court does not seem to have understood this well. One notice, for example, that in matters of disputed elections, the defunct Independent Electoral Commission (IEC) was questioned, regarding its duty to declare the result of the provisional ballot whose cancellation was being sought.

We can take for example the famous MLC case, although the SCJ decided the matter as a judicial court[131], rather than a Constitutional Court. In its ruling **RCE/ADP/021 of 21 March 2007[132],** in which it made the final proclamation of Andre Kimbuta Yango, the candidate on behalf of the MPA, elected Governor of the Province of Kinshasa City, and the Court is attempting to correct this. It specified that "*the Independent Electoral Commission was not a party to the trial of election disputes*"[133]and its role in such an instance is simply to provide, where necessary, expertise to expertise to the trial courts[134].But it immediately retreats into confusion for other aspects of the case.

Admittedly, the one making the appeal, "*Movement for the Liberation of Congo (MLC)*", was the applicant in this case. However, the court should not have referred to Andre Kimbuta Yango, the candidate whose election by the MLAs was challenged, the **respondent; the** party won the case in the first degree. In public law, this does not apply because the term gives the impression that the application by the MLC was directed not against the act of proclaiming the IEC provisional results of the election of the governor of the Province of Kinshasa City, but rather against the candidate Andre Kimbuta Yango. Also, is it not surprising that the Court has summoned both parties, represented by their lawyers, in order to conclude and argue, almost as in a private lawsuit? Everything indicates that the Court was dragged into such an error attributed to misinterpretation of the **adversarial principle**. In public law, this principle means that the judge should consider, in parts, the arguments for and against the motion before him, but not in the presence of the parties and counsel appearing before him.[135] At least, it is accepted that interested parties in such cases may, if necessary, be invited to enlighten the religion of the Court, without being nevertheless considered as parties in the trial.

---

131 The same criticism applies, however, when the SJC served as Constitutional Court. Just see how IT handled the case challenging the result of the second round of the presidential election.

132 This ruling already confirms the position taken by the court in its various rulings of 09 February 2007, in particular the rulings RCE 010 and RCE 016, declaring an appeal by the IEC inadmissible for lack of standing. See KATUALA KABA KASHALA, *op.cit.*, pp.124-125 et 135-136.

133 *Idem*, p.246.

134 *Ibidem*.

135 A. MAMPUYA KANUK'A TSHIABO**, op.cit.**

Instead of giving the adversarial principle that connotation of public law, the court did, however, make an application such as in private law courts. The analysis of the former First President of the CSJ, Roger Etienne Tinkamanyire Bin Ndigeba corroborates this assertion. He explains that the Court sought not to impose default judgments against parties interested in cases submitted to him in order to avoid any dispute by failing to exercise remedies not provided by the law[136].

Unfortunately, we noticed that the SCJ received extensively before it third party opposition, since this extraordinary appeal[137] not anticipated by the electoral law. The previous explanation of the former Chief Justice, Roger Etienne Tinkamanyire Bin Ndigeba, proves so eloquently. Moreover, it would be ridiculous to assume that the legislature had not foreseen such a third opposition; otherwise we might ignore the capacity in which the SCJ ruled on various cases of electoral disputes submitted to it.

First, it follows from the foregoing that the SCJ was seized as a court of appeal, particularly with regard to appeals against the election results disputes within the jurisdiction of courts of appeal in the first degree[138]. This problem does not concern us in this study. The SCJ, acting as a Constitutional Court ruled on the case of challenges to national, legislative and presidential elections. This is precisely where the shoe pinches, because the Court had received a year earlier its third opposition, whereas, obviously, this action was prohibited by Article 168, paragraph 1 of the Constitution, under which "*The rulings of the constitutional court are not subject to appeal ....*" In our opinion, the prohibition affects any remedy that puts into question the authority of *res judicata* in these cases and not the appeals on interpretation or concerning the correction of clerical errors that were detected.

In addition, for specific litigation outcomes, this remedy seems inconsistent with Article 74 of the Elections Act of 09 March 2006 (paragraph 3), which imparts on the SCJ, including when it serves as that appellate court within two months to make its rulings, unless the period is reduced to seven days for the election of the President of the Republic. However, these delays are very short given the volume or the size of the backlog. They also have an indicative value with respect to the judge, as there is no sanction if they are actually exceeded. As a result, there will therefore be no commission of any irregularity on the procedure, when the deadline is based on the requirements of a sound judicial administration. But when the Court issues its ruling, the case is closed. The third objection is, from this moment, incompatible with the afore-mentioned Article 74 of the Elections Act, since the Court can not reverse a case following the introduction of this extraordinary appeal, without taking the illegal risk of awarding itself a new deadline.

What then should we infer from this behaviour of the SCJ, except perhaps in bad faith or counterfeiting procedures in favour of certain defendants? We agreed that, for our part, these legal errors were behind the protest of rulings of the High Court in 2007 and thus caused a constitutional crisis between the judiciary and the National Assembly.

---

136 E.R. TINKAMANYIRE Bin NDIGEBA, op.cit., p.10.

137 It is provided for in Article 84 of Decree-Law No. 82-017 of 31 March 1982 relating to proceedings before the JSC, but only before its administrative section. By definition, the third opposition is a special remedy which entitles a third party not called to account, to oppose a court decision which is prejudicial to his rights, asking the court that made its withdrawal or its reformation. See MUKADI BONYI et KATUALA KABA KASHALA, Procédure civile, Kinshasa, Editions Batena Ntambua, 1999, p.164; MATADI NENGA GAMANDA, op.cit., p.479

138 Litigation in the election of MLAs and provincial governors (article 74 in fine de la Loi n°06/006 du 09 mars 2006 portant organisation des élections présidentielles, législatives, provinciales, urbaines, municipales et locales).

I.2.2. The institutional crisis of 2007 caused by the challenged rulings of the Supreme Court of Justice delivered following the dispute of the parliamentary elections

There exists a gap between the time of legal validation of the mandate of members of parliament and that the announcement of final results at the national assembly by the SCJ, acting as the Constitutional Court. Under Article 114 of the Constitution, the first time occurs during the special session of the National Assembly, held, according to the law, a fortnight after the announcement of provisional results by the IEC. However, the second time will take place only after the court has exhausted all contentious cases submitted to it, normally within two months from referral. As soon as the final rulings of the Court shall be forwarded to the parliamentary chamber, it leads to two things: the validation of the parliamentary positions for some and defeat for others.

The 2007 crisis arose from the resistance of a part of the National Assembly to obey the decisions of the SCJ, which resulted in the invalidation of a group of 18 members of parliament, including the former Speaker of the Provisional Committee. The complaints against the Court's having ruled on disputes submitted to it outside the statutory period and having accepted, in many cases, the reversal of its own judgments as a result of the exercise before its third opposition . The challengers concluded that the rulings of the SJC was "*unconstitutional and illegal*", the National Assembly had to reject them because of discretionary powers in the validation of mandates of its members. An *ad hoc* commission was even formed to examine each case, their rulings and to propose to the plenary of the National Assembly the verdict of each of them[139].

This situation was not unique; and not the first time that such rulings of the SCJ have been the subject matter of court disputes. In fact, even as we place ourselves in another context, it is interesting to recall that, under the influence of the Second Republic, the Central Committee of the Movement Populaire de la Revolution (Party-State) could break through its disciplinary committee, the judicial decisions curved on matters already decided upon[140]. Subsequently, such a jurisdiction belonged to the former Department of rights and liberties established by Ordinance No. 86-268 of 31 October 1986[141].One bestows the political dictatorship on the judiciary, that which had been robbed of all power.

Without going into details of this case, there is reason to rejoice that the force of law ended up prevailing over politics, so that the 18 members of parliament were eventually removed from office. The position of the plenary of the National Assembly drew its support primarily from sections 149 and 151 of the Constitution. Section 149 provides that the judiciary is independent of the legislative and executive powers (paragraph 1); while Article 151 provides that "*The legislature can not rule on jurisdictional disputes, or modify a court order nor oppose its implementation* "(paragraph 2).

---

139 E. BOSHAB, « Le principe de la séparation des pouvoirs à l'épreuve de l'interprétation des arrêts de la Cour suprême de Justice par l'Assemblée nationale en matière de contentieux électoral », in G. BAKANDEJA Wa MPUNGU, A. MBATA BETUKUMESU MANGU et R. KIENGE-KIENGE INTUDI (dir.), Participation et responsabilité des acteurs dans un contexte d'émergence démocratique en République Démocratique du Congo, Actes des journées scientifiques de la Faculté de Droit de l'Université de Kinshasa 18-19 juin 2007, Kinshasa, PUK, 2007, p.23.

140 *Idem*, p.22.

141 BALINGENE KAHOMBO, «La protection des minorités ethniques en République Démocratique du Congo. Entre rupture et continuité des ordres constitutionnels antérieurs», *Librairie africaine d'études juridiques*, vol.2, avril 2010, p.17 ; NGONDANKOY NKOY-ea-LOONGYA, *Droit congolais des droits de l'homme*, Louvain-la Neuve, Bruylant-Academia, 2004, pp.374-375 et 390.

Moreover, the crisis of 2007 allows us to lift, *de lege ferenda*, the problem of the prohibition of appeals against decisions of the Constitutional Court, pursuant to Article 168, paragraph one, of the Constitution. Is this a fair option and based on terms of the positive law?

As fair option, it deserves no further comment, except to refer to the legal problems of the group of 18 members of parliament removed from office. Their appeals could not be heard following how they argued against the allegedly erroneous rulings of the SCJ. A proposal in terms of positive law then it does not appear either, as it is true that this option is contrary to the principle of a higher court, which is enshrined in international law of human rights, as a rule not subject to dispensation[142].The Constitution of February 18, 2006 also recognizes explicitly, in Article 61.5, where it states: "*Under no circumstance, even when the state is in session or state of emergency has been declared ... it cannot be derogated from the fundamental rights and principles listed below*:5 *the rights of defense and the* ***right of appeal.***" But it may be objected that the non-derogable principle of a two-level jurisdiction would be limited to criminal matters, as is clear from the international case[143],so that section 168 of the Constitution would pose no problem for the rulings of the Constitutional Court.

This argument is unfounded. First, the Constitutional Court also has the power to penalize[144]. It considers the President of the Republic and the Prime minister[145]as well as their co-authors and accomplices in the first and last resort, under Section 164 of the Constitution. Secondly, Article 61.5, above, has not drawn a distinction between the criminal matters and the rest. That is why we are convinced it provides, in terms of protection of human rights, a guarantee that is more extensive than international law. Nothing does, indeed, give a different interpretation, because it constitutes in our view, a special provision, which must be narrowly construed. It is clear that it violated, flagrantly, by section 168 of the Constitution. In addition, this last article really encourages discrimination, in that it prohibits double degree of jurisdiction in matters where other people are allowed to do.

For all these reasons, it is fitting that it should undergo an amendment in the name of justice and coherence of the standard law. In this context, Professor Ngondankoy has already foreseen, given the imperative of respect for this second hearing, a possible "*decentralized organization*"[146] of the Constitutional Court, in giving it a first-level structure this that of appeal. The proposal is scientifically defendable, but hardly acceptable for budgetary reasons. Maybe the design should simply introduce into the organization an appellate Court, as to what the legislature has set for the Children's court[147].

Anyway, despite its current shortcomings, the SCJ, as a transitional constitutional court, has also developed a case whose relevance will, for a long time, serve as a work of reference both academically and practically.

---

142 Le Tribunal pénal international pour l'ex-Yougoslavie l'a reconnu en 2001, bien que ce principe, posé à l'article 14 (5) du Pacte international relatif aux droits civils et politiques du 16 décembre 1966, ne figure pas expressément parmi les règles insusceptibles de dérogation prévues à son article 4 See TPIY, *Arrêt confirmatif relatif aux allégations d'outrage formulées à l'encontre du précédent conseil, Milan Vujin,* IT-94-1-A-AR77, 27 février 2001, 4ème attendu.

143 *Ibidem.*

144 Cf. *supra*

145 On the statutes of these criminal cases of these two political authorities See lire NYABIRUNGU Mwene SONGA, *Traité de droit pénal général congolais*, Kinshasa, Editions Universitaires Africaines, 2007, pp.237-242.

146 NGONDANKOY NKOY-ea-LOONGYA, « De l'organisation de la Cour constitutionnelle congolaise : le Constituant de 2006 induit-il le principe d'une organisation décentralisée de la nouvelle juridiction constitutionnelle », *communication lors de Journées des réflexions sur la mise en place des ordres juridictionnels prévus par la Constitution du 18 février 2006*, Faculté de Droit, Université de Kinshasa, du 29 au 31 janvier 2009, inédit, pp.6-7.

147 Article 84 et 87 de la Loi n°09/001 du 10 janvier 2009 portant protection de l'enfant.

II. THE PERSISTENT UTILITY OF THE WORK OF THE SUPREME COURT OF JUSTICE IN THE PROMOTION OF THE RULE OF LAW

Ideally, there are two trends worth noting here. On one hand, the SCJ case law has reflected boldness of the constitutional court and on the other hand marked real progress in the elaboration of the Congolese state law.

II.1. The boldness of the jurisprudence of the constitutional court.

This boldness is manifested through the definition of some basic concepts of public law and in the establishment of the principle of continuity and regularity of public services in constitutional law.

II.1.1. The definition of certain cardinal notions of public law

Two notions have particularly attracted our attention: the rights to a defense and the concept of calculating an absolute majority.

It should be noted however that this second notion is not in fact the work of constitutional judges, but rather, that of the SCJ ruling on electoral appeals[148]. It concerns, with full force, the policy area of constitutional judges and must be articulated. And, anyway, as we have seen, these are the same judges who adjudicate in all cases submitted for consideration before the High Court.

It has defined the term *"absolute majority"* in its **Judgment RCE 014 of 16 February 2007**, delivered in the case of Mbatshi Batshia, whose election in the first round as governor of Bas-Congo was challenged by MLC on the grounds that no candidate had obtained an absolute majority of the 29 MLAs who participated in the voting. The candidate Mbatshi Batshia had, on behalf of the MPA, won 15 of the 29 contested votes, instead of an absolute majority of votes calculated at 15.5 votes, against 14 for his challenger MLC, Fuka Unzola.

Being a case of "the occasion makes the thief", the SCJ had to apply a cardinal principle in these terms: "*The calculation of the absolute majority differs depending on whether the number of votes cast is an even number or odd. In the case of an even number, the absolute majority is half plus one, while in case of odd number, the rule is that the majority are calculated using half the next lowest even number which it added a unit* "[149]. Applying this principle led the Court, after having declared unfounded the allegations of the MLC, to proclaim Mbatshi Bathia who had been elected in the first round, as governor of Bas-Congo.

This time, as the Constitutional Court, the CSJ outlined the concept of "*rights to defense*" in its ruling of **Judgment R.CONST.062/TSR of 26 December 2007**, pronounced in the case of Celestin Cibalonza Byaterana. It must, immediately, be noted that this principle is enshrined in Articles 19, paragraph 3, and 61.5 of the Constitution albeit not defined. In addition, Article 19 refers to the concept of "*right of defense*" in the singular, whereas Article 61.5 makes reference to the plural. This results in some discomfort in the use of this terminology, so that there is reason to wonder if it is a single right of defense or, rather, a set of rights.

---

[148] *Contra* D. KALUBA DIBWA, « Le constitutionnalisme congolais : de la démocratie électorale à la démocratie constitutionnelle », http://www.la-constitution-en-afrique.org/, 26 juillet 2010. Il s'agit d'une contribution présentée lors de Journée scientifiques de la Faculté de droit sur le thème général : cinquante ans de constitutionnalisme en RDC, du 24 au 26 juin 2010. L'auteur souligne, à tort, que cette œuvre est à mettre au crédit du juge constitutionnel.

[149] KATUALA KABA KASHALA, *op.cit.*, p.236

It must also be noted that the Court in fact adopted the same concept above in both genres. In its definition, it stated that the rights of defense was *"all the rights belonging to **a person** who is a litigant or outside any trial, which is the subject of an adverse action with the nature of a penalty or consideration of the person"*[150].One of the merits of this definition is clarifying the scope of the rights of defense. They are not limited to criminal matters, as one might be tempted to think, following the merger of Article 19 cited in defense of which everyone has the right to benefit from all levels of the criminal proceedings. Instead, defense rights apply to all cases before a judicial procedure as part of a *"trial"*. From our point of view, the term trial should be read here in its broadest terms possible, to include both judicial settlements as those relating to arbitration. Additionally, outside this specific context, the rights of defense are in order, provided that the one who invokes them has been accused. However, it is unclear what the Court meant when it said the same is true when a person has had an *"adverse action taken in consideration of his person"*, outside any sanction.

The other merit is that the Court emphasized, in its definition, a group dimension, plural, much like the rights of defense under international law[151].

Unfortunately, this definition has a weakness, since the Court had not established its material consistency, that is to say, the group of rights referred to as the rights of defense. At least, it says, these rights greatly make up *"the contradictory principle"*[152]. In its ruling of **R.CONST.078/TSR of 04 May 2009** delivered in the case of José Makila Sumanda, the Court extended the content of its definition, stating that respect for human rights also meant the right for a person, adding, *"or of an institution"* to the information about complaints made against them.[153] On this latest addition, we noted that this constitutes a further enlargement of the rights of defense. This is a great innovation, because the provisions of Articles 19 and 61 of the Constitution, clearly, only targeted the rights of persons, yet from now hence forth also applied to institutions. The problem is, therefore, to know which institution the High Court was referring to.

From our perspective, they are those political bodies involved in the democratic context of the implementation process of the political responsibility of governments. This is called National Government or provincial government, against which motions of censure can be adopted by the National Assembly and provincial legislatures respectively (Articles 146, 147 and 198 of the Constitution).

The reason that the Court had to broaden its definition developed in its Judgment of 26 December 2007 came from a misinterpretation it might have felt in the Celestine Cibalonza Byaterana case. The former governor had faced a censure motion passed by the Provincial Assembly of Sud-Kivu on 12th November 2007, winning with his entire government. By definition, under Congolese law, unlike a confidence motion that is directed against an individual member of a government, the motion of censure, targets an institution. Therefore, the former Governor Cibalonza had the right to claim the benefit of the rights of defense, knowing that the person was, from a legal perspective and theoretical foreign to that motion. At the time, the error of the Court, it seemed, was to have accepted the rights of defense to a person and yet the sanction of the provincial government, then declared unconstitutional, rather concerned an institution to which these rights, given by the court, were simply inapplicable.

---

150 CSJ, 26 décembre 2007, R.CONST.062/TSR, *inédit*, cinquième feuillet.

151 Read L. SINOPOLI, « Les droits de la défense », in H. ASCENSIO, E. DECAUX et A. PELLET (dir.), *Droit international pénal*, Paris, Editions A. PEDONE, 2000, pp.791-805.

152 CSJ, 26 décembre 2007, R.CONST.062/TSR, *op.cit.*, cinquième feuillet.

153 CSJ, 04 mai 2009, R.CONST.078/TSR, *inédit*, sixième feuillet.

Besides the principle of due process and the right to information about the complaints made against the accused, the rights of the defense would also include all rights associated with all the guarantees of a fair trial: legal guarantees and safeguards the trial process[154].Therefore, they are protected in particular by the right to have ones case heard by a competent, independent and impartial court, the right to legal counsel of his choice, the presumption of innocence, public hearings, the right to be tried without undue delay and a higher court. Having said that, it is therefore in a broad sense, the definition of the rights of the defense while in the narrow sense, these rights would be limited to the adversarial principle, that the "accused", that is say the person or institution in question,-if one prefers a more appropriate term than the term used by the Court, must be able to discuss the complaints against him with means of defense[155].In this case, it would be necessary to call them simply "the right to defense". Their practical importance is not to dismantle, as indeed we will see on the principle of continuity and regularity of public services.

II.1.2. The consecration of the principle of judicial continuity and regularity of public services in constitutional law

The Transitional Constitution of April 4, 2003 had established five institutions supporting democracy, including the Electoral Commission[156].This statutory body has been organized by the Organic Law No. 04/009 of 05 June 2004. Article 39 states that "*The Independent Electoral Commission is dissolved automatically after the adoption of its general report on the recent elections.*" Article 222, paragraph 2, of the Constitution of 18 February 2006 however, requires that "*the institutions supporting democracy are automatically dissolved upon installation of the new Parliament*." This installation took place, according to the Court, on February 3, 2007 when the INEC, established by Article 211 of the Constitution of 18 February 2006 when the IEC was not effective. For, since that date, the new constitution had not yet set up a transitory mechanism of managing the electoral process. Moreover it awarded itself the transitory powers, the IEC continued to exist *de facto,* while performing acts connected with its duties. Convinced that there was a real legal problem which was likely to affect the validity of its acts, the IEC acting President, Father Apollinaire Malumalu Muholongu, made an application to the SCJ. In its application of 23 July 2007, for an extension of mandate, he sought to justify the actions that it had taken since February 3, 2007 and, secondly, to complete the constitutional responsibilities. The Court was asked to solve the following legal problem: the existence of the IEC, beyond the date of 03 February 2007, was this it compatible with the Constitution, notwithstanding article 222, paragraph 2 above?

In its ruling **R.CONST.005/TSR of 27 August 2007**, the SCJ drew its support from section 222, paragraph 1, and 223 of the Constitution, which respectively provided that "*the political institutions of the transition remain in office until the actual installation of the corresponding institutions provided for in this Constitution and exercise their powers under the transitory Constitution*" and that "*pending the installation of the Constitutional Court, the State Council and the Court of Appeal, the Supreme Court of Justice shall exercise the powers vested by this Constitution.*" The Court then deduced from these provisions that the purchaser has applied the principle of continuity and regularity of public services, as developed in administrative law[157]. To extrapolate the IEC, under its authority regulating the function of

---

154 L. SINOPOLI, *op.cit.*, pp.794 et 800

155 CSJ, 26 décembre 2007, R.CONST.062/TSR, *op.cit.*, cinquième feuillet

156 Under Article 154 of the Transitional Constitution of 04 April 2003, other institutions supporting democracy are: the Ethics Commission and the fight against corruption, the Truth and Reconciliation Commission, the High Media Authority and the National Observatory of Human Rights.

157 CSJ, 27 août 2007, R.CONST.005/TSR, *inédit*, huitième feuillet.

institutions[158],it insisted that the wish of the 2006 constitution, which established the INEC at the same time the delayed dissolution of the IEC, is to say only after installing the new Parliament, was complete before the dissolution, the whole electoral process[159].But since the installation of the new Parliament took place before this process was completed, the Court held based, drawing on the spirit of the grantor, to apply the same principle IEC Continuity and regularity of public services[160] until the INEC became effective. Consequently allowing the extension of the mandate of the IEC[161].

However, the ruling of the SJC is questionable, particularly regarding its power to hear the case. Indeed, the application of IEC was poorly written, in the way it asked the Court to extend its mandate beyond the provided term. Is this a power falling within the sphere of duties of the Constitutional Court? In reality, the SJC would be declared incompetent, thus forcing the IEC to come back to it, but on the basis of a leader who has the appropriate power. In this connection, it ought to have taken as interpreted by the Constitution since it could not, formally, "allow" a technical arrangement with a political agenda to continue to operate solely on the grounds that it would hold an alleged power to regulate the institutions of the Republic.

Further, the Court did not need to allow the IEC to continue to operate, provided that this was going to expire in a logical and automatic way, as the positive response it would have given to the interpretation sought by the applicant.

In addition, it is doubtful that the IEC and its role - the management of the election process- should be regarded as a public service, but rather an administrative service. Yet we have just noted, the IEC is a technical and policy-oriented body, so that the Court should have applied to validate its legal existence beyond the scheduled term, the constitutional principle well known to the permanence and continuity of the state, rather than place its reasoning on a rule of administrative law, scientifically inappropriate in this case.

The distinction is also significant. Indeed, the principle of continuity and regularity of public services does not apply to validate a service whose legal existence is disputed. It requires only that validity of existing service do not interrupt or allow undue disturbance in the provision of its services at the expense of users. However, the principle of permanence and continuity of the state means that it remains in its identification and must continue to operate normally, irrespective of the modifications in its substance (territory, population and political power)[162].However, if it happens that there are changes of political power, then there is no transitory mechanism to manage the electoral process, it might be an institutional vacuum, preventing the state to operate normally. So it is only this principle that justified the continued existence of the IEC, the same way that the constitution held the other institutions in place, under Articles 222, paragraph 1, and 223 of the Constitution.

In its ruling of 27 August 2007, the Court also seems to have touched on this distinction, but without grasping it technically. It specified that it would extend the mandate of the IEC, because the wish of the constitution was to fill the legal void at all levels, both politically,

158 *Idem*, septième feuillet.
159 *Idem*, huitième feuillet.
160 *Ibidem*
161 The Court justified this more especially to be avoided before installation of the INEC, a possible institutional vacuum, lack of management organization of the electoral process, in case of permanent incapacity of the Chief state, provincial governors or in case of dissolution of the National Assembly.
162 Definition from international doctrine. Read P.-M. DUPUY, Droit international public, Paris, Dalloz, 2006, pp.60-61.

as the judicial body charged with organizing elections, "*which will evolve together with these institutions in mobilizing resources, preparation and organization of local, municipal and urban elections, and in the handling of electoral disputes and in order to avoid the institutional vacuum in case of impeachment of the Head of State, provincial governors, in the dissolution of the National Assembly and finally the implementation of international commitments of the Democratic Republic of Congo*"[163]. So where in these terms is the principle of continuity and regularity of public services? Well, we only conclude that the Court failed to distinguish the administrative law from constitutional law, although its ruling retains its place in the elaboration of the Congolese rule of law.

II.2. The judicial work of the SCJ in the promotion of the Congolese rule of law

"*The rule of law is one in which the law is above and to the benefit of all*"[164]. One of the remarkable translations of this definition, reported by Joseph Cihunda, is the submission of the State, its organs and governments, to judicial inspection[165]. This presumes the existence of an independent judiciary[166] and accessible to the governed, able to strengthen the requirement of the rule of law in the governance of public affairs. In this regard, we note that the judicial work of the SJC has consolidated, despite resistance from some conservatives, the right of direct access for all to the constitutional court, a right whose effective practice leads, in particular, to an increased growth in the judiciary's political life in the DRC.

II.2.1. Direct access for all to the constitutional court

The extension of the right of appeal to the constitutional court began with the implementation of the Transitional Constitution of April 4 2003, subsequently boosted by the Constitution of February 18, 2006. However, the sense that some senior judges believed to have reserved such a law proved restrictive. We saw it in the position taken by the prosecution in the matter of compliance or non-compliance of the DRC's Constitution to the accession to the Treaty of 17 October 1993 concerning OHADA[167], in the SCJ's ruling pronounced by **R.CONST.112/ TSR of 05 February 2010**. It is the same defended doctrine[168] by country's attorney general, Katuala Kaba Kashala in 2004. They all believed in the binding persistence of the transition to the Office of the Attorney General for anyone who wants to submit his appeal for a review by the SCJ. This obligation, however, seemed justified during the dictatorial regime, by the fact that the AG could, already at his level; filter complaints addressed to the SCJ, and thus exclude those who were possibly compromising according to political circumstances of the time. Fortunately, the Court supported the abolition of the monopoly of the AG to run the constitutional court. Such abolition allows us to conclude, contrary to Katuala Kaba Kashala, not the admission by the Court exceptions to its own referral[169], but the obsolescence, if not implied repeal of certain provisions of the Legislative order of 31 March 1982 on the procedure before the SCJ[170].

---

163 CSJ, 27 août 2007, R.CONST.005/TSR, *op.cit.*, huitième feuillet.

164 J. CIHUNDA HENGELELA, « Rapports entre les autorités politiques provinciales et le pouvoir judiciaire à Kinshasa », *Librairie africaine d'études juridiques*, vol.2, 2010, p.24.

165 E. MPONGO BOKAKO BAUTOLINGA, « Le rôle de l'armée dans la construction de l'Etat de droit en République démocratique du Congo », in G. BAKANDEJA Wa MPUNGU, A. MBATA BETUKUMESU MANGU et R. KIENGE-KIENGE INTUDI (dir.), *op.cit.*, p.77.

166 J. CIHUNDA HENGELELA, *op.cit.*, p.25.

167 Organisation pour l'Harmonisation en Afrique du Droit des Affaires

168 KATUALA KABA KASHALA, « Une nouvelle exception à la saisine de la Cour suprême de Justice telle qu'organisée à l'article 2 du Code de sa procédure », *Justice, science et paix*, numéro spécial, Kinshasa, juin 2004, pp.7-11.

169 That's what the Attorney General of the Republic, Katuala Kaba Kashala, argued in 2004 about the reception given to requests from the President of the Republic in constitutional review of laws passed by Parliament. Katuala Kaba Kashala idem, p.9.

170 En particulier les articles 131, 132 et 133, alinéa 4.

The biggest beneficiary of the introduction of the direct access to the constitutional court was, presumably, the political opposition. First, each member can individually file a constitutional complaint at the Court. Then, the mechanism of constitutional review of ordinary legislation, and perhaps, constitutional law is their own prerogative, especially because it is difficult to conceive that the majority who voted in the law still ask for constitutional censorship.[171]

However, in practice, the control of the action of the majority by the opposition is half-hearted. The number of appeals to the constitutional court is negligible. According to Lawyer Marcel Wetsh'Okonda, the SCJ made only two rulings, in addition to admissibility of rulings between 2003 and April 2010, following the referral by the opposition[172]. This would stop the ruling **R.CONST.06/TSR** of 24 March 2004 on compliance with the Constitution of the Transition Law No. 04/002 of 15 March 2004 on political parties and ruling **R.CONST.044/TSR** of 03 January 2007 concerning the meaning of "*political setting*" contained in the Rules of Procedure of the National Assembly[173].

In addition to these two cases, the SCJ had never been able to answer at least two other requests from members of the political opposition, preferring to use "*the strategy of the freezer,*"[174] for lack of independence, vis-à-vis the political system. This is the petition submitted by Senator Lunda Bululu about compliance or non-compliance to the Constitution of Law No. 07/009 of 31 December 2007 on the state budget for the fiscal year 2008. That it does not respect the constitutional principle of withholding tax, depending on the allocation of national revenue at 40% to the provinces and 60% to the central government. It is also about the recent request of April 2010 aimed at seeing whether the Court, under the Constitution, could have the Prime Minister as head of government, the subject to a motion of no confidence or only to a censure motion.

If such an attitude on the part of the Court, in addition to allegations about its biasness, could deter political opposition to resort to the constitutional court, it also appears that the same opposition had not yet known able to frequently use the constitutional weapon which is reserved for them in the protection of democracy and the rule of law. Yet, it does not still agree with the majority, the wild stubbornness with which it often criticized to adopt all the laws which it wants, in the absence of a minority of blocking at Parliament. Nevertheless, the fact remains that the trend of moment is increasingly jurisdiction of the political life in Congo.

II.2.2. The increasing trend in jurisdictionalisation of political life in the DRC

It is a very good thing that politics and its leaders are governed by the law, long superseded by the use of armed struggle or other forms of social violence as a means of making political demands. Going to court has become now a constitutional obligation, now a faculty, now more than ever a necessity. Meanwhile, the recognized authority in the constitutional court, although sometimes challenged, tends to rule over the entire political class, which does not obey its rulings.

---

171 P. PACTET et F. MELIN-SOUCRAMANIEN, *op.cit.*, p.76.

172 M. WETSH'OKONDA KOSO SENGA, « L'arrêt de la Cour suprême de Justice n°R.CONST.112/TSR du 5 février 2010 … », *op.cit*.

173 About these two cases, the author explains that: "In the first, the Court decision is motivated by the fact that the number of members required to enter valid has not been reached on the one hand and secondly that the period in which this request should have been made has not been met. In the second case is the fact that this is not the interpretation of the constitution which had been sought but rather an expression contained in the Rules of Procedure of the National Assembly and had already delivered a notice pursuant to such rules of procedure to return the Constitution to have constituted the main means of the Court. "

174 D. KALUBA DIBWA, « Le constitutionnalisme congolais : de la démocratie électorale… », *op.cit.*

The verification of these assumptions has already been made partly[175]. The President of the Republic is obliged to appeal to the Court, whenever Parliament has adopted an organic law, in order to monitor its compliance with the Constitution. He also acquired the habit of relying on the constitutional court, seeking the interpretation that it has on the text of the Constitution in order to properly base its actions on the law. This custom began, as the transition from 2003 to 2006, with **Notice of RL09 20 January 2004 on the difficulties of interpretation of Articles 76 and 94 of the transitory Constitution**. In this case[176], the SCJ was still incompetent to rule on the request of the President of the Republic in a joint meeting of the Legislative section, given that the interpretation of the constitutional text fell within the jurisdiction of the SCJ, all sections together as a constitutional court. This error was denounced by the doctrine[177], so that the Court had to correct itself when it was called, again, to rule on the request of the President of ruling according to its author, an advisory opinion on the possible contradiction with the Constitution of certain provisions of the OHADA Treaty. The Court gave its decision, as seen by its ruling R.CONST.112/TSR of 05 February 2010, without almost saying that the motivation of the OHADA Treaty contains no provision that contradicts the constitution. The consequence is that the President of the Republic promulgated on February 11, 2010, the law authorizing[178]membership of the DRC to the said Treaty.

In cases involving the provinces, we note that the Court was asked to resolve conflicts between the executive and the provincial assemblies. Of the three cases previously brought before the Court, its decisions were implemented. Indeed, the Governor of western Kasai remained in office, as well as that of South Kivu, before his resignation a few weeks after the pronouncement of the ruling of 26 December 2007. As for the Governor of Ecuador, the decision of the Court of 04 May 2009, rejecting his constitutional challenge to the motion of no confidence passed against him by the Provincial Assembly, led to his replacement at the end of a partial election, by Jean-Claude Baende. This is confirmation of the authority of the constitutional court, from which the National Assembly did not conceal itself, though they say so, in the case of 18 governors removed from office.

Thus, these few outcomes seem encouraging. They would be more useful if the Court improves the quality of its work and respected its independence and its reputation with the litigants. In a post-conflict state, it is difficult to imagine the advancement of the rule of law without the confidence that they give to justice. If justice is political and partisan, it becomes arbitrary and ultimately sours seeds of social conflict, such as to negate all the gains of democracy, constitutionalism and the rule of law which is not easily obtained through bloodshed and screams.

CONCLUSION

The current Supreme Court of Justice (SCJ), as far as its institutional and normative make-up are concerned, is not well organized to efficiently carry out the responsibilities conferred on

---

175 Lire notre étude séparée intitulée« L'originalité de la Cour constitutionnelle congolaise ressuscitée ».

176 Il était question de savoir si le Président de la République avait, aux termes des articles 76 et 94 de la Constitution de la transition, la compétence de nommer seul, sans consulter ni les quatre Vice-présidents ni le Gouvernement, les gouverneurs et vice-gouverneurs de provinces, les membres du Conseil supérieur de la Magistrature, les mandataires de l'Etat dans les établissements publics et paraétatiques ainsi que les agents des services de renseignements. Et la Cour a répondu par l'affirmative.

177 Voir notamment L. OKITONEMBO WETSHOGUNDA, « La forme juridique de la décision d'interprétation d'une loi : un avis ou un arrêt ? », *Les Analyses juridiques*, n°9, 2006, pp.46-49, cité par M. WETSH'OKONDA KOSO SENGA, « L'arrêt de la Cour suprême de Justice n°R.CONST.112/TSR du 5 février 2010 … », *op.cit*.

178 Officiellement dénommée « Loi n° 10/002 du 11 février 2010 autorisant l'adhésion de la République Démocratique du Congo au Traité du 17 octobre 1993 relatif à l'harmonisation du droit des affaires en Afrique ».

the constitutional judge which is an interim mandate within the framework a constitutional democratic State.

As a judicial type of court dominated by lawyers mainly from private and judiciary, it cannot currently satisfy the objectives of specialization and efficiency required of a Congolese constitutional court as envisaged in the constitution of 18th February, 2006. Moreover, its structure is based on outdated text; adopted during a period when legal control of political power was not tolerated. Dictatorship, in itself anti-freedom could not have allowed the existence of a strong SCJ parallel to itself. It is also not surprising that there being no guarantee of the Court's independence, apart from the formal declaration of the same, that the court may have already been infiltrated by the executive.

It is the executive that appoints recalls and provides the SCJ judges at will. Moreover, as though this was not enough, the little power that the judges had enjoyed has been taken away, first by the Central Committee of the Mouvement Populaire de la Révolution (MPR) through its disciplinary commission, and secondly by the former Department of citizens' rights and freedoms established by Order nº 86-268 of 31 October 1986. Both of these bodies could quash orders made by the SCJ.

From a legal perspective, dictatorship has been abolished. However, the SCJ structure established in 1982 remains unchanged. Its weaknesses therefore continue to plague the institution. On the one hand it is accused of having fallen into the hands of the government and the instability of its jurisprudence has cost it legitimacy. On the other hand, a certain loss of confidence on the part of those seeking redress before it and a tendency to disobey its orders.

It is however not without its merits. Its work on jurisprudence has been flourishing in the last few years. Despite its mistakes, it never ceased to amaze through the courageous orders it issued. This work is expected to develop further since the right to appeal directly to the constitutional court is now a significant legal gain in the development of the rule of law in Congo.

The future constitutional court should bring corrective measures to the current SCJ. However, things do not seem to have begun well in the eyes of the triple objective of the constitution[179], namely: specialization, speed and efficiency. First, because of the mode of appointment of the nine current members, there is reason to fear political patronage and dominance of a political voice over another especially during times when there was no coalition. Fortunately, there is a mitigating factor to this problem: the Constitutional Court members' nine-year non-renewable term and the reinforced system of incompatibilities.

There is also reason to fear that the Prosecutor General's office within the Constitutional Court, a Congolese innovation[180], may not enjoy the necessary independence to accomplish its mission. Its members as well as their colleagues from ordinary courts would be subjected to the statutes of common law whereas the constitutional court, considering its important role in the functioning of political institutions, is not a jurisdiction like any other. One can nonetheless hope that the authorities will not play the game of appointments and dismissal of judges to turn the institution into a "whipping boy" totally subjected to its will.

[179] Exposé des motifs de la Constitution du 18 février 2006, point 3.
[180] Aucun autre pays de tradition romano-germanique n'a institué un Ministère public constitutionnel.

While waiting for the establishment of the Constitutional Court, it is necessary to call for an internal restructuring of the current SCJ as a transitional constitutional jurisdiction. Priority should be given to the promulgation of an organic law on the structure and operations of the constitutional court, as it contains elements of procedures related to constitutional disputes that are currently lacking in the SCJ. This will allow it to put aside the order of 31st march 1982 which, by having given more room to private and judicial law, has proved inadequate for trial under public law. Perhaps with the new law, the Court will no longer commit the same kind of mistakes in her work for which she has been criticized since 2006. There is also need to put an end to the chronic instability of the members of the court as has been witnessed in the last few years. But this is the responsibility of politicians who should understand that the building of the rule of law does not work alongside a constitutional jurisdiction with fluctuating membership that does not inspire the confidence of all stake-holders. Consequently, it is necessary for politicians to strive towards the reconstitution of the judges to the SCJ and respect its immutability until the establishment of a future Constitutional Court. Finally, the senior judges should be well remunerated to be at par with other senior officials of the executive and the legislature.

REFERENCES

A. Legal texts

18. Constitution du 18 février 2006.

19. Loi n°06/006 du 09 mars 2006 portant organisation des élections présidentielles, législatives, provinciales, urbaines, municipales et locales.

20. Loi n°09/001 du 10 janvier 2009 portant protection de l'enfant.

21. Loi organique n°04/009 du 05 juin 2004 portant organisation, attributions et fonctionnement de la Commission électorale indépendante.

22. Loi organique n°06/020 du 10 octobre 2006 portant statut des magistrats.

23. Ordonnance-loi n°82-017 du 31 mars 1982 relative à la procédure devant la Cour suprême de Justice.

24. Ordonnance-loi n°82-020 du 31 mars 1982 portant Code d'organisation et de la compétence judiciaires, telle que modifiée et complétée par l'Ordonnance-loi n°83-009 du 29 mars 1983.

B. Case Law

13. Cour constitutionnelle du Bénin, 27 juillet 2005, Décision DCC 05-069, inédit.
14. CSJ, 04 mai 2009, R.CONST.078/TSR, inédit.
15. CSJ, 05 février 2010, R.CONST.112/TSR, inédit.
16. CSJ, 16 février 2007, RCE 014, inédit.
17. CSJ, 20 janvier 2004, RL09, inédit.
18. CSJ, 21 mars 2007, RCE/ADP/021, inédit.
19. CSJ, 24 mars 2004, R.CONST.06/TSR, inédit.
20. CSJ, 26 décembre 2007, R.CONST.062/TSR, inédit.
21. CSJ, 27 août 2007, R.CONST.005/TSR, inédit.

22. CSJ, 27 novembre 2006, R.E.006, inédit.

23. CSJ, 27 novembre 2006, RCE.PR.009, inédit.

24. CSJ, 3 janvier 2007, R.CONST.044/TSR, inédit.

25. CSJ, 31 juillet 2007, R.CONST.051/TSR, inédit.

26. TPIY, Arrêt confirmatif relatif aux allégations d'outrage formulées à l'encontre du précédent conseil, Milan Vujin, IT-94-1-A-AR77, 27 février 2001.

C. Doctrine

34. BALINGENE KAHOMBO, « La protection des minorités ethniques en République Démocratique du Congo. Entre rupture et continuité des ordres constitutionnels antérieurs », *Librairie africaine d'études juridiques*, vol.2, avril 2010.

35. BOSHAB E., « Le principe de la séparation des pouvoirs à l'épreuve de l'interprétation des arrêts de la Cour suprême de Justice par l'Assemblée nationale en matière de contentieux électoral », in G. BAKANDEJA Wa MPUNGU, A. MBATA BETUKUMESU MANGU et R. KIENGE-KIENGE INTUDI (dir.), *Participation et responsabilité des acteurs dans un contexte d'émergence démocratique en République Démocratique du Congo*, Actes des journées scientifiques de la Faculté de Droit de l'Université de Kinshasa 18-19 juin 2007, Kinshasa, PUK, 2007.

36. CIHUNDA HENGELELA J., « Rapports entre les autorités politiques provinciales et le pouvoir judiciaire à Kinshasa », *Librairie africaine d'études juridiques*, vol.2, 2010.

37. DUPUY P.-M., *Droit international public*, Paris, Dalloz, 2006.

38. ESAMBO KANGASHE J.-L., *La Constitution congolaise du 18 février 2006 à l'épreuve du constitutionnalisme. Contraintes pratiques et perspectives*, thèse de doctorat en droit public, Université de Paris 1-Panthéon-Sorbonne, Université de Kinshasa, présentée et soutenue publiquement le 17 juin 2009.

39. FAVOREU L., « Brèves réflexions sur la justice constitutionnelle en Afrique », in CONAC G. (dir.), *Les cours suprêmes en Afrique. II. Jurisprudence : droit constitutionnel, droit social, droit international, droit financier*, Paris, Economica, 1989.

40. KABANGE NTABALA, «Quelle constitution pour la Troisième République face aux réalités zaïroises ? », *Annales de la Faculté de Droit*, vol.XXV, Kinshasa, PUZ, août 1996.

41. KALUBA DIBWA D., « Le constitutionnalisme congolais : de la démocratie électorale à la démocratie constitutionnelle », http://www.la-constitution-en-afrique.org/, 26 juillet 2010.

42. KATUALA KABA KASHALA, « Une nouvelle exception à la saisine de la Cour suprême de Justice telle qu'organisée à l'article 2 du Code de sa procédure », *Justice, science et paix*, numéro spécial, Kinshasa, juin 2004.

43. KATUALA KABA KASHALA, *La jurisprudence électorale congolaise commentée*, Kinshasa, The Carter Center, RD Congo, novembre 2007.

44. MAMPUYA KANUK'A TSHIABO A., «**A propos du projet de Loi organique sur la Cour constitutionnelle »,** Quotidien «Le Phare» du 9 avril 2008 ; article rapporté par S. BOLLE, «Quelle Cour constitutionnelle en RD du Congo? », http://www.la-constitution-en-afrique.org/, 16 avril 2008.

45. MATADI NENGA GAMANDA, *Droit judiciaire privé*, Louvain-La-Neuve et Kinshasa, Brylant-Academia s.a, Droit et Idées nouvelles, 2006.

46. MBOYO EMPENGE EA LONGILA B.B., «La mégarde des modèles de constitutions euro-occidentales et l'élaboration d'une constitution zaïroise de développement véritablement intériste», *Annales de la Faculté de Droit*, vol.XXV, Kinshasa, PUZ, août 1996.

47. MPONGO BOKAKO BAUTOLINGA E., « Le rôle de l'armée dans la construction de l'Etat de droit en République démocratique du Congo », in G. BAKANDEJA Wa MPUNGU, A. MBATA BETUKUMESU MANGU et R. KIENGE-KIENGE INTUDI (dir.), *Participation et responsabilité des acteurs dans un contexte d'émergence démocratique en République Démocratique du Congo*, Actes des journées scientifiques de la Faculté de Droit de l'Université de Kinshasa 18-19 juin 2007, Kinshasa, PUK, 2007.

48. MUKADI BONYI et KATUALA KABA KASHALA, *Procédure civile*, Kinshasa, Editions Batena Ntambua, 1999.

49. NGONDANKOY NKOY-ea-LOONGYA, « De l'organisation de la Cour constitutionnelle congolaise : le constituant de 2006 induit-il le principe d'une organisation décentralisée de la nouvelle juridiction constitutionnelle », *communication lors de Journées des réflexions sur la mise en place des ordres juridictionnels prévus par la Constitution du 18 février 2006*, Faculté de Droit, Université de Kinshasa, du 29 au 31 janvier 2009, inédit.

50. NGONDANKOY NKOY-ea-LOONGYA, *Droit congolais des droits de l'homme*, Louvain-la Neuve, Bruylant-Academia, 2004.

51. NYABIRUNGU Mwene SONGA, *Traité de droit pénal général congolais*, Kinshasa, Editions Universitaires Africaines, 2007.

52. NYEMBO-Ya-LUMBU O., *La Constitution de la Troisième République est fédérale. Regard critique sur la «décentralisation»*, Kinshasa, Editions Universitaires Africaines, 2009.

53. OKITONEMBO WETSHOGUNDA L., « La forme juridique de la décision d'interprétation d'une loi : un avis ou un arrêt ? », *Les Analyses juridiques*, n°9, 2006.

54. PACTET P. et MELIN-SOUCRAMANIEN F., *Droit constitutionnel*, 25ème édition à jour, Paris, Sirey, août 2006.

55. SINOPOLI L., « Les droits de la défense », in H. ASCENSIO, E. DECAUX et A. PELLET (dir.), *Droit international pénal*, Paris, Editions A. PEDONE, 2000.

56. TINKAMANYIRE Bin NDIGEBA E.R., *Le rôle du juge électoral*, audience solennelle et publique de rentrée de la CSJ, discours du Premier Président, Kinshasa, 2008.

57. VUNDUAWE te PEMAKO F., «L'histoire constitutionnelle des actes ayant force de loi au Congo-Zaïre (1885-2005) », in Liber Amicorum Marcel Antoine Lihau, *Pour l'épanouissement de la pensée juridique congolaise*, Bruxelles, Brylant et Presse de l'Université de Kinshasa, 2006.

58. WETSH'OKONDA KOSO SENGA M., « L'arrêt de la Cour suprême de Justice n°R. CONST.112/TSR du 5 février 2010 sur l'OHADA », http://www.la-constitution-en-afrique.org/, 04 avril 2010.

59. ZOLLER E., *Grands arrêts de la Cour suprême des Etats-Unis*, Paris, PUF, 2000.

A COMPARATIVE ANALYSIS OF JUDICIAL INDEPENDENCE IN THE DEMOCRATIC REPUBLIC OF CONGO AND THE REPUBLIC OF CONGO

By **Camille NGOMA KHUABI**

INTRODUCTION

The political organization of a modern state rests on a certain number of principles, among them, the principle of separation of power.

This principle has not ceased to be the subject of debate since the publication of the "l'Esprit des Lois" by Montesquieu: it encompasses the idea that in a state, power should control power. A type of consensus that summarizes the formulation retained by the French constitutional council has been created according to which its jurisdiction's independence is guaranteed as well as its specific type of function, which neither the legislator nor the government can infringe upon, to censure the jurisdiction decisions, to subject these to injunctions or to substitute them during case judgments arising from their competencies. It is a matter of the separation of powers according to Professor Guy Carcassone[181], a watermark below which this independence will be unrecognizable.

Indeed, all the countries, recognising the need to maintain equilibrium between the three traditional powers, namely, the executive, the legislative and the judiciary, include this old principle in their respective constitutions.

During an international conference on the independence of judges held in Rouen, France[182] in May 1953, Mr. Vincent Auriol, the President of the Republic of France declared in his message:

> *"To protect the law against pressure, whatever its origin, the judge said that it is a common principle to all free and civilized countries.*

On his part Mr. Ernesto Battaglini clarified the judge's independence

> *'as the centre and home of all judicial institutions: it is the essential support for the judicial function itself and the eminent Italian magistrate added that "the judge's independence has a triple aspect: constitutional independence, functional independence and institutional independence".*

According to Mr. JEAN LOUIS ROPERS, the Secretary-General at the French cassation court, this concept incontestably is derived from the doctrine of separation of power already explained by Montesquieu. Indeed, according to the author of "l'Esprit des Lois", "

---

* Teaching assistant at the Faculty of law of the University of Kinshasa, Coordinator of the CIDHE, a NGO(NON GOVERNMENTAL ORGANIZATION) on protection of Human Rights and the Environment established in Kinshasa / RDC.

181 GUY CARCASSONE "The theoretical elements on the question of judicial independence" Act of the AHJCA congress, Dakar, November 2009, in *http//www.ahjucaf.org/spip.php?* Article 7166

182 Jean Louis ROPERS, "International conference on the independence of judges" RIDC TI.R 699 1953

'*there is no liberty, if the power to judge is not independent from legislative power and the executive. If it was joined to the legislative power, the power over citizens' life and liberty would be arbitrary since the judge would be the legislator. If it was joined to executive power, the judge would assume the form of an oppressor*."

If in practice the two first powers seem to agree on the idea of clear separation of powers[183] between them, judicial power seems to affront the executive in a struggle for independence that it hardly achieves, especially in states whose regimes are less welcoming to the emergence of a true democracy.

In effect, the matter of judicial independence has always been at the heart of debates particularly in francophone countries, especially the Democratic Republic of Congo and her sister republic, Congo Brazzaville. During the last congress organized on this subject, Professor Guy CARCASSONE gave the results of an enquiry done in some of those countries as follows,

> *"in Albania 'according to public opinion, judges are not independent'" "In Burkina Faso, 'public opinion does not feel that judges are independent'. In France '54% of those interviewed consider that judicial function is rather dependent on political power'. In Guinea, 'it should be realized that public opinion does not view judges as independent.' In Haiti, "public opinion supposes that the judiciary is corrupt and partial, hence it would not be independent." In Mali, "though public opinion does not view the judges as under orders of the powers that be, it nonetheless remains that they are under monetary influence." In Mauritania, "public opinion is rather convinced that judges are under the influence of political or financial powers. In Moldavia, 38% of the polls do not place much confidence in their judiciary, against a mere 27.6% who feel the contrary. In Chad, public opinion feels that judges are not independent, just as in Togo where it does not seem convinced of the judges' independence*.[184]"

The Democratic Republic of Congo and her neighbour Congo Brazzaville, two francophone countries with the closest capitals were, unfortunately, omitted from the study, which ironically was done by an organization that they both belonged to. Having both come out of colonization at the dawn of the 60's, they belong to the Romano-Germanic system, a fact that could at first sight render comparative analysis of the judicial power independence less necessary in the two countries. However, it is true that in the sister republics, the principle of judicial independence has always been at the heart of debates both in the political, judicial and scientific arenas. It is still the subject of lively discussions particularly in the DRC, evidenced by the impact it has had on the news bulletins over the last six months.

Being able to reflect on some hackneyed theme is both current and practical: current in the sense that in 2006, a constitution was passed by referendum in the DRC. In this constitution, the constitution makers clearly intended to break with a very dark past in the field of judicial independence[185]. Two laws were subsequently adopted for implementation to ensure the independence of the judiciary.[186]
The last constitution of January 20, 2002 in the Republic of Congo expressed in ambiguous

---

183 In parliamentary systems for example, a clear separation of powers can be observed between the executive and the legislature if the dual executive, is shared between an opposition majority in parliament and a minority power. On the contrary, the legislature may appear as a rubber stamp when the power lies in the majority in parliament. In these circumstances its independence may be seriously threatened.

184 GUY CARCASSONE op.cit

185 Read articles 149 and 150 of the constitution of 18 February 2006

186 This is the Organic Law No. 06/020 of 10 October 2006 concerning the status of magistrates and the Organic Law No. 08/013 of 5 August 2008 on the organization and function of the Judiciary Council in the Democratic Republic of Congo.

terms[187] the wish to respect the principle of judicial independence. To analyze these documents in light of recent developments on the issue would include the current interest both to the political-judicial world and the scientific world. Despite the fact that this principle is formally enshrined in the two countries, and the implementing legislation has been adopted, it remains that in judicial practice, the judges face serious challenges in the exercise of their profession in total independence. The practical interest would be to steer the judiciary on key behaviours that should be adopted to win its independence.

Do we seek to understand what are the main obstacles or threats to the exercise of judicial independence in both countries despite a very ancient consecration of the principle? What are the possible mechanisms to address them? To answer these two questions posed, an examination of the problem requires a method that enables us to understand as many aspects of the object as possible. Moreover, our approach would be to first describe the evolution of the issue of judicial independence through the analysis of several pieces of very disparate texts (I). Then we dwell on the state of practice in both states under consideration, through the examination of some cases where case law, interference by the executive or of its departments had very unfortunate implications in the application of the principle of judicial independence and its consolidation as a constitutional power (II). The conditions for real independence can finally be exposed in the light of latest developments elsewhere (III).

I THE EVOLUTION OF THE QUESTION OF JUDICIAL INDEPENDENCE IN BOTH COUNTRIES

The issue of independence of the judiciary in the countries under examination evolved over a span of two periods: the Cold War period and after the fall of the Berlin wall. Although each of the two states had dealt with the matter in the midst of great global upheaval, in both cases, the Cold War period remains the darkest in the history of judicial independence: the period we live in is marked by limited progress made sometimes with great reluctance. We track its legislative developments first in the Democratic Republic of Congo, and then in the Republic of Congo.

1.1 LEGISLATIVE EVOLUTION IN THE DEMOCRATIC REPUBLIC OF CONGO

We analyze the constitutional and legislative provisions on the independence of the judiciary in this country, by reviewing the powers assigned to the organs of implementation mandated to ensure the independence of the judiciary. Indeed, during its fifty years of independence, the Democratic Republic of Congo has had several constitutions that have simultaneously altered the content of the principle of judicial independence. This legislation is already very abundant and diverse. From the 1960 fundamental law of the constitution to 18 February 2006, the legal content of this principle has remained unstable.

The Fundamental Law of 19 May 1960 on the structures of the Congo, Articles 187-197 refer to the judiciary. Article 187 paragraph 1 establishes the principle that the executive cannot prevent, stop or suspend court activity. Article 192 stipulates that the status of judges is governed by law and within the framework of their status, judges are appointed for life, they can be moved only by a new appointment or on their own consent, and their suspension is only possible after a trial. Indeed, though the principle of tenure, which is very important

[187] Section 136 of the 2002 constitution of the Republic of Congo is formulated as follows: "The judiciary is independent of the legislature. In the exercise of their functions, judges shall be subject only to the rule of law."

for the proper administration of justice, was recognized by judges, the one on appointment made a distinction between judicial courts and those of prosecutors. Thus, Article 194 of the Act specified that prosecutors themselves are appointed and dismissed by the Head of State alone. Under these conditions, the independence of the government law officer already faces the inevitable force of executive order. This aspect has remained in subsequent constitutions.

2° The 1964 constitution which dedicated eight articles to the judiciary (Art. 122-130) based itself on the principle of judges' security of tenure and the appointment of prosecutors by discretion of the Head of State but two important innovations can be emphasized in connection with the Basic Law of 1960. First, Article 129 refers to a status of judges that is fixed under a national law, and adds that their appointment can be done only under national law, but in the absence of such a law, the appointment of judges should logically be done in the spirit of Article 194 of the Basic Law of 1960. The second innovation is derived from reading section 130 which introduces the Superior Council of Magistracy as a disciplinary panel of judges. What is significant is not actually the Superior Council of Magistracy itself, but specifically the fact that no magistrate, as a member of this body, could be appointed[188] by the Head of State[189], despite him being the Superior Council president, assisted in this task by the Minister of Justice, who was the first vice-president and member by right. Obviously it is regrettable that a special body responsible for managing magistrates had only received powers to discipline a limited category of its members: the judges, and the alternative of giving advice on the appointment of trial judges. The independence of the judiciary was thus reduced to a mere legal formality such that the constitution of 24 June 1967 did not need to make changes to a system that favoured the executive. Sections 56 and 63 relating to two aspects of the issue discussed above have kept the same spirit with the constitution of 1964.

3° Another painful step experienced was in relation to the judiciary, more specifically, its independence. Indeed, in 1974 a constitutional review interrupted the 1967 constitution by Act No. 74-020 of 15 August 1974 amending the constitution of 24 June 1967. The presentation pattern of this law stated that all the old institutions of the republic had become members of the Popular Movement for the Republic (MPR), operating under the supervision, direction and presidency of the President of the MPR, who thus receives full powers. As for the judiciary, the point states that the designation Judicial Council was preferred over others for reasons of policy option. The Judicial Council composed of all courts[190], received the mission to state the law in the great MPR family. Article 67 paragraph 2 stipulated that a judge is independent in carrying out his mission: Article 71 as well deals with the Supreme Council of Magistracy under the same terms as in the old constitution of 1967. At the same time in a similar text there appeared a seeming willingness to recognize the independence for the magistrate, by referring to a Supreme Council of Magistracy which in practice never worked. Moreover, its operation did not change much in the face of the political backlogs characterized by a regime unwilling to change, so much so that that Law No. 078-010 of

188 In the Republic of Congo, the Head of state has discretion in appointing members of the Supreme Council of Magistracy. The constitution of March 15, 1992 changed this practice by introducing a system for electing members of the CSM (…) by parliament in joint session (art 134, para 2). The same spirit can be seen in the fundamental Act of 1997 that implicitly provides in its Article 74, paragraph 2 that the law sets the conditions for appointing members of the CSM (...). Law 16-99 of April 15, 1999 marked the end of a system that seemed rooted in people's minds. Indeed, Article 4 of the Act provides that the President appoints the members of the CSM (....). The current 2002 Constitution is silent on the question, Article 5 of the Organic Law on the MSC recognizes specifically the President of the Republic the powers to appoint a number of members of this body apart from those who have membership by right. We have therefore returned to the old system in contradiction with the principle of judicial independence enshrined in the constitution.

189 Section 130 of the Constitution determines the composition of the CSM and the procedures for appointing members to the party before it. The Head of State had no power in this process.

190 Article 66 of Law No. 74-020 of 15 August 1974 amending the constitution of June 24, 1967

15 February 1978 previously discussed amending the constitution was unable to improve independence in the judicial system, already held hostage.

4° In effect, this law (N°078-010) of 15th February 1978 touching on the revision of the 1967 constitution appears to relax the conditions of a good functioning of justice, has not only been inscribed in the spirit of the old order, but has at the same time caused a reversal of it. This stems from reading the explanatory memorandum which states that the Judicial Council has undergone significant reform by reason of the creation of a permanent president who is a magistrate. That would allow, according to the text, the strengthening of unity of command and would allow the judicial council to function to its best. In this effect the president of the judicial council, named by the President of the Republic, is recognized to have the power to check the court sentences, the possibility to suspend their executions, to edict directives to judges arising out of the exercise of their judicial function, to which they can only derogate by special justification[191]. Article 97 recognizes that the president of the judicial council as empowered to participate in the deliberations of the Executive Council. The general formula according to which the magistrate is independent in the exercise of his duties appears in Article 97 paragraph 2, but he can only act otherwise in case of a contradiction with regard to articles 95 and 98 previously examined. The constitutional amendment that was done on the 15th November 1980 changed nothing to this order of things that would operate under these conditions until 1990 when the regime announced the process of change towards of country's democratization.

In effect on the 24th April 1990, President Mobutu gave a speech in which he proclaimed the opening of democratic space towards multiparty. The July 1990 constitutional modification should therefore be understood this context. By law N°90-002 of 5th July 1990, the regime tended to comply with the spirit of that speech and thus the rehabilitation of the three traditional powers featured among the new guidelines brought in by this law. As for its independence, Article 110 states simply that the mission of declaring law is vested in courts and that the judge is independent in carrying out its mission. Nevertheless, the announced opening of political space allowed the holding of a Sovereign National Conference (CNS) which initiated important reforms hitherto unfulfilled, the CNS resolutions and its constitution that had never been enacted. CNS tasks had the merit of having developed a legal structure which the country has never completely turned away from, including the issue of judicial independence.

The advent in 1997 of a new regime installed by the AFDL did not allow the release judicial power either under the systematic subjugation the country had lived through for three decades. The decree-law No. 003 of 28th May 1997 on the organization of political power in the Democratic Republic of the Congo had made the Head of State the sole holder of public powers. What place did it reserve for judicial powers? Sections 11 and 12 uses catch phrases that "the judiciary is independent of the legislative and executive branches"; ..." the judiciary is independent in carrying out that task. In the exercise of its duties, it is subservient only to the law."Have we not decried the weaknesses of a judicial system undermined and eroded by unscrupulous practices? The Inter-Congolese Dialogue, through its Global and Inclusive Agreement and the Transitional Constitution of April 5, 2003 reaffirmed the independence of the judiciary by declaring for the first time that "justice is done throughout the Democratic Republic of Congo on behalf of the Congolese people." The creation of a Supreme Council of Magistracy and the improvement of judges working conditions were constitutionally

[191] For more details see also Articles 95 and 98 of Law No. 078-010 of 15 February 1978 amending the 1967 Constitution.

communicated. None of these provisions though was acted upon, the judges continued to work in a regime of "probation", as the practice will demonstrate.

A constitution was adopted in 2006, with the most ambitious principles set forth therein regarding the independence of the judiciary: a SCM completely purged from political influence and not admitting any non-judicial members. The two laws of implementation were passed and promulgated (Organic Law No. 06/020 of 10 October 2006 concerning the status of magistrates and Organic Law No. 08/013 of 5 August 2008 on the organization and function of the Supreme Council of Magistracy in the Democratic Republic of Congo). A comment was made about a perfectly good system, but which in practice carried the term "impracticable".

1.2 THE EVOLUTION OF THE ISSUE IN THE REPUBLIC OF CONGO

A country's harmonious function of power is inscribed into a general context of its political life and Congo Brazzaville is no exception to this principle. Indeed, between 1960 and 1990, the history of Congo Brazzaville has been marked by violence which entrenched a regime during which consolidation of constitutional practice could not be allowed in the matter of independence of judicial power. Having worked in a system dictated by the one-party Marxist-Leninism since its independence in 1960, the prevailing political conditions in the Republic of Congo, just as in the DRC, could not foster the emergence of a judiciary independent from the executive. After this period, the 1992 constitution was adopted by referendum on15 March of the same year.

The various reforms in the judiciary field during this period enable us both to highlight the past difficulties it encountered in its independent operation, and to measure the stakes of the issue in a context of democratization. Between 1992 and 2010, three constitutions were adopted along with several other related laws, some to the status of magistrates, others in the organization and functioning of the Supreme Council of Magistracy, which never worked in practice.

1.1.1 The constitution of 15th March 1992

The 1990 marked the beginning of a new political era in the country. Given the growing frequency of strikes, the ruling party abandoned its references to Marxist-Leninism in favour of the multiparty system which opened the door to the organization of a National Conference along the lines held in other African countries to facilitate a policy change regime. It is within this framework that the 1992 constitution was adopted by referendum. Among the new reforms instilled by that text, those touching on the independence of judicial power were the most important. On the 20th August the same year, three laws, Law N° 022092 relating to the organization of judicial power, Law N°. 023-92 the status of the magistrates, and the one of N°. 024-92 instituting the Supreme Council of Magistracy were adopted to accompany the implementation of this reform.

This constitution in Article 129 paragraph 2 explicitly lays down the principle that the judiciary is independent of the legislature and the executive. Paragraph 3 goes further, stating that Supreme Court judges are elected by parliament in joint session, under the conditions laid down by law. This clarification regarding the election of judges of the highest court by parliament denotes the fact that the judiciary, represented by the highest judicial institution, had long been under the influence of the executive. It was necessary to reduce the influence of its leaders by adopting clearly defined constitutional legal mechanisms. This

is an evolution never before witnessed in the region and in several other parts of Africa[192], but we are quick to add that this reform has not been extended to all levels of the judiciary. The silence surrounding the mode of appointment of other judges would inevitably allow the president to retain control over much of the judiciary. Besides, this innovation has not been able to spread over a period to the point of crystallizing it in constitutional practice. As we shall see later in this analysis, this idea stood against pressures and the executive's "quasi-natural supremacy" over other traditional powers of the state.

Moreover, section 133 ultimately provides for the adoption of a law on the statute of magistrates. In this context, law No. 023-92 of 20 August 1992 on the status of judges and No. 024 of the same date on the institution of the Supreme Council of Magistracy must be adopted. The president, who by law is a member, chairs the Supreme Council of Magistracy under section 134, while other members are themselves elected by parliament in joint session. Also Law No. 29-94 dated 18 October 1994 on the institution of the Higher Judicial Council, was part of the initiative to strengthen the independence of the judiciary. All these changes marked the end of an era of absolute power by the President of the Republic. In fact, the Supreme Council of Magistracy is an organ within the judiciary responsible for judges; hence its powers should not be limited to disciplining „members" over whom it has no real power. In our view, these powers, and as we shall see later, should cover all the prerogatives of a supervisory body. Is it not said that he that can do most can do the least? If a supervisory body such as the SCM can have no such discretion in the appointment process for judges - its own members - over whom these sanctions apply, what will power to sanction be based on? Moreover, a disciplinary regime can only have the effect of sanctioning; we should also highlight the inevitable chilling effect that such a system can have if its holder has the authority to punish members in cases of misconduct. In Rwanda, for example, Law No. 3/1996 mentioned earlier conferred extensive powers to the Supreme Council of Magistracy members. These powers extended from appointment to revocation, but in the latter case, a quorum of three fifths of the SCM was required[193]. How was it like, five years later, in the 1997 Constitution?

1.2.2. The Fundamental Act of 24 October 1997

The adoption of the 1992 constitution allowed the holding of general elections in August of that year. The regime was defeated in these elections and lost power. With presidential elections scheduled for July 1997, armed clashes broke out in central and northern Brazzaville early June between the national army and the Cobras of D. Sassou-Nguesso who lost power in 1992. The latter took power and enacted the Fundamental Law which would regulate power over the transitional period. In this text, sections 71 to 75 relate to the judiciary. Article 71 provides that judicial power is vested in national courts, but the President of the Republic guarantees its independence through the Supreme Council of Magistracy over which he is president, under Article 74 of the same text. Article 75 limits itself to stipulating that trial judges and prosecutors of the courts are appointed by the President of the Republic on proposal of SCM.

The silence surrounding the procedure for appointing the Supreme Council of Magistracy (SCM) judges should be interpreted to mean election by parliament in joint session as provided by the 1992 constitution in Article 129 paragraph 3. Article 74 also provided for

[192] Organic Law No. 3 / 1996 of 29 March 1996 on the organization, functioning and powers of the Supreme Magistracy Council of the Republic of Rwanda provides in Article 15, paragraph (a) the principle of appointment of judges by the Supreme Council of the Judiciary without the possibility for the president to intervene in its procedure. This is a first ever precedent in Africa.

[193] See Article 10, paragraph 3 of the Organic Law No. 3 / 1996 of 29 March 1996 on the organization, functioning and powers of the Supreme Magistracy Council of the Republic of Rwanda already cited.

the establishment of a Magistracy Council, chaired by the president and whose manner of appointment of members is fixed by law. There being no law adopted until 1999, it was necessary to refer to the 1992 constitution which provided in Article 134 paragraph 2 that the SCM includes the President of the Supreme Court, who by right is a member and judges elected by the parliament in joint session under conditions set by law. In Law No. 16-99 of April 15, 1999 amending and supplementing certain provisions of Law 024-92 of 20 August 1992 and Law No. 29-94 of 18 October 1994 on the establishment of SCM, the principle that the president of the Republic chairs the SCM was maintained. Similarly, the Minister of Justice and first president of the Supreme Court are ex officio members assuming the first and second vice-presidency of SCM respectively. With the exception of the highest magistrates of this court who are ex officio members, other Council members are appointed by the President of the Republic.[194]

This constituted a setback to the 1992 reform, implicitly maintained in the 1997 constitution which stripped this prerogative from the head of state, as a result of the very negative impact it had on judicial independence. Another setback arising from the law surfaces in the process of appointing judges. Indeed, Article 8 recognizes the president's power to appoint Supreme Court judges. Yet the foundations for the election of judges by senior parliamentarians had been laid down in 1992 as a response to the president's omnipotence. Article 10 seems contradictory when it requires the SCM to make every effort and take appropriate action to defend and preserve the independence of the judiciary when challenged. Indeed, Article 71 of the Basic Law of 1997 affirmed that the President of the Republic through the Supreme Council of Magistracy guaranteed independence of the judiciary; nevertheless in practice, as we will show later, generally it is the president of the republic through his executive branch who is the main actor in questioning this independence, by using some un-recommended practices. This tendency not to grant real independence to the judiciary particularly in this country is confirmed by the current 2002 constitution and the final Act on the SCM.

1.2.3. The constitution of 20 January 2002 and its organic statute on the Supreme Council of Magistracy (SCM)

The country went through a long political transition from 1990. With the prospect of an output of this process in 2002, a constitution was adopted to ensure the organization of power after the transition. In this constitution, the proclamation of independence of the judiciary was made in ambiguous terms. Its article 136 provides that: "*Judicial power is independent of the legislature. In the exercise of their functions, judges are bound only by the rule of law.*"[195] The president is the guarantor of the independence of judiciary[196] through the Supreme Council of Magistracy (SCM) which he presides over[197]. Indeed, the principle of the president as the judiciary's guarantor has been the rule in the Republic of Congo throughout the reign of the current president, a major player in the country's political life.

Having managed to hold onto power through a long transition during which its powers have been eroded, particularly with the recent 1992[198] reform implicitly maintained in the

194 As regards the composition and mode of appointment of member judges of CSM, read articles 3 and 4 of Law No. 16-99 of April 15, 1999 amending and supplementing certain provisions of Law 024-92 of 20 August 1992 and Act No. 29-94 of 18 October 1994 on the establishment of CSM.

195 Article 129, paragraph 2 of the 1992 constitution stated in clear terms that the judiciary is independent of both the executive and legislative branches. In the same country and within 10 years, it is regrettable that we have not capitalized the value of a reform carried out in a context that we described previously.

196 Read article 140 of the constitution of 2002.

197 Article 139 of the constitution under analysis foresees the creation of a CSM (Supreme Judicial Council)

198 This reform is evidenced by two articles. Article 129 paragraph 3 had established the principle of the appointment of judges of the

1997 constitution, a current practice tends to favour a reversal to strong government. Indeed, by resuming control over the entire appointment process for judges, including those of the Supreme Court, the recent reforms clearly favour a regime consolidated by an "election victory". It probably drew the "wrong lessons" from a statement of principle that "the most senior judges in the country should be elected by parliament."

The regime, through the current constitution has made a complete turn into the old methods of sad memories experienced during its first thirteen years in office (1979-1992). Actually, section 141 specifies that Supreme Court members and other national court judges are appointed by the president; only those of the SCM are irremovable. Pursuant to section 139 of the Constitution already referred a draft law on the organization, composition and operation of the SCM was submitted to parliament. Its adoption enabled this body to sit on May 4, 2009, thirty-two years[199] after its last 1977 session. Indeed, this organic law on the SCM does not improve the condition of the magistrate. Compared to all previous laws, a closer look at this law indicates a decline by several decades. Article 4 for example provides: the Supreme Council of Magistracy is presided by the President, who cannot under any circumstances delegate this authority in any form whatsoever.[200]

From the foregoing, it follows that the issue of independence of the judiciary has evolved with the political changes that these states have experienced throughout history. If this principle had always been proclaimed and constitutionally enshrined, it would have brought out a possible convergence. It has on the other hand been differentiated by several points of view. The convergence is first at the dedication of the SCM as a body, sometimes for discipline, sometimes for management of judges, then the level of recognition of independence for the magistrate of a special status. The dissimilarities in turn appear particularly in the appointment process of judges and mode designating to those who must compose the SCM. Indeed, the SCM is the body designed to ensure the independence of the judiciary by the extent of powers it is assigned. These powers should cover all the basic elements on which we can measure the effectiveness of the independence of an organ. And in the SCM, these powers relate to the procedure for appointing judges, managing their careers, their budgets and disciplinary system.

In practice, as we shall demonstrate, this was not the case. In both countries, this body was headed primarily by the President and the Minister of Justice, respectively assuming the duties of president and vice president. The President of the Supreme Court, Second Vice-president, merely played a secondary role, that of applying the disciplinary processes.

In the DRC, for example, until before the last reform, the SCM had no power over the public prosecutors who thus escaped its control, and for the appointment and promotion process and their disciplinary system. After recasting the judiciary into the Judicial Council, another body appeared beside the SCM: the Inspectorate General of Courts, an instrument for the Ministry of Justice, for ensuring that magistrates are not judge and jury of their own mistakes. On the other hand in the Republic of Congo, since the constitutional change in 1992, there was a clear difference first in the process of appointing judges at various levels of responsibility, and in terms of determining the composition of the SCM. Compared to the

Supreme Court of Justice by parliament: Article 135 paragraph1 meanwhile had expressed in clear terms to the fact that CSM was the judiciary's guarantor of independence. Its paragraph 2 submits the appointment of prosecutors by the President on proposal of the CSM without specifying the nature related to this proposal or otherwise.

199 Ghys Fortuné DOMBE BEMBA, « Grincement des dents, allégresse à la magistrature et déception des peuples », Article en ligne in congoinfos.com

200 Formulation in accordance with Article 139 of the 2002 constitution

DRC, the big difference was that the 1992 Constitution[201] expressly left the power to elect the Supreme Court of Justice judges to parliament. This spirit has been kept implicit in the 1997 constitution[202]. During the same period, a category of judges were members of the SCJ by law with the others being elected by parliament. In the minds of its sponsors, this brief evolution spared judges from the authoritative grip of the executive. It is therefore regrettable that such progress was not maintained in the current 2002 constitution. Indeed, the text[203] is reversed to a system decried during the darkest periods of this country's political life which involved entrusting the appointment of all judges, including those in the highest court with the President on proposal by SCM, whose majority members are themselves appointed by presidential decree.

In the DRC, the issue has somehow changed since the adoption of the Organic Law No. 08/013 of 5 August 2008 on the organization and function of the Supreme Court of Justice. Its real independence can be discussed only if the operational capability of the institution is guaranteed: some leading members of the SCM transition - including the first president of the Supreme Court of Justice and Attorney General of the Republic - were they not appointed on 9 February 2008 when the President signed the very controversial orders of judicial organization? Despite the courageous reforms initiated in these two countries, the judiciary still seems -in the eyes of the proponents of political power-, an instrument to serve their interests. The changes at different periods of both countries' political history to improve the system, face challenges over there, and are violated here. This can be verified in judicial practice in these two countries.

II. JUDICIAL INDEPENDENCE IN PRACTICE

A theoretical analysis of the issue of judicial independence through various constitutional provisions and regulations of the countries under review have enabled us to have a perception on the conception of political actors of what is, and what ought to be legal power in their countries. Although constitutions explicitly recognize the principle of judicial independence, it is true that sometimes, the constituents may have ulterior motives as the proclamation of the principle leaves leeway for players not wishing to take it too seriously. Therefore the assertion that its solemnity did not suffice to provide the necessary effectiveness has been backed by laws and regulations to implement it. But experience has shown that the degree of development of these laws did not allow judges to be independent. This is due to several factors. The past existence in these countries of one-party communist regimes justified the executive right over the judiciary; currently, there is another factor influencing the choice of political actors towards a return to old practices, despite reforms in this sector in recent years. According to Prof. Alioune Badara FALL[204] of the University of Montesquieu-Bordeaux IV, it seems that "jurisdiction of society", a phenomenon that started a few years ago in Western democratic countries in particular - that is increasing and in the near future will certainly impact countries in transition to democracy - is an extraordinary favour to the judge's ascent in the hierarchy of power, changing people's perception of him and his functions especially. This society juridification manifests itself through the appropriation by the Law field once monopolized by politics if not by politicians.

---

201 Article 129 para 3 of the 1992 Constitution provides: The Supreme Court consists of judges elected by Parliament in joint session in the manner provided by law.

202 Article 75 of the Basic Act of October 24, 1997 is limits itself to: The trial judges and prosecutors of courts are appointed by the President of the Republic on proposition by the CSM. This implies the designation of those of the Supreme Court in the manner and form prescribed in Article 129 para 3 of the 1992 constitution.

203 Read article 141 of the 2002constitution

204 Alioune Badara Fall, « *Les menaces internes à l'indépendance de la justice* », in Debates on protection of judicial independence, 10th AHJUCAF Congress, Dakar 7-8 November 2007.

There appeared a movement of the «Policy» overtaken by the «Law» that upset both the physical borders and the executive and judiciary members' respective spheres of classical intervention. This movement is, according to the Author[205], due to demanding social transformation in terms of governance and issues related to human rights. The judge now appears increasingly as both the arbitrator between the government (e.g. the constitutional court) and the sanctioning body (magistrate or administrative judge) for failure to effect "duties" and "obligations" as part of their general activities, and under the watchful eyes of people constantly informed by the media. The judge is no longer limited to the execution of law, nor is he merely a guardian of individual liberty; he seems to become the authority that media place on the headlines every time a case transforms him into a specialist in medicine (euthanasia), history (the Papon case), finance (Elf affair) or agronomic (GMOs and the Bove trial) etc.. So many areas of daily life almost completely foreign to the judge in the past, but which today reflect the boldness and fearlessness of the magistrate who does not hesitate to indict any person in any area, to pursue justice as defined by law.

The judge thus appears somewhat flustered and legitimised, which is not without complications in the conventional hierarchy between the executive and judiciary powers that he represents. Also, the judiciary remains subject to restrictions that undermine the independence of judges in the exercise of their functions. We describe here some of the causes underlying these obstacles, and we will provide some suggestions for a true statement or consolidation of the independence of the judiciary in both countries.

II.1. IMPEDIMENTS OR INFRINGEMENTS ON THE INDEPENDENCE OF THE JUDICIARY

In his latest report on the independence of the judiciary (part I: the independence of judges), the Venice Commission stresses that judicial independence has two complementary aspects. They are external independence which protects judges against influences from other branches of government; an essential component of the rule of law. Internal independence guarantees that a judge bases his rulings solely on constitution and laws and not on the instructions of judges higher in hierarchy[206]. In practice, however, there are two kinds of constraints on the independence of the judiciary: some are internal arising from law, the others more threatening ones arising from external factors. In either case, the threats posed to the impartiality of justice are regrettable.

II.1.1. Internal or "legal" impediments to judicial independence

The degree of independence enjoyed by the judiciary varies from state to state and depends on the fulfilment of the rule of law. Like everywhere else, the principle that the judiciary is independent of other powers - notably the executive - is indisputable now in the countries under consideration. This proclamation, at least in formal terms reflects this fact. A careful analysis though enables us to discover that very often the obstacles to genuine judicial independence, and thus the judiciary, result in the formulation of laws supposed to organise in practice the function of the implementation organs of this principle.

A. Impediments resulting from the law on the status of judges

In many countries of the Romano-Germanic system, the lives of judges are organised by a special status. However, this status is determined unilaterally by legislation in all states

[205] Idem

[206] European Commission for Democracy through Law (Venice Commission), Report on the independence of the judiciary Part I: the independence of judges, Strasbourg, March 16, 2010 (Doc. CDL-AD (2010) 004.

where the profession of judging is institutionalised. It is therefore an area where negotiation is unplanned for between the magistrate and the future administration that sets the conditions for recruitment.

This unilateral nature of recruitment does not mean authoritarianism: Candidates for the office of judge in a democratic state know that once recruited, they receive *a priori* sufficient safeguards to exercise their profession work independently. This is attributed to their status which includes structural guarantees related to the organisation of the judiciary the material nature that allow them to be free from interference. In practice however, it appears that this statute often puts the judges in a "casket", hence theoretically affirmed independence is virtually diminished. In the case under consideration, and as we have demonstrated in the texts analyses, these violations to statutory guarantees accorded to magistrates arise from hierarchical organization of the judicial and statutory rules themselves.

a) Hierarchical bureaucracy

It may seem odd and even paradoxical to evoke the notion of hierarchy of justice since it implies a sense of subordination, which is difficult to conceive in this area. However, it must be accepted that justice, as a public service, is also affected by hierarchy. The hierarchical structure not only allows for judicial structuring, but also protects the citizen against arbitrary Court decision. This principle affects both the judiciary - which thus forms a hierarchical body - and the courts. It allows determining responsibility and gives some cohesion to the judiciary. In justice, however, this hierarchy is unique and is not dependent on the magistrate in respect of his superiors or the court when it comes to sitting judges. This does not seem the case for prosecutors in many countries. In the Democratic Republic of Congo, in fact, the distinction between judges and the prosecutors in respect of these rules appears to be easing.

The 2006 constitution brought an end to a system that consisted of placing prosecutors under the direction and control of their superiors[207], which is the authority of the Minister of Justice who more often than not had negative power of injunction over them. Under the constitution, the prosecutor was formally freed from s the Minister of Justice, this in fact happens in practice. In the Republic of Congo, hierarchical subordination is explained in very threatening terms in Articles 28 and 29 of Law No. 15-99 of April 15, 1999 amending and supplementing certain provisions of Law No. 023-92 of 20 August 1992 on the status of the judiciary.. In several other countries notably in France, Senegal, Burkina Faso and Togo, the question of control of the judiciary prosecution by the Minister of Justice remains central and a current concern in the discourse of independence of the judiciary. Some want a complete break between prosecutors and the government.

The hierarchy within the courts does not raise particular problems. Like everywhere, the principle of double degree of jurisdiction is intended to provide better justice to the complainant dissatisfied with a decision by the first court to seek justice from a higher court. If it were to make a contrary decision, it would not constitute an infringement of the autonomy of the decision of the court as each jurisdiction is free to rule as it wishes, whatever its position in the hierarchy. However, the hierarchy between people creates more complex relations, and raises more questions about the magistrate's independence.

---

[207] The principle of hierarchical subordination of all members of the public ministry arising from a Court of Appeal to a higher authority derives its basis from another principle, namely, that of the full exercise of public action, which belongs to the Attorney General at the Court of Appeal (read Professor Luzolo Bambi Lessa, criminal proceedings court, Kinshasa, 2007)

b) Infringements linked to the statutory rule itself

Hierarchical power mentioned in the judiciary does not in any way concern decision-making; it arises solely from the conscience of every judge who is accountable neither to his boss nor to anyone. Rather, certain administrative powers granted to heads of courts and prosecution services, which in practice may constitute a threat to judicial independence if they are not limited to operational requirements. They are responsible for regulating the organisation of hearings, filling placements and assessing the professional activity of judges under their authority. Even if there are safeguards surrounding these powers to prevent arbitrary acts, the magistrate is not free from pressure or from sanctions from his superiors. In the case of the Republic of Congo, for example, Articles 28[208] and 29[209] cited above are indicative of such risks. Other forms of legal obstacles arise from the powers of the Minister for Justice.

B. Impediments emerging from the duties of the Minister of Justice

The Department of Justice resulted from the French Revolution. Originally, it was the agency for the King on issues relating to justice. Since justice was administered in the name of the king, the minister also exercised supervisory authority over judges and headed the courts. For this reason he was a true member of the judiciary. It must still be noted that this system has changed thanks to several improvements made to respect the rules of the game[210].

However, in both countries under review, despite several reforms, the powers exercised by the Minister for Justice on behalf of the Crown still trace their current powers back to the Justice Minister. In the Democratic Republic of Congo for example, the functions of the Minister for Justice are clearly defined in Presidential Decree No. 07/018 of 16 May 2007 establishing the powers of Ministers. In Article 1 letter. B, chap. 9, it recognises the duty the Minister of Justice, among others, as administration of justice. Administration of justice refers to the exercise of regulatory authority, control of judicial activities, and general supervision over the judiciary, and monitoring institutional reforms. Ruling over the breach of the principle of judicial independence, an observer underscored the fact that this power to administer justice vested upon the Justice Minister, as a Member of the Executive, places him above the Judiciary[211].

It is true that separation of powers implies limitation of power by means of mutual control, aimed at maintaining the balance of power and not interfering in the essential activity of the other[212]. Professor VUNDWAWE te PEMAKO[213] sees the reason where acts of government escape judicial control, contrary to administrative acts which, are subject to it. Within the framework of the DRC in particular, that power can be very dangerous in practice if the holder seeks to use it extensively and repeatedly. It is within this context that the Minister of Justice Gizenga II during a press conference held August 29, 2008, promised to punish judges who, in his view, "render unfair judgments and compromise themselves through corruption."[214] often ignored internal damages to the independence of judges and courts

---

208 Article 28 paragraph 2 states that: "Any gross insubordination constitutes also repeated misconduct."

209 Article 29 provides that: the heads of court, apart from any disciplinary action, have the power to issue a warning to judges under their authority.

210 In France, for example, despite the fact that the President of the Republic chairs the CSM, and the Minister of Justice is the vice-president, a very important correction was made to the extent that, outside the CSM, neither the President nor the Minister of Justice can give injunctions to magistrates.

211 Constantine YATALA NSOMWE NTAMBWE, The independence of the judiciary in relation to the executive in Congo - Kinshasa, Online article.

212 D. Chagnolaud, Droit constitutionnel contemporain, Dalloz, Paris 1999, pp 59-61

213 VUNDWAWE te PEMAKO, Traité de droit administratif, Larcier, Bruxelles, 2007, PP 858-859 ; Cour Suprême de Justice, Arrêt (RC. 2407) du 8février 2002, Bulletin des Arrêts 2004, p114-115.

214 Read the full briefing on the official website of the Ministry of Justice: http://www.gov.cd

which, in both countries are just as real and important, are financial and material. Coupled with other material factors external to the judiciary, these latent and insidious factors can ultimately become internal threats.

C. Impediments associated with material and financial conditions

Any institution requires financial capacity to organise its functions. In providing public service such as justice, the budget must be developed by players' involvement. However, in both cases under examination, the material and financial resources have been lacking. This is evident in the functioning of courts and related services as well as the terms and conditions of Judges.

As regards jurisdictions issues, studies generally done on material and financial conditions, especially in African countries, have shown notable insufficiencies capable of affecting the exercise of "good justice" and as a result, hinder the magistrate from carrying out their tasks. This consequently results in loss of credibility particularly from litigants and independence among other state powers.

In the Democratic Republic of the Congo for example, an inquiry commissioned with the support of the European Commission under the guidance of Professor J. Mvioki BABUTANA[215] of the Faculty of Law demonstrated that courts and courthouses, offices and prisons receive no funding for operations and investment. Yet every year, the Ministry of justice prepares and submits budgetary projections to the budgetary commission of the justice sector. Having examined the in depth issues affecting the justice sector in the DRC, the professor revisited the matter in another study where he observed that: *"at the budgetary level, independence of judicial power is reduced to the task of a simple service of Justice"*. In his preliminary note on the DRC assignment, the Special Rapporteur comes to the same conclusion, and attributed *"the lack of financial independence to the lack of independence whether in civil and military justice and feeds a quasi-generalized corruption among the magistrates and justice auxiliaries (…)*[216]".

In many African states, financial resources are inadequate. The budget allocated to the Ministry of justice does not generally exceed 1% of the national budget. In the DRC for example the budget is 0.6% of the total national budget. Considerable lack of material means, insufficient office space, worn out office material, writing machines are characteristic of the justice sector.

These financial inadequacies do not spare judicial officers from potential external pressure; the remuneration received is often too little and not commensurate with the service they provide. Their salaries, allowances and benefits are determined by statute. In the Republic of Congo though, there is a government effort to improve their situation, it must be recognized that low salaries for judges in these two countries puts them in a vulnerable situation such that they enjoy less „prestige" in the eyes of consumers of justice..

Professor Mvioki, did not fail to speak of the „hackneyed magistrate", beaten to the rank of a simple civil servant. Can one imagined that a judge, with no other means of transport at his disposal, riding on the same bus with a suspect he has just sentenced? The situation in DRC is real, despite an understanding that majority of the high ranking judges have been given official vehicles.

---

[215] Joseph MVIOKI BABUTANA (Dir.), The status of the Congolese judicial system, Report, Konrad Adenauer Foundation, European Commission, Kinshasa, August 2003, pp178-179.

[216] See Doc. A/HRC/4/25/Add.3, 2007, p 1§2.

Save for the risks of aggression, a judge will hardly benefit from the necessary respect required to dispense justice.

To ensure financial security for judges and judicial institutions, the judge's entitlement to a salary and retirement benefits and other social amenities should be guaranteed and sheltered from executive interferences. Equally, this will shield the likely compromise to independence of the judge individually, and protected the dignity of the institution. The general idea implied by this proposal is that the relationships between justice and the state organs should be depoliticized[217].

As par article 149 of the DRC constitution, magistrates' salaries should be formally determined by the Supreme Prosecution Council which prepares a budget that it passes to the government to be included in the general state budget. In the Republic of Congo, this is not yet the case. On this subject, Madame Nicole DUPLE, Professor at the LAVAL University thinks that if judges' salaries are included annually in the budget plan presented to parliament by the executive, it is important to watch that the executive does not arbitrarily determine the salaries and other financial advantages related to the judiciary. It is also all important for the image of the independence of justice that the judges should not have to negotiate directly with the executive. Similarly, judges' union or their representative associations should not have to negotiate judges' salaries with the government. Besides, as far as salaries are concerned, judicial independence does not prevent the associations or magistrates' unions from seeking representation. What is important is that those answerable do not have the feeling that the judges can decide to abandon part of their independence in exchange for a salary or advantages that suitable to them[218].

Added to these problems is the lack of personnel[219] and deficiency in training material, information and documentation. In the case of the DRC particularly, the Kingdom of Belgium has tried to reduce this difficulty by publishing six volumes all the applicable legislation in DRC until 2003. Other forms of threat to the independence of judicial power are inherent to the magistrate's conduct and their judgements.[220].

D. The "intrinsic" threats associated with judges' conduct and the duty to judge

Without confusing magistrates' private life and professional activity, it should be recognized that in DRC, the reputation of those charged with rendering justice still holds a very big place in the public opinion. Certain misconduct associated with the integrity of judges has been condemned (corruption, alcoholism etc). At the internal level, such information weakens the magistracy, giving an opportunity to executive authorities hence, risking loss of independence.

In effect there are many types of "intrinsic" threats to the adjudication that ruin the independence of judicial power: directly or indirectly arise from types of politicisation of justice sector in certain African countries. First, it was deemed incomprehensible that magistrates take sides, contrary to their judicial function characteristic of modern democratic state. In the Republic of Congo for example, it is a characteristic of judges to sanction magistrates against the ruling regime.. Also, in the words of a prosecutor in the era where he unequivocally stated that the subjugation of justice to the executive in that country:

---

217 Nicole DUPLE, op cited

218 The last recruitment contest organized in this country last year largely answered to the problem.

219

220 Nous allons y revenir dans l'analyse de certaines décisions de justice notamment au Congo Brazzaville.

> *"the judicial council is not a real institution, but an organ by which the MPR -and hence its president, who incarnates it- exercises the justice mission. The Zairian magistrate is not, strictly speaking, the president's attorney but in some way the president himself exercising his mission do state the law (…..) The Zairian magistrate should become more and more aware of the importance of his assignment and render justice in the militant spirit and knowledge"*[221].

Today justice seems to present formal and more conformed aspects to democratic principles. In the Republic of the Congo for example, the tendency towards an executive hold on justice is subtle. It manifests itself through fears -often justified- experienced by certain magistrates, who are at the receiving end of sanctions of all sorts. Certain judicial rulings clearly show this subjugation of justice to political power[222].

1.1.2 External threats to judicial independence

The threats to external interventions on the impartiality of justice are from different sources and are varied in nature. We believe however, it is befitting to highlight some of them. The nomination, promotion and compensation process, or better still, the process of mandate renewal can by nature compromise the real or apparent impartiality of justice. Certain pressures coming from the social environment can also have a negative influence on the impartiality of the judge.

A. Appointment, magistrate's career and renewal of term of office: moments of external interference

In many countries, appointments of magistrates often depend on success of an entry exam in a magistracy school or results of a contest. In the Democratic Republic of the Congo and in Congo Brazzaville, the appointment process of magistrates is not susceptible to engender suspicion with regard to the independence of the spirit of these processes.[223] . Nonetheless, recruitment based on examination or organized competition by a superior council is less questionable if this organ does not undergo, -in fact and in appearance-, the influence of financial and executive power[224]. The nomination and promotion of magistrates by the executive is done upon recommendation of the judicial council. In such a hypothesis, and the liberty of choice of the nomination authority is restrained. It can be feared that the person named feels indebted to the authority that chose him.

In Belgium for example, although the power to appoint belongs to the King upon presentation of candidates by the Supreme Justice Council, a single candidate only is presented for each vacant service and hence it is him who holds the real power of nomination. In DRC, the President of the Republic is given power to name the magistrates upon proposal by the SCJ. Should there be a similarity? Article 2 of organic law No. 08/013 of 5th August, 2008 containing the organization and functioning of the Supreme Council provides that the Supreme Council is the organ for managing judicial power. It develops proposals for nomination, retirement, revocation, sacking and reinstatement of magistrates. It decides the

---

221 Evariste BOSHAB, « La misère de la justice et la justice de la misère en République Démocratique du Congo », in *Revue de la Recherche Juridique*, 1998, p. 1169

222 We will revisit this aspect in the analysis of certain rulings of justice notably in Congo Brazzaville.

223 Read Article 2 of Organic Law No. 06/020 of 10 October 2006 on the status of judges in the DRC, and Article 17 of Law 15-99 of April 15, 1999 amending and supplementing certain provisions of Act No. 023-92 of 20 August 1992 on the status of judges in the Republic of Congo.

224 Apparently derived from political pressures, it seems that the last judges' contest in the DRC was not immune to corruption. Families would pay large sums of sometimes up to $ 1500 for the admission of their children unemployed for several years. Uncles, aunts and cousins have been thus included.

rotation of judges without prejudice to the principle of security of tenure, in conformity with the provisions of article 150 of the constitution. In Congo Brazzaville, the same powers are given to the Head of State upon recommendation the SC. However, t law 16-99 of 15th April 1999 on the SC brings two specifications: firstly, as concerns all the magistrates and interior jurisdiction, article 7 provides that their nomination is recommended by the SC, which should observe the rule of impartiality and that the magistrates to be named should correspond to a certain number of criteria determined by the law. As for the Supreme Court magistrates on the other hand, article 8 of the same law specifies that nomination is made on a list of candidates who fulfil the criteria of admission[225]. The President of the Republic's nomination authority will also have a choice to operate between many candidates, given all the risks this process has previously carried.

In Belgium where the King has the authority to nominate those names recommended and submitted by the SCJ in the matter of judges' nomination, in contrast to the two countries under examination, the SCs do not have a real power in the matter of nomination. The number of posts to be provided and do not correspond to the number of candidates. This leaves a margin for manoeuvre for an executive power hardly favourable to an enhanced judicial independence; a sentiment of blind allegiance can be engendered in the spirit of the people named in these conditions. Yet it seems true that in these two countries, the proposal that recognized the power of the SCM is likely to involve the latter in the process of appointing persons under its career management. However, we can discuss the nature of that power. Is it merely an opinion, which the president can do without, or a ruling power by the executive?

Moreover, one wonders how such an SCM, where the majority of members are appointed by the President of the Republic -in the case of Congo Brazzaville for example- can exercise control over the appointment decisions taken contrary to recommendations given to him? In matters of promotion, it is equally to the SC that the law provides that they propose certain candidates[226] including to the state counsel[227]. The description established each year by the heads of jurisdictions and heads of the public prosecution office aims at enlightening the competent authorities on the magistrates' influence, knowledge and professional aptitudes and to determine his promotion grade.

In the DRC, article 156 of the constitution confers on the Supreme Council of Magistrates (SCM) the authority to propose three candidates to the constitutional court from a list of nine members to constitute the court.. Three are designated by parliament meeting in congress and three others on the initiative of the President of the Republic. In a country where the executive is majority in parliament, this can lead to government control of the constitutional court. In Congo Brazzaville, the constitutional court is equally composed of nine members, three of whom are named by the Head of the State, two are proposed by the Supreme Court office among its members, four upon proposal of the chairman of each parliament chamber. In DRC, members' term is nine years non-renewable; its chairman is elected by his peers. In Congo Brazzaville this mandate is equally nine years, but renewable. Its chairman is named by the President of the Republic; the nomination authority can find the chance to maintain

[225] These criteria are determined in article 3 of law 15-99 of 15t April 1999 modifying and completing certain provisions of law No. 023 of 20th August, 1992 containing the statute of the public prosecution, taken again from article 7 of law 16-99 of 5th April 1999 modifying and completing certain provisions of law 024-92 of 20th August 1992 and of law No. 29-94 of 18th October 1994 containing the institution of the Supreme Public Prosecution Council. It is a matter of seniority in the profession, of experience, of technical and competence; of professional of moral integrity; of professional known and of a high sense of patriotism".

[226] Article 11 of the organic law n°06/020 of 10 October 2006 on the status of magistrates

[227] Article 2 para. 5 of Organic Law No. 08/013 of 05 August 2008 on the organization and functioning of the Supreme Council of Magistrates in the DRC

or change the member who is deemed to conform or is less favourable, to his regime as the case may be.

From the foregoing, it follows that even if such an organ holds the power to nominate, it does not mean magistrates that the nomination process is free from the influence of executive power. In the appointment as well as in the promotion of judges, fears still remain; it is even feared that the proposed CSM is not likely to assign decision-making to the appointing authority which make a choice from a list of several candidates to fill very limited roles that are well below the minimum numbers of candidates.

The system of appointing judges on list regarding for example the judges of the Supreme Court and the President of the Constitutional Court in Congo Brazzaville, presents no guarantees of independence for reasons we have already mentioned. In the DRC, for example, magistrates said they were informed by their superiors that to aspire for promotion, they needed to make certain rulings.[228].

Maintaining the ratification system allows the President of the Republic to present himself as the true holder of nomination powers. Is this the intended spirit of the constitution? In the DRC, there is no evidence of such a hypothesis. The right approach would be to dispense with this process. This must not reveal abstraction as, in Rwanda organic law No 3/1496 of 29 March 1996 on the organization, functioning and powers of the Supreme Magistrates Council allows this organ to name only the sitting magistrates with the exception of the chairman and the vice-chairman of the Supreme Court. This option should reduce the direct interference of the executive in the appointment or promotion of magistrates.

The judge, like any other State agent, is concerned about pursuing a good career in his profession linked to the nature and the exercise of his activity. The threats concerning the judge's career might appear contradictory with the idea of the prosecutor's independence asserted directly or indirectly by the terms of the countries examined. Yet, a prosecutor who demonstrates a high degree of independence in the eyes of their superior, or towards executive authorities or policies in place would find his career threatened and his independence curtailed. The prosecutors are more or less attentive in the perspective of advancing in their career with guarantees from their benefit in this regard, and are therefore quite conscious that they are not free from sanctions.

The threat on their independence and integrity is prevalent throughout their career, right from recruitment to the exercise of their function, be it judges, public prosecutors or administrative judges. Other forms of threat to the independence of judiciary powers to be feared manifest themselves more in the administration of justice.

B. The interference clearly spelt out in the administration of justice Judicial activity in the Democratic Republic of Congo and the Republic of Congo is very often confronted with some difficulties at several levels. Apart from the difficulties previously described, which can be avoided by adopting clearer policies; others which seriously affect the judicial independence originate generally from the executive or its services which enter into the administration of justice. If the overall judicial system is thus subjected, in DRC military justice appears most exposed. Nonetheless, many innovations have been introduced in this field in the last seven years.

---

[228] UNITED NATIONS, report of the United Nations special rapporteur on the independence of judges and advocates, assignment in the Democratic Republic of the Congo. Doc. A/HCR/8/4/Add.2 39, 11 II April 2008 available online at http://daccessdds.un.org/doc/UNDOC/ GEN GO8/128/48/PDF/Go812849.pdf

Indeed, for a long time, military tribunals have been conducted, under the chair of an officer nominated by a military command and without proper qualifications of a judge. The career judge attached to the tribunal used to stay within the judges' college as a simple member among the other officers, but did not lead the proceedings process. As for the prosecutors (military auditors), they were, by virtue of their functions, directly attached to the command and the executive as advisors. The most highly graded among them, the auditor general, automatically exercised the functions of judicial advisor to the Minister of Defense during peace time, and to the President of the Republic during war-time[229]. Besides, the auditor general was the head of the military justice body and therefore had precedence over the judge. This effect in regard to the prosecutor's department was confirmed by the power recognized by the military audit for inviting the military jurisdictions audiences.

Some of these effects have been progressively deleted in the course of time. First, the resolutions taken by the National Sovereign Conference held in 1992 had allowed the deletion several certain signs by repealing legal steps which were justified. Also, the chairman of the military jurisdictions has been progressively confined to the judge or advocate to the detriment of officers without the qualities of a magistrate. At the same time, the independence of the bench in regard to the prosecution department and the precedence of the judges on the public prosecutor have been restored.

The judicial military code of 2002 and the constitution of 2006, on the other hand, were allowed to make career conditions for the judge or advocate more standardized than those for their civil counterpart. Also, the nominations for the judge advocates would henceforth meet the general conditions described in the law having judges' statute in DRC, and which cannot make itself by requisition carried out by superior judges. Likewise, these terms distinctively limited the authority of the Minister for Defense on military justice. The latter will no longer order termination of the proceedings already committed.

In practice, nevertheless, the open attacks against the independence of the judges are guided in a regular way by the members of the executive, armed forces command and the judicial hierarchy itself. This practice is not a new phenomenon in this country, but it appears to have taken worrying proportions since the transition period according to the AfrMAP study.. Several reasons can explain this. Indeed, during the war, the government put together some alliances with some armed insurrection groups. Faced with difficulties of delinking itself from such accords, the government preferred acting against the independence of the judges in order to protect former allies. Also, these attacks against the independence of judges took various forms; political pressures in fact, to revocations and ill-timed transfers of judges. In some instances, some judges are specially designed to know particular issues; in others still, we note the submission of the proceedings with prior authorization of the Command and some injunctions before making decisions[230].

a) Political pressure

Generally, the political pressures exerted on judges were aimed at coercing them, to abandon the proceedings or to influence with their decisions to protect one or several former allies. In some cases, political pressures are practiced in a very subtle way and their manifestation is often never obvious for the general public outside the concerned judge. Gideon Kyungu

[229] Marcel WETSH'OKANDA KOSO, *République Démocratique du Congo, la justice militaire et le respect des droits de l'homme – L'urgence du parachèvement de la réforme*, une étude d'AfriMAP et de l'Open Society for Southern Africa, publication du réseau open Society Institute, Johannesburg, 2009, p. 7

[230] *Idem* , pp. 8-9 ; 71-77

Mutanga and Tshiinja Tshiinja, two former heads of North Katanga, are quoted for having benefited from such protection from the Government. In the first case, political pressures were exerted on the judge in order to influence the outcome of his decisions.. In a report of 8 February 2007, the "MONUC"[231] magistrate's court from where the military chief was voluntarily delivered on 12 May 2006 had to confirm this state of affairs when it was noticed that the departure of Mr. Gideon depended exclusively on whims of the President of the Republic. In the case of Tshiinja, the drill judge, driven back by the Civil Society about the slow starting of proceedings, confirmed that the fate of a suspect did not depend on him but on public power.

In other cases, these political pressures are more open. It appears that the ones practiced on judges in the Kilwa matter were in particular so open that they had to arouse the indignation of four Human Rights Organizations which later signed a press communiqué[232].

More recently, the government banned judge advocates from pursuing the heads and the combatant armed groups based in the North and South Kivu, in particular those of the rebel National Council for the Defense of the People (CNDP) Movement. Through a letter dated [233] 9 February 2009 addressed to the Attorney General of the Republic and the Auditor General of the armed forces of the Democratic Republic of Congo, the Minister of Justice had instructed them "*not to engage proceedings against default armed group members and to arrest the ones already initiated*". The imperative of peace was often advanced in order to justify such decisions. It is, however, necessary to say that these measures, if they allow establishing a resemblance of peace to calm situations, do not remain less that they constitute an allowance to the nuisance capacity granted to some of our lost brothers. It is necessary to remember that peace equates justice. Several matters before the international jurisdictions (Arusha Tribunal for Rwanda and the International Criminal Court), for example in the case of the Sudanese Head of State) do not testify to this demand. To these pressures already very perceptible, other factors add on not less negligible undermining the independence of justice.

b) Dismissals, ill-timed transfers, threats and harassment of judges

In the Democratic Republic of Congo, article 150 of the constitution spells out in its last paragraph that: "*the judge is permanent. He can only be transferred by a new appointment or at their request or by rotational reasons decided by a superior Council of judicial authorities*". In the Republic of Congo, under the terms of article 141 of the constitution of 2002, only the Supreme Court judges are permanent. In many cases, unfortunately, the revocation and transfer have been used to punish a judge who has abused power. In DRC for example, the prime chair of the military high court NAWELE MUKHONGO was dismissed in 2006 under suspicious conditions of the law. It appears that this dismissal was linked to an acquittal by the military court of Kinshasa-Gombe garrison, of Major Marie Thérèse NLANDU, one of the opposition candidates in the last presidential election, pursued by the participating head of an insurrectional movement. A United Nations report[234] affirms that it could be blamed on the general chairman, not to have a well organized chairman of the military court, MBOKOLO, the then cabinet director.

---

[231] MONUC, *La situation des Droits de l'Homme en RDC au cours de la période de juillet à décembre 2006*, 8 février 2007, p. 22.

[232] ACIDH, ASADHO, GLOBAL WITNESS ET RAID, *Le procès de kilwa: un déni de justice, chronologie, octobre 2004-juillet 2007*, 17 juillet 2007

[233] Lettre du Ministre de la justice N° 0226/JPM284/D/CAB/MIN/J/2009 portant « Amnistie à accorder aux membres des groupes armés (CNDP…). »

[234] NATIONS UNIES, *Rapport de l'expert indépendant sur la situation des Droits de l'Homme en République démocratique du Congo*, Doc. A/HCR/7/25, 29 février 2008§28.

This proposition appears to gain ground by the fact that, Mr. MBOOLO and Mr. KAKWENDE, another judge advocate close to General NAWELE were, under the same circumstances transferred out of the country. By not having reported to their respective posted stations, they raised proceedings against them for disobedience. In another UN report, the expert notes that:

> "*in several trials for serious crimes, the judges having instituted unfair actions or taken unfair decisions to a member of the military command were moved and, following this movement, the decisions taken by their successor ended up acquitting the accused. In numerous cases, the military and police commands do not hand over to the judges the guilty military or police officers, sometimes explaining that they are supported by the capital (…) ".*

The judges describe an unbearable situation in which it is often impossible to work[235].The weight of command practice was identified as one of the factors of counter performance on military justice. Everywhere, the command assumes the right either to ban the proceedings against some elements placed under their authority or to submit the said proceedings to their prior authority. Thus, in a letter addressed to the Bunia garrison military auditor dated 24 July 2006, the General MBUYAMBA NSONA[236], commander of operations in Ituri, the following can be seen:

1. *I have observed that for some time now, garrison military officers are invited and come to discuss in your offices without the knowledge of the commander of operations.*
2. *From now henceforth, all invitations, any power of appearance or, will henceforth have to be approved imperatively by the commander of operations. The military officers are in operation.*
3. *Acting otherwise will constitute a flaw of procedure and to this effect be punishable.*

In many other cases, the judges often felt threatened. In the same report, we observed that:

> "*several judges indicated having received threats, especially in the Easter provinces of the country, among others, for having accepted the MONUC support. They received warnings telling them that, after the departure of the MONUC, they will remain and their account will be settled. Other judge advocates indicated having found some tracts containing threats and enjoining them not to worry in murder matters. In the case of military justice, it is the military officers who threaten or assault the judges to the extent of intimidation, in view of ensuring their impunity or that of their colleagues. Recent serious incidents which took place at Kisangani where General Kifwa removed four judges from their residences, undressed them and beat them in the streets in front of crowds, and later taken to the headquarters where two of them might have been subjected to cruel treatment and abused the whole night, demonstrates that the judges' vulnerability degree is gaining intolerable levels*[237]*."*

In the Republic of Congo, in the absence of several documents to analyse, it was difficult for to measure the impact of the interventions of the executive in the administration of justice. However, after reading the two reports furnished by the International Federation League of Human Rights (FIDH) on the matter of the "*Missing from the Beach*", it was possible to affirm that, in this country, the judges were never shielded from political pressures. Other forms of external assumption, if the proceedings – away from any media – were placed at stake "*power interests*" or involve the judged personalities of a certain influence. The |Missing

[235] Doc. A/HCR/8/4/Add.2, 11 Avril 2008, *op cit*. § 39.
[236] Marcel WETSH'OKANDA KOSO, *op. cit*. pp75-76
[237] Doc. A/HCR/8/4/Add.2,11 Avril 2008 *op cit*. § 38

from the Beach" matter, by its importance shades light on the condition of the judge when the *interest of the state* are threatened.

Yet, at the end of January 2002, the public prosecutor's department of Meaux (France) had opened judicial proceedings against unknown persons, following the complaints filed by FIDH and survivors of the Beach massacres, which took place from 5 to 14 May 1999 against refugees in the south of Brazzaville. On 1st April 2004, while on a private visit to France from 19 March 2004 at his Meaux vacation resort, Mr. NDENGE[238] was arrested and placed under watch in Paris at the request of the Meaux judge, Jean Gervillé, who instituted the trial. Jean François N'Dengue was therefore directly involved in the tortures and the massacre of more 350 Beach refugees in May 1999, within the port of Brazzaville. It appears that despite the pressures emanating from Quai d'Orsay[239], the investigating judge sent Mr. N'Dengue directly to Santé prison. It is then that Mr. Sassou N'Guesso, president of Congo (mandated by ELF-TOTAL) and a long time friend of Jacques Chirac entered into the scene and had his relationship exert some influence. When it did not work, and then came the threats:

> *"What would they say, gnashed the African president, if I had the military attaché of the French Embassy arrested? Or if I threatened the interests of Total and its directors on the ground?[240]"It seems that this blackmail about powerful French petroleum interests in Congo got the upper hand and influenced the decision, since, according the French press already quoted, the "President Chirac, before flying to Moscow, had asked Villepin to settle the issue at night".*

This led on 3 April, at 2 a.m., to the instruction room of the court of appeal of Paris – without justification in his judgment – to set the captive free. At 3 a.m., Mr. N'dengue was immediately released and left Santé. The FIDH, the French league of Human Rights (LDH) and the Congolese Watchdog of Human Rights (OCDH) decided to seize the Senior Counsel of the French Judicial Authorities in order to investigate the decision to release Jean-François N'Dengue.

In their letter of 5th April 2004, we could thus conclude:

> *"Independently of the legality of such a decision, taking into account the absence of Mr. NDENGE's diplomatic immunity and for the charges held against him, it appears that this issue impacted on the treatment to the least, surprising. It was brought to our knowledge that the services of the police force having proceeded with the questioning of Mr. NDENGE, the examining magistrate and the Freedom and the detention judge repeatedly intervened in order to avoid the examination of the interested party and his detention (…) These facts appear to justifier to us a seizure of your Council so that it will examine the reality of the interventions whose investigators and the bench were the object. In the same way, the exceptional treatment of this procedure may justify the examination of the conditions in which a judge accepted to make the ruling[241]".*

Mr. Jean Gervillié, the examining magistrate at the Meaux Grand Instance Tribunal, also seized the Senior Counsel of the judicial authorities for a petition. The judge in charge of the

---

238 Un officier de la gendarmerie congolaise (Brazzaville) de haut rang

239 Lire le Canard Enchaîné du 7 avril 2004**, « L'affaire n'dengue - les menaces de SASSOU envers Chirac - quand la France-Afrique fait dérailler la justice française ».**

240 Idem.

241 International Federation of Human Rights, Legal Action Group of the FIDH, Republic of Congo, Case of the Missing of the Beach, developments and issues of ongoing proceedings in France, the Republic of Congo and the International Court of Justice December 2001-July 2004, No. 400, July 2004, p.12. (Find the full report on http://www.Fidh.org/justice/index.htm).

open instruction against unknown persons for crimes against humanity, committed between April and July 1999 in Brazzaville (Congo) had denounced the interventions suffered, in a way to compromise seriously the peaceful sequence and independence of information which had been captured. Following this request, the public prosecutor's association met on 13 April 2004. In the communication from the association's chair, Madam Aïda Chouk, said:

> *"Ladies and Gentlemen members of the Senior Counsel of the public Prosecutor', Mr. Jean Gervillié, the examining magistrate to the Meaux Grande Instance Court has submitted your petition request. The judge in charge of the open preliminary investigation against unknown persons for crimes against humanity, committed between April and July 1999 in Brazzaville (Congo Republic) indicates to this effect that this practice was the subject of interventions in a manner to seriously compromise the peaceful proceedings and independent of the ongoing preliminary inquiry. The circumstances under which Mr. N'DENGUE is being watched and those of the audience of the examining magistrate's chamber of Paris on the prompt special hearing by the Attorney General of the Meaux Grande Instance Court, leading us to us submit to you a notice on possible prejudicial pressures to the principles of the independence of the authorities and separation of powers"*[242].

In the ensuing proceedings committed in France, the Congolese authorities announced their wish to re-launch inquiries on judicial proceedings which would have opened, against unknown persons since 2000. According to FIDH, several elements witnessed a strong political assumption in the trial. They wrote: *"11 June 2002, the public prosecutor and the doyen of the examination judges were relieved of their duties by the Minister for Justice*[243]*. Patrice NZOULA was appointed the senior justice of the investigating judges: death of an investigating judge and appointment of a new one"*.

In another report of FIDH on a judicial mission for the trial of the Missing from the Beach, the experts suspected the independence of judges and of the jury charged with this trial in the following terms: The choice of the jury was not left to chance; rather, they were carefully chosen by the Congolese administration. As for professional judges, the modalities of their selection remained unknown by the advocates met by the official representative of the FIDH, which meant that they are not controlled by transparent rules. Thus, their independence was doubted. Their appointment came exclusively from the President of the Republic, who decided the proposal of guard of the Seal and a supreme council of prosecution department, which, in real sense was not created (…)". All whole proceedings were marked by open irregularities and, unfortunately, pertinent political guardianship on a judicial authority which may not, but only the defense rights – essential attribute of the right to an equitable process – will have been respected[244].

In DRC, like in Congo Brazzaville, the analysis of some practical cases has shown diverse forms of political assumptions taken in the administration of justice. The consequences of such practices on the independence of judicial power would stop any momentum in a country like DRC on embarking on major reforms.. More so, even if it is before military jurisdiction that such attitudes were the most evident – in the case of DRC, for example – that does not mean that civil judges should be protected from such pressures. A report already cited indicates that:

---

242 Find the extract of the letter in Pressafrique of April 2004, in http://www.pressafrique.com/m41.htm

243 Both figures have told the the FIDH no procedure was initiated in the Congo in the case of the Beach. The step taken by the Minister of Justice may therefore be regarded as a sanction against them.

244 FIDH, Mission d'observation judiciaire au procès des "disparus du Beach", Brazzaville, été 2005, n° 435, Décembre 2005, in http://www.Fidh.org/justice/index.htm.

"*as regards executive political interference in the administration of justice, we may signal the case of a vice president who had the execution of Judgment regularly suspended, going up to sequestrate and detaining bailiffs committed the execution of the decision*". The same report notes: "*it is common to see the Minister for justice suspend the execution of justice decision given in good and due form. It also happens that he summons an order to an examination judge to set free a defendant without taking into account the records*"[245].

Moreover, it happens in some cases that the judge, all under the authority of no other organ or collectively, aliened their independence to individuals or to an agent. This form of pressure, though often not organised, is not least awesome.

c) Social environmental pressure on Judges

A judge is an integral part of the social environment within which he or she operates and therefore cannot be isolated; "the correct justice" is delivered by a judge faced with reality. Members of the civil society for example recognizes this fact to the extent that a judge does not appear vulnerable to political, religious, ethnic, or economic influences, likely to affect its impartiality. The concern to eliminate the potential conflict of interest risk justifies that e judges should be banned from any susceptible professional activity that would lead them to practice their judicial duties with bias. The maxim "*nemo debet esse judex in propria sua causa*" which conveys the demand of impartiality signifies that judges should not be placed in situations where they are made to choose between their personal interests and the exigencies of justice. The laws which establish the incompatibilities foresee generally and explicitly the ban to practice political duties or to belong to a political party.

However, in practice, the influences and pressures coming from their susceptible social environment likely to compromise their impartiality are from diverse sources that would be difficult to mention all of them here. In general, in the two countries under study, the judge allow themselves more often to be influenced by social considerations (clannish or tribal)[246] and by the corruption attributed to poor financial remuneration..

Having close relationships among influential personalities in political authorities (family, clan ethnic) has been an asset in winning trials. A loss of a case is likely even when it is legally sound. On the corruption factor, l, based on their meagre salary, judicial officers have been known to ask for money from litigating parties in order to pronounce a judgment. If not, a delay is occasioned, without fear retribution for denial of justice. Then, winning the case goes to the party which offers more money. Professor VUNDWAWE did not hesitate to raise this issue with Advocates and magistrates who maintain mercenary relations by selling off the law cheaply for money[247].

In a UN report on the independence of judges already cited, the expert notes:

"*whereas Advocates do not appear to suffer from neither lack of organization of their profession nor lack of independence at the formal level, the difficulties they meet are found at the lack of*

---

[245] Joseph MVIOKI BABUTANA (Dir.), *Etat des lieux du système judiciaire congolais,* Rapport, op cit, p 179

[246] Even the rules governing the promotion are also affected by the phenomenon of tribalism, that the Bar-Mbuye Mbiye TANAI seems to be saying that when he writes: "The rules governing the promotion is another problem in that jurisdiction was often dismissed as a possible criterion for selection, evaluation of candidates is often limited to tribal or clan or regional balance, with the result that some are bound to a deserving career that eventually lead to flat despair and bitterness. (Mbuye-Mbiye TANAI, The State of the Congolese justice system, openning court Speech, Kinshasa, December 2008) Read the full speech in www.justice.gov.cd

[247] VUNDWAWE te PEMAKO, *op. cit, p.* 119

independence of judges level, and especially of their corruption. It is quite frequent for judges to ask for money from advocates and, if they do not pay, they more often lose their cases. For this fact, a group of Advocates let themselves get corrupted and those who remain honest face a lot of difficulties[248]*"*.

The social environment and the power of money on the judge are, therefore, two factors that will be necessary to consider in the determination of rules on the independence of judges. The principle of security of tenure for judges for example should fit into this reality; a more dissuasive system of punishments is, so to say recommended to discourage practices..

II.2 JUDICIAL INDEPENDENCE IN THECONGOS

In countries which cut links with the communist system and adopted the pluralist democratic political system, the administration of justice has been remodelled in order to fit the new demands of democratic rules. There is no valid doctrine of the independence of the judicial function; it is for this reason that that independence is an indisputable cause of weakness, at least countries with Roman law. However, it remains a fact that independence of judges is a necessity recognized by all, and that has been assured in all free countries. In the two countries, reforms have been initiated since the 90's. The analysis of their constitution and respective laws enabled to demonstrate that formally, the Democratic Republic of Congo seems to go very far towards a wider recognition for the independence of the judicial power. In the Republic of Congo, very ambitious reforms began between 1992 and 1997. Unfortunately these were not harmonised with previous reforms aimed at the judicial system criticised in the past. It is this independence that we are going analyse in the light of the experience learnt from several countries. In practice, the independence of the judge should be guaranteed by certain conditions mentioned here. In other words, where proclamation and the establishment of the principle of separation of powers are formally sufficient to ensure the independence of justice, collectively submitted, many other guaranties are required to support e the independence of judges individually. Here we are coming from more classic interpretation of the law on independence. These principles are widely known and shared, which hardly suffices that all the problems are settled. Making an inventory of the subjects, is examining the difficulties. In general, away from the external independence protected by the laws, the judge also has to be able to use internal independence. Within the framework of this study, we will limit ourselves to external conditions of independence which rely on the recruitment and advancement of the public prosecution department; the issue of permanency of the bench; the legal responsibility of the bench to immunities and protection against insults, by proving the role that SCM may play and in what condition the SCM can be efficient.

II.2.1 SCM, the organ that appoints and promotes judges

In several countries with a democratic culture, the constitution confers role of the independence of judicial power to an independent organ. In DRC like in Congo Brazzaville, it is up to the Supreme Council of the Judicial Authorities which is mandated to appoint and career advancement of judges.. But the effective establishment of these powers remains subject to certain conditions. In fact, Supreme Council of the judicial Authorities is the regulatory organ of the judges' career established also in the remove and recommendation to the executive for nomination, and therefore to shield them from political influences. As regards recruitment of judges, the two countries practice is a competitive entrance exam or appointment.

[248] Doc. A/HCR/8/4/Add.2, 11 Avril 2008, *op cit*. §47

For this matter, this career sequence has to be organised such that one cannot be abandoned at the whim of political power. If the competition system appears to garner unanimity to some *formal guaranties* forwarded, the most difficult is in the transition management: when going from an unsatisfying system to satisfying one, how should this be done and by whom? Faced with an enslaved or mercenary judicial system, do we start with purging it – which is not an easy thing already – only to bring independence guaranties to new judges, or do we start with the constitutional and legislative guaranties?,?

The DRC certainly had to ask itself such questions and likely that Congo Brazzaville would be faced with the same dilemma. In the past, in these two countries, the appointment of judges was the privilege of the Minister for Justice in accordance stated procedure. Currently, the CSM composed of the authorities, themselves judicial, received confidential tasks for the selection for advancement. But the reality is sometimes kept away from this principle because in fact, other than corruption which is always present in the selection of the candidates, the political power is far from having renounced everywhere to have an influence on these choices. Indeed, even if the SCM is formally competent to recommend appointment, promotion and dismissal of judges, the real power lies with comes in reality from the President.

In DRC, the SCM is totally composed of judges, what then can guarantee the absence of any political influence in the carrying out of their duties? In the Republic of Congo, they are far from this idea. Indeed, when it is necessary to sit for the appointment or promotion of judges, the SCM composed mainly of members nominated by the President, is presided over by the latter or, in his absence by the Minister of Justice. Also the weight of the executive members within this organ and the modalities of decision-making during deliberations leave no doubts as to judges' vulnerability.

In Senegal, whose system is very close to the one for Congo Brazzaville, the practice has shown that the deliberation procedures and voting within the SCM are often merely formalities of which either the President of the Minister for Justice applies sometimes when they act in nominating or promoting judges for political reasons. It has in fact been observed that even if they have presided over the SCM sitting for the purpose of appointment, the President does not feel obliged to appoint exactly as the SCM.. In fact, the practice appears to indicated that: "*sometimes the president, following the rejection shown by the SCM of an appointment proposal for the Guard of the Seal, the Minister for Justice is careful in appointing the proposed judge, sometimes the President despite the favorable opinion of the members of SCM, never went ahead to appoint the proposed judge*[249]", which, of course, in the appointment of judges, the President's competence is not linked to the voting result of the SCM.

In order to avoid the risk of politicising the duties of the judge in Congo, the ideal would be to cut the umbilical cord between the SCM and the Executive as it has been done by the neighbouring states which was, Mr. Aliou Niane, chairman of the Union of Judges of Senegal recommendation. During a private radio - *Radio Futurs Médias (RFM)* broadcast - on 19 august 2007, Mr. Alioune declared that since "*the President cannot be the head of the National assembly neither the Senate, on principle and in order to ensure an effective independence of Judges, he cannot be the head of judicial power through the Supreme Council of Magistracy authorities*".

In regard to appointment and promotion of judges, strengthening of the SCM powers require that the laws are the clearest possible, in demanding for example the standard of the

[249] Juriscope, "The special status of magistrates and the judicial system in Senegal", 1997, p6 quoted Foundation OSISA (AfriMAP), in The High Judicial Councils or equivalent bodies in Africa: a brief comparative presentation of their powers and composition : legal advice to parliamentarians of the Democratic Republic of Congo, November 2007, p. 7.

decree of the President to the proposal made by the SCM. The suppression of this decree in DRC as in Congo Brazzaville ought to be the ideal. Even in Rwanda and Mozambique, Article 222 of the constitution assigns 4 tasks to the Supreme Council of Judicial Authorities (Conseilho Superior da Magistrature Judicial) CSM: appoint, transfer, promote and dismiss the judges: evaluate the professional merit and exercise disciplinary action against the tribunals' administrative staff, without prejudice to disciplinary powers of the courts' heads; proceed to inspect, inquire and investigate extrajudicial matters linked to the courts' administration and tribunals; give consultative opinions and recommendations on wide options of the judicial power, at their own initiative or at the request of the President, parliament of government.

In the Recommendation No.R(94)12, the Committee of Ministers of the European Commission also allowed a preference for the SCM as an appointing organ, in accepting other sentences and indicates:

> "*Competent authority as regards selection and career of judges ought to be independent from the government and the administration. In order to guarantee its independence, preparations ought to be made for vigilance, for example, so that the members are appointed by the judicial power and that the authority decides itself on its own procedural rules. Nonetheless, when the Constitution, Legislation or the traditions allowing the government to intervene in the appointment of judges, it is convenient to guarantee that the appointment procedures for judges are not influenced by other motives than those linked to abovementioned objective criteria*[250]".

As regards advancement, Recommendation R(94)12 foresees that: "*Any decision concerning the professional career of judges ought to remain on the objective criteria, and the selection and career of the judges ought to be base on merit, considering their qualifications, their integrity, competence and efficiency*[251]". The President of the Bar MBUY-MBIYE TANAYI expressed the same opinion in his speech when parliament resumed when he said:

> "*The presiding rules for promotion constitute another problem, in so far as competence was often isolated as a possible criterion for selection, the assessment of the candidates was limited more often to tribal or clannish origin, or even to regional balancing, with consequence that some deserving people are compelled to a plane career which ends up by creating despondence and bitterness. Beyond that, the assessment or quotation system of judges has to be put into force to the condition of course to revert to the objectivity in the appreciation of the deserving. The only admissible remedy remains thus on the organizations of the tests or competitions, after a special cycle of training of public prosecutor's department meant for those who should be empowered to lead jurisdictions or magistrates' offices. It is certain that everybody would be a winner in this regard, if the bench, the privileged witness of the magistrates' activity was consulted for an optional opinion for all the promotions in the Bench*[252]".

Likewise, in his Notice No. 1 par. 25), the Consultative Council of European Judges furthermore recommended "to the authorities of Member states responsible for the appointments and promotions or charged with the formulation of recommendations in regard to adoption, make public and establishing objective criteria so that the selection and judges' career are 'founded' on merit, considering their qualifications, integrity, competence

250 Commission de Venise, Doc. CDL-AD (2010) 004, *op. Cit.* , p. 7, §28
251 Idem, p.6 §23
252 MBUY-MBIYE TANAYI, *op. Cit.*

and efficiency". Merit is not measured only with judicial knowledge, analytical competencies or intellectual excellence. One's assessment ought also to take into account the personality, judgment safety, accessibility, communication skills, efficiency in the decision-taking, etc[253]., conditions that a judge must met if judicial independence is to be guaranteed.

A. The question on removal of judges

The security of tenure principle is not always defined by the laws processing independence of justice but only constitutes essential elements. «*Permanency of judges declared Mr. Paul FABER, former president of the Superior Court of Justice of Grand Duché of Luxembourg, is one of the principal guarantees of their independence in respect of political powers*». This principle is today proclaimed constitutions of almost all the states. In essence, it signifies in the first place that a judge cannot, even by advancement, be removed or transferred without their consent. In Canada, the North British American Act stipulates that judges of superior courts remain in charge during good conduct. The words "during good conduct" are interpreted to mean judges are appointed for life.

In DRC, the principle is articulated under Article 150 of the constitution of 2006. In Congo Brazzaville, only the judges of the Supreme Court are permanent (Article 141). It is therefore clear that on the issue of security of tenure of judges, several conceptions are accepted and For Professor BIBOMBE MWAMBA, this poses several questions; we can discuss its content and of what it consists[254].

The principle of security of tenure has to tangible even though its application may be vary. In our direction, several factors can restrain the complete application with certain limitation. Health of the judge and their misconduct especially, can make it recommendable that duties are withdrawn. This requires a totally independent political organ. In DRC like in Congo Brazzaville, the SCM is the disciplinary organ of judges. It exercises its jurisdiction in accordance with the foreseen arrangements in the laws on the statute of judges of these two countries[255]. In the first country[256], Article 20 of the organic law No. 08/013 of 5 August 2008 on organisation and functioning of the SCM provides for disciplinary jurisdiction of the judges. Article 21 of the same law specifies that the disciplinary power of the SCM is exercises by the national chamber and the provincial discipline chambers. Articles 22 and the following define the competencies of these chambers: Article 47 draws a non-exhaustive list of disciplinary faults and Article 48 lists restrictively fines which may be slapped on an offending judge. In the second case, the disciplinary system is equally confined to the SCM through the judges' discipline commission, deliberating on each record in preparation, submits its conclusions to the SCM rounded up in its entirety and ruled under the chairmanship of the President[257].

It has been emphasised that the security of tenure can pose problems in the small countries and/or villages for a judge.. In fact, the specificity and difficulty of the resident judicial system, it seems, is at a crossroads at various fronts which makes the fight against more complex and heavy which brings into question the integrity of the judge.

---

253 Commission de Venise, Doc. CDL-AD (2010) 004, op. Cit. , pp.6-7, §2

254 BIBOMBE MWAMBA, « Le droit à un procès équitable à travers la Déclaration universelle des Droits de l'Homme et le pacte international relatif au droit civil et politique », in *Anales de la faculté de Droit*, presses de l'Université de Kinshasa, décembre 2007, p.196.

255 Au Congo Brazzaville, les articles 28 à 39 de la loi 15-99 du 14 mars 1999 modifiant et complétant certaines dispositions de la loi n°023-92 du 20 août 1992 portant statut de la Magistrature organisent la procédure disciplinaire.

256 En RDC, la procédure disciplinaire des magistrats est décrite aux articles 50 à 64 de la de la loi organique n°06/020 du 10 octobre 2006 portant statut des magistrats.

257 Lire l'article 12 de la loi organique portant organisation, composition et fonctionnement du CSM au Congo.

The independence of the judge brings together a combination of factors, it would be prudent not to leave a judge in the same place of appointment for too many years, in order to avoid an influence on them and compromising of their independence.. It has, moreover, been demonstrated that the judge is more often subjected to pressures of their social environment. The principle of security of tenure stipulates that the judge cannot undergo any changes in their career unless by reason of gross misconduct in the exercise of their duties. To the contrary, judge's security of tenure is equally threatened by untimely transfers and irregularities operated generally on punishment. Elsewhere, they are sometimes a matter of work necessity[258], which poses the question of accountability between these two principles. It is advisable to say t the security of tenure of a judge is not a personal privilege. It rather aims at guaranteeing the independence of judiciary and therefore of the person charged with applying it. Also his consent has to be requested and the procedure of transfer respected even in the framework of these «service necessities», without limiting oneself to a simple inquiry.

In the European framework, the issue of transfers of judges is processed in the European Judge Charter paragraph 3, 4 which stipulates that: *"The judge on duty in a court cannot, in principle, make a new appointment or a new transfer, even for promotion, without there freely having consent. It can only be done with exception to this principle with the case of the movement was foreseen on disciplinary punishment and was pronounced, in the case of legal amendment of judicial organization and on temporary transfer in order to strengthen a neighbouring court, the maximum duration for such transfer being strictly limited by the statute without prejudice of application of spot arrangements 1.4.*

This position was otherwise adopted by the Constitution of Venice when it declares: *"Transfers against the judge's wish can only be authorized in exceptional cases."* In Africa, the Declaration and the Cairo Plan of Action adopted in 1995 encourages francophone states to eliminate "any obstacle to the independence of judges, first indemnitors of an accessible justice and efficiency, by assuring them the necessary statutory means and materials for the exercise of their duties…" The Senegalese State Counsel has taken this direction by annulling for illegality (ignorance of the principle permanency of judges) two presidential decrees which had proceeded to transfers/punishments of judges unwittingly. The Senegalese constitutional council did not hesitate to annul an organic law for unconstitutionality[259]. The Benin constitutional council also strongly affirmed the necessity for respecting the principle of the independence of the judiciary in matters where political power tried to contain the judicial system. The Court effectively specified that

> *"respect for the principle of permanency demands that the judge has been individually consulted once on the new duties which have been proposed to them and the exact stations where they have been called to exercise them… The elements of this consultation constitute the conditions of the minimum procedure demanded to guarantee the independence of the judges[260]".*

[258] This is the case of Senegal where the principle of tenure is thwarted by Article 5 of Organic Law No. 09-27 of 30 May 1992 on the status of judges. It allows the executive to argue the "requirements"to neutralize the judges opposed to the dictates of political power. Thus, it may proceed with the agreement of the Supreme Council of Magistracy, displacements of judges without needing to seek their agreement, and especially without this is objectively controlled by the exigencies of service. This departure from the principle of tenure is also coupled with another: Article 68, paragraph 2 of the Act ensures the interim if the number of available judges in the court is insufficient. We also find such provisions in Mauritania, Benin or Burkina Faso to name a few.

[259] CC Sn 23 juin 1993 citée par Alioune Badara FALL, *op cit.*

[260] V. DCC.97-033 du 10 juin 1997, *idem*

In France, in order to mitigate this risk, the doctrine proposes the adoption of the principle of permanency "temporary" where duration of the duty of the judge to such and such station is determined in advance. If at the time for reporting for duty the judge concerned knows that they cannot go beyond this date, they will not be any violation to their independence. The organic law of 30 May 2001 took this direction by limiting to seven years in the exercise of the duties of the judge or public prosecutor in the same court.

In any case, the composition of the disciplinary organ as well as the process of selecting its members is naturally to be learnt as for the extension of the guarantee of security of tenures. The best guarantee t without doubt is that the disciplinary body is composed of judges' peers. Also, because the independence of the judicial power is not only of interest to the judges, the external persons can form part of the disciplinary organ.. But if the executive appoints some members of such a body, those ones ought not to be the majority. Besides, when – as is the case in Congo Brazzaville – the President or the Minister of justice and guard of the seal belong to the Supreme Council of the Bench or its equivalent, it ought not, to in any case, participate in the disciplinary process[261]. There are other factors to these aspects, for a real independence of judges.

B. Financial aspects in the independence of judges

The question of financial conditions of judges and the absolute necessity of granting them more satisfying means has quite widely been tackled. At this stage we want only to reiterate by recalling diverse positions adopted in the European framework. Firstly, according to Recommendation no. R (94) 12 already cited, *"the remuneration (for judges) ought to be guaranteed by the law"* (principle 1.2.b.ii) and to *"to the measure of the dignity of their profession and of the responsibilities that they assume"* (principle III.I.b). The Charter spreads this principle to medical insurance benefits and retirement pension, of what is CCJE approves in it Notice No. 1 when it says:

> *"62. Though some systems (for example in the Nordic countries) apply in traditional mechanisms in the absence of legal formal arrangements, the CCJE is of the opinion that it is generally important (and in particular in the case of new democracies) to fix specific legal arrangements guaranteeing the salaries of judges who would protect theses salaries against reductions and which would ensure de facto salary increments according to the cost of living".* In summary, the Venice Commission considers that the law ought to guarantee judges a remuneration equivalent to level and dignity of their load as well as extent of their assignments.

There is no effective barrier to all forms of risks apart from the judge's sense of responsibility. It is the judge's own awareness of his duty which, if lacking, brings about the loss of respect for oneself. Failure to do so, for one who will spend a larger part of his life judging others can only result in defiance from others. Professor Guy CARCASSONE sees this as a sign that the magnitude of this task has not been fully realised, the worst part being that the freedom and independence that goes with the office do not measure up to the duties.[262] Once again, the Supreme Council of Magistracy is called upon to play a key role. Such recommendations good as they maybe however, presupposes that in order for them to be implemented, the SCM, the institution mandated with the appointment and promotion of magistrates requires the necessary legitimacy to carry out this in a manner that will not bring about criticism.

[261] Madame Nicole DUPLE, op cit
[262] Guy CARCASSONE, op cit.

Very often the executive intervenes even indirectly, to avoid corporate derivations.
Thus it is not surprising that the composition of the magistrates' supreme instances is subject to heated debate. It seems to me that this is one of the least important conditions for efficiency, and maybe for acceptance of this organs activity.

C. Conditions of acceptance and efficiency of the activity of the SCM

The efficiency and acceptance of SCM activity depends on several factors. The organ is often criticised for being too complimenting in the application of sanctions against its members due to its corporate nature. Besides more vigorous sanctioning of the magistrates, who have more independence, questions about its organization raise more and more debate.

a) The question of the composition of the Supreme Council of Magistracy

The composition of the SCM has always been a contentious issue in many countries where this institution has a long tradition. This issue has fundamentally been raised to ensure its affirmation in practice. In France for example, when the MSC was instituted by the 1946 constitution, the question was equally raised. Seeking to know whether the magistrates should be the majority within this organ, M. Vincent Auriol, had the following to say at a party held at the Elysée,

> *"obviously the council is not perfect. It has the flaws of human nature. But I do not wish you the magistrates to be majority in the council as previously requested. You will thus know the difficulties that governments undergo in the presence of parliament: you will see chapels going up, your union dislodged. The corporate nature that weighs heavily on the deliberations of political assemblies would be detestable in the administration of justice. You would no long make impartial appointments. You would be condemned to cooption*[263]''. This position was adapted and currently tends to be generalized practice in several states.

In South Africa for example, section 174 of the constitution establishes the appointment and removal processes all judicial officers (especially judges and magistrates). In the subject of appointment of judges, a special organ was created called Judicial Services Commission (JSC). This Commission is composed of 23 people: the president of the Constitutional Court, the president of the Cassation Court, presiding judge of the High Court the Minister of Justice (or his representative), two lawyers appointed by their professional body, two commissioners of oaths appointed by their professional body, a university law specialist appointed by his faculty, 6 members from the National Assembly (3 of whom from the opposition) 4 delegates from the Provincial National Council and four people appointed by the president of the Republic in his personal capacity.

In Mozambique, the SCM allows members who are not magistrates into its composition. By virtue of article 221 of the Mozambican Constitution, the JSC is composed of 16 members. Only two of them are from the law fraternity, the other 14 members are elected or appointed members. Law members are the President of the Supreme Court (who is by right president of the JSCM) and the vice president of the Supreme Court. The other JSCM members are: two members appointed by the president of the Republic, five members appointed by parliament on the basis of proportional representation of all parties in parliament (that is to say the number of members among the five, nominated by the parties represented in parliament is proportional to the number of seats that they control; seven judges elected by their peers.

[263] Jean Louis ROPERS, op. Cit. p. 707

As it is the case with South Africa and Mozambique, the composition of the Committee on the Judiciary of Malawi seeks to ensure it is independent of the executive or erected in an exclusive club of judges for reasons of corporate self-protection. The Commission is a body composed of five people constituted in the following manner: the Chief Justice who is president of law, the president of the Public Service Commission and a judge of the Court of Appeal appointed by the President of the Republic on the recommendation of the Chief Justice, a lawyer appointed by the President on the recommendation of the Chief Justice, a lower court judge appointed by the President on the recommendation of the Chief Justice. Notice no. 10 CCJE on the Council of Justice to the service of the society specifies this position in paragraph 16:

> *„The Council of Justice may consist either exclusively of judges or both judges and non-judges. In both situations, corporatism should be avoided. And further, in paragraph 19 states: "According CCJE, such a mixed composition has the advantage, to avoid corporatism and secondly, to reflect the various currents of opinion within the society and thus appear as an additional source of legitimacy of the judiciary. Even with a mixed membership, the Council of Justice should work without the slightest concession to the game of parliamentary majorities and pressures of the executive, without any subordination to party politics, to be able to vouch for the values and essential principles of justice. ".* [264]

There is however a fact that, in almost all countries, the executive wants to have decisive influence over appointments of judges. Whether in countries with long democratic tradition, such systems can function properly in allowing an independent judiciary as the powers of the latter is limited by culture and legal traditions that have developed over the decades. However, new democracies such as the two countries under review have not yet had the opportunity to develop these traditions, which can prevent abuse. Accordingly, at least in these countries, on the composition of the JSC, an explicit constitutional and legal provisions are necessary as „security'' to prevent political abuse in appointing judges. The composition of this council should, in our view, present pluralistic judges representing a significant portion, if not of most, of its members. With the exception of ex officio members, these judges should be elected or appointed by their peers[265].

Congo Brazzaville remains among those countries where control of the Council of the Judiciary by the Executive has had a negative impact on the independence of the judiciary, yet the principle of independence of the judiciary is reproduced in the 2002 Constitution and specific guarantees of independence of the judiciary are provided both in the constitution as in statutory law. Such guarantees are, however, systematically challenged. Reforms to operate in the future should boldly move towards more democratic separation of powers, by allowing non magistrates as members within the JSC. The President of the Republic and the Minister of Justice should be excluded to ensure its wide legitimacy. It is under these circumstances, that that body can ensure its effectiveness and affirm its assertion.

In the DRC, this issue seems to evolve slowly;[266] and the operated modifications do not seem to impact decisively on direct or indirect political power, on the functioning of justice or on the career of magistrates through the magistrate's council. It would not be an exaggeration

---

264 Venice commission report, op. Cit. , p.7, §30.

265 Idem, p. 8, §45-46

266 The fear born of MSC corporatism risk re-launched the idea to revise the composition of the Magistrates Superior Council, management organ of judicial power as laid down in article 152 of the Constitution. By this initiative, the honorable TSHIBANGU KALALA, professor of public law, had proposed to place the President of the Republic at the head of the MSC and to reduce the number of members of the organ. This brought a lot of disapproval from the civil society meeting at the Protestant Welcome Centre in Kinshasa from 28 to 29 September 2007 at the occasion of *Session of Reflections on the Achievements of Justice Reform in DRC for the Promotion and the Defense of Human Rights*.

to think that the appointment or the recruitment of the last magistrates remains under the control of politicians who would like to ensure above all else, that these people thus appointed were grateful to them and would not be show any hostile tendencies to them.

b) The question of the civil and penal liability of magistrates

The exercise of dispensing justice requires from the magistrates, in addition to common sense, the objectivity allied to competence and self control, of moral and human qualities as well as a solid level of education not only in the judicial discipline but in other disciplines that teach total knowledge of man. Such qualities have enabled a "doctrine" quite broad and spread out, to maintain the idea of immunity of magistrates against prosecution for acts committed in the exercise of duty. According to this principle, the mistakes that a judge may make relatively to competence, to procedure, to the interpretation of law or elements of proof should be the object of judicial control or of appeal. For acts of such a nature, an author even suggested that the magistrates should be protected against critics not only because of special indulgence towards them, but in order not to dilute their authority in any way and so that the trust that people have in their judges should not be undermined.

The corollary of this principle is that, for all reprehensible acts committed by the magistrate in the exercise of his duty, legal prosecution is possible but through a special procedure. This is a procedure where an aggrieved person may appeal to a higher magistrate that is the judge senior to the magistrate who has given a ruling against him. In simple terms, it is about a plaintiff complaining about a judgment being issued unfairly against him through unlawful means.

In France, this procedure was removed; in Canada where the judges enjoy total immunity against prosecution for wrongful acts committed in the course of duty. The law states that "criminal offence" committed in line of duty cannot be considered.. Such an error cannot consequently be covered by immunity against prosecution. In Congo Brazzaville, this procedure has not been regulated. In the Democratic Republic of Congo, several behaviours are foreseen and given special procedure. This is taking part in fraud which is the fact of giving judgment or behaving in a manner that is intentionally harmful to the plaintiff. It may be a case where justice is denied where judgment is not delivered. Other examples include where a magistrate keeps a file for a long time. In the list of these mis conduct, there are also the professional mistakes such as corruption, but especially misappropriation of public funds.

If legislation is believed to have solved the problem, the consequences of involvement in misdeeds as it currently stands do not appear to be satisfactory for the criminal sanctions. In fact article 61 of the magistrate's statute provides that: "*disciplinary action remains distinct and independent from repressive action which may give way to the same facts. Nonetheless, in cases of definite sentencing depriving one of freedom for more than three months, the magistrate will be relieved of his office.*"

In practice it seems that magistrates refrain from sentencing fellow magistrates to three or more months in prison even when they have committed serious offences. Such rulings result in denial of justice. Magistrates condemned by peers for fraud, that is to say, for have given rulings with intention of harming, especially for misappropriation of funds or having asked for money from a plaintiff, is not punished. It is the state that is liable for the damages-interest.

At the same time, daily life confirms the denunciation done by a former first Chief of Justice who highlighted in his speech of 30 November 1999 that: "For years the criminal have sought justice in vain in the corridors of justice or that "amongst the evils that have contributed to disfigure our justice system, are ignorance of the law, laziness, negligence, indiscipline and a drinking culture…and the greed." The president of DRC has severally denounced the state of justice in his country. President Kabila, during the country's *43rd* independence celebrations on June 30 stated that

> *"the magistrate abuse the independence linked to the delicate and noble nature of his duty, making him also guilty of misappropriation of funds and corruption with a disconcerting ease. I am determined to put an end to this state of affairs (…) It is time that the legal operators chose their camp: one to serve or the one to make martyrs of a people already murdered and destroyed by several years of conflicts and violence."*

Following these denunciations, in Congo Brazzaville as in DRC, several magistrates have been dismissed for misappropriation of funds. In the Republic of Congo, following two reports[267] examined and adopted by SCJ on 4 May 2009, 11 magistrates were revoked on the 15 May of the same month by a presidential decree. In DRC in the same period 165 magistrates accused of misappropriation of funds, corruption and fraud and other offences were equally revoked in the framework of "purging of the justice sector" In the two countries, the dismissal were criticised for being selective and only targeted "the small fish". In this cases which were irregular, proper procedures were not followed. But in the face of reality of practices that are regrettable, what can be done?

The demand and attempts at having independent justice in DRC has been included at least in the proposed legislation.. In light of the evident laxity and the need to clean up the justice system by a procedure beyond suspicion, the issue of civil and criminal responsibility of the magistrate must be reconsidered. In this sense, a bill of the organic law modifying and complementing the organic law no06/020 of 10 October 2006 bearing the statute of magistrates was proposed and tabled before the parliamentarians by the Minister of Justice. The revision should bear on articles 4, 12, 15 and 61of the magistrate's statute in brief, of disciplinary measures of the involvement in Congolese law, according to the terms of professor LUZOLO BAMBI LESSA, Minister of Justice, initiator of the bill.

Several reasons have been evoked to support this idea. In the preamble of this project you will have read:

> "(…), *in the register of disciplinary matters of the National Chamber of discipline, only one matter has been entered as number 01, which is definitely insignificant given the multitude of complaints and grievances registered in my Practice against magistrates.*
> *In the same context, the exponential argumentation of the number of requests of involvement by magistrates testifies to the malaise lived daily by the criminal subject. As proof of this 30 cases registered from 1968 to 1998, being 30 actions of involvement in 30 years. We have gone beyond 700 in the period from 2000 to 2010, being an average of an action per year for the first half, and from 70 per year for the second half. Faced with this unfortunate observation, the government having as per the terms of article 130 of the constitution concurrently with each parliament, the initiative of laws, initiated the reform bill with the objective of putting the magistrates statute in perfect harmony with the Constitution as well as with other organic bills on the judicial power on one hand, and on the other to follow the purging of the magistrates for the reinforcement of clauses having links to the disciplinary regime of the magistrates"*[268]

[267] Report presented by the Discipline Commission, and by the Careers Management Commission
[268] Speech by his Excellency the Minister of Justice and Human Rights before senate on the occasion of the presentation

Concerning the article dealing mainly with the "disciplinary measures" t, the following arguments have been put forward:

> "(…) *The first is that the practice has demonstrated that to avoid revocation of the magistrate, the jurisdictions take care not to pronounce a sentence depriving freedom for a period of more than three months or to substitute it with a sentence to pay a fine. The consequence is that a magistrate who is given a fine, even an exorbitant one continues normally with his career if the sentence does not lead to imprisonment or does not go beyond three months. The second reason is that the clause under examination does not sufficiently take into account the nature and sentencing of a magistrate. Whatever, sentence pronounced; it should be analyzed in a retraction of the act committed by the latter. This sentencing consecrates a lack to the duties of his state, to the honor and dignity of these functions. This being the case, all sentencing definitively pronounced should bring the revocation of its author exclusively in the subject of intentional offense.*
> *Another reason is that by insisting only penal sentencing, the law kept silent on numerous sentencing of a civil nature pronounced against the magistrate for acts committed in the exercise of or during duty. These acts do not constitute less a lack of duty of his state, to the honor or the dignity of his functions.*
>
> *This is particularly the case of sentences following the procedure of taking part in fraud or misappropriation of funds committed during a trial, be it during the delivery of a ruling at the end of which the Republic is systematically condemned to pay significant damages and interests in its capacity as the civil responsible. The observation of this insufficiency amply justifies the modification of article 61 of the magistrate's statute by spreading it to penal sentences for intentional offenses and to sentencing of civil nature of taking part in fraud or misappropriation of funds. Prosecution for misappropriation of public funds is by nature a penal procedure (...).*[269]''

From the above, the issue of civil and criminal responsibility of magistrates is also fundamental as all the other necessary aspects of independence. If in the advanced legal culture countries resort to mechanisms of taking part in corruption is made less important. As a e measure of its contribution to an independent and impartial judiciary, in the countries like DRC or the Republic of Congo, such a procedure may be necessary.

CONCLUSION

In all democratic and non democratic societies, the question of the independence of judiciary is still a debatable issue, but with varying degrees of consideration. It is about perfecting the systems put in place over many years, but whose adaptations answer to an ever increasing level of demand imposed by the rule of law and at times demanded by the populations[270]. In the second case, these systems may exists with those countries inspired by reform agenda An analysis of the proposed bills in the two countries reveal the existence of several orders which will not allow judicial authority to come to a level of autonomous power. Also, collaboration with the others unfolds with strictest limits laid down by the law.

---

of the bill on organic law modifying and completing organic law n°06/020 of 10 October 2006 bearing on the statute of the magistrate. 03 May 2010 (read full text on www. Justice. Gov.cd).

269 Speech by his Excellency the Minister of Justice, des *op. cit.*

270 In a resolution adopted September 30, 2009 by the Parliamentary Assembly of Council of Europe (PACE), it was stressed that the independence of the judiciary is the main bulwark against any interference motivated by political considerations in the operation of justice. Sabine Leutheusser-Schnarrenberger (Germany, ALDE), PACE rapporteur on this issue, examined how policies can interfere in criminal proceedings in four countries representing major criminal justice systems in Europe (United Kingdom France, Germany and Russia). In its resolution, the Assembly has asked Germany in particular, to create a system of autonomy of justice inspired by the Judicial Council exists in most European states, and to abolish the possibility for Ministers of Justice to issue directions to the prosecution of individual cases

Practice has demonstrated that magistrate remain the focal point for independence of the judiciary and judicial authority. The legalism observed recently has uplifted the intension of judges and the extent of their powers to the point that politicians at times have felt threatened. Such is the case in the two countries examined. Several reforms were initiated to free magistrates from political assertions and others are still in the pipeline. But that which enables the independence of a judge, is less positively defined placed side by side in principle to the duties other than the legal culture and the force of its character. The recruitment of magistrates for example should be characterized and aimed at presenting to the candidates all the challenges and limitations attached to their duties and position. This will deter those that are not morally able up to the task.

Without minimizing the impact of the material and financial conditions of the magistrate and the affirmation of their independence, the composition of the Magistrates Supreme Council seems s to be another condition for accepting efficiency and control on magistrates. It is one of the legitimatise factors. The disciplinary measures taken against the involvement in misdeeds instituted in the DRC should enable judicial operators to be more responsive to their heavy responsibility. Congo Brazzaville should equally adopt the same measures and even attained the level of his French counterpart.

As Dr. Hans Neureuters[271], would say, a judge is, in principle, a universal civil servant of human society. He should be available to any citizen in all judicial matters. He should act in freedom and free himself from all forms of feelings and resentments, preoccupations and social prejudices. Nonetheless, never having the right to rid himself of feelings of humanity; even more, he must be full of love for his neighbour (…). Beyond a textual definition, his independence should remain a state of spirit called upon to exercise throughout his career. At the end of the day, these are the real elements of an independent judiciary without which laws and important institutions remain dead in letter.

REFERENCES

- ACIDH, ASADHO, GLOBAL WITNESS ET RAID, *Le procès de kilwa: un déni de justice, chronologie, octobre 2004-juillet 2007*, 17 juillet 2007
- Acte Fondamental du 24 octobre 1997 (Congo Brazzaville)
- Alioune Badara Fall, « Les menaces internes à l'indépendance de la justice », in *Débats sur la protection de l'indépendance du pouvoir judiciaire*, Deuxième Congrès de l'AHJUCAF, Dakar 7-8 Novembre 2007.
- BIBOMBE MWAMBA, « Le droit à un procès équitable à travers la Déclaration universelle des Droits de l'Homme et le pacte international relatif au droit civil et politique », in *Anales de la Faculté de Droit*, presses de l'Université de Kinshasa, décembre 2007, pp 191-213.
- Canard Enchaîné du 7 avril 2004, ***L'affaire n'dengue - les menaces de SASSOU envers Chirac - quand la France-Afrique fait dérailler la justice française.***
- Commission européenne pour la démocratie par le droit (Commission de Venise), Rapport sur l'indépendance du système judiciaire partie I : l'indépendance des juges, Doc. CDL-AD(2010)004, Strasbourg, 16 mars 2010

[271] Dr Hans Neureuter quoted by Jean Louis ROPERS, *op. Cit.,* p 708.

- Constantin YATALA NSOMWE NTAMBWE, L'indépendance du pouvoir judiciaire à l'égard du pouvoir exécutif au Congo-Kinshasa, Article en ligne.
- Constitution de la République Démocratique du Congo du 18 février 2006
- Constitution de la République du Congo de 2002
- Constitution de la République du Congo du 15 mars 1992
- Cour Suprême de Justice, Arrêt (RC. 2407) du 8février 2002, Bulletin des Arrêts 2004, pp114-115.
- D. Chagnolaud, *Droit constitutionnel contemporain*, Dalloz, Paris 1999
- Evariste BOSHAB, « La misère de la justice et la justice de la misère en République Démocratique du Congo », in *Revue de la recherche juridique*, 1998
- Fédération Internationale des Droits de l'Homme, Groupe d'action judiciaire de la FIDH, *République du Congo, affaire des Disparus du Beach, Développements et enjeux des procédures en cours en France, en République du Congo et devant la Cour internationale de Justice*, Décembre 2001-juillet 2004, N° 400, juillet 2004, in http://www.Fidh.org/justice/index.htm).
- FIDH, Mission d'observation judiciaire au procès des "disparus du Beach", Brazzaville, été 2005, n° 435, Décembre 2005, in http://www.Fidh.org/justice/index.htm.
- Ghys Fortuné DOMBE BEMBA, « Grincement des dents, allégresse à la magistrature et déception des peuples », Article en ligne in congoinfos.com.
- Guy CARCASSONNE, « Les éléments théoriques de la problématique de l'indépendance de la justice », *Acte du congrès de l'AHJCA*, Dakar, novembre 2009
- Jean louis ROPERS, « Un colloque international sur l'indépendance des juges, in *RIDC*, T1, 1953 pp 699-709.
- Joseph MVIOKI BABUTANA (Dir.), *Etat des lieux du système judiciaire congolais,* Rapport, op cit, p 179.
- Joseph MVIOKI BABUTANA (Dir.), Etat des lieux du système judiciaire congolais, Rapport, Fondation Konrad Adenauer, Commission Européenne, Kinshasa, Aout 2003,
- Joseph MVIOKI BABUTANA, ''le système judiciaire congolais : Etat des lieux et perspectives'', in Pamphile Mabiala Mantuba-Ngoma, Théodor Hanf et Béatrice Schlee, *La République démocratique du Congo : une démocratisation au bout du fusil*, publications de la Fondation Konrad Adenauer, Kinshasa, 2006, pp…….
- Les Conseils Supérieurs de la Magistrature ou organes équivalents en Afrique : brève présentation comparative de leurs pouvoirs et compositions : avis juridiques à l'intention des parlementaires de la République démocratique du Congo, novembre 2007
- Lettre du Ministre de la justice N° 0226/JPM284/D/CAB/MIN/J/2009 portant « Amnistie à accorder aux membres des groupes armés (CNDP…). »
- Loi N°16-99 du 15 avril 1999 modifiant et complétant certaines dispositions de la loi 024-92 du 20 août 1992 et de la loi N° 29-94 du 18 octobre 1994 portant institution du CSM.
- Loi 15-99 du 15 avril 1999 modifiant et complétant certaines dispositions de la loi n°023 DU 20 août 1992 portant statut de la magistrature, repris à l'article 7 de la loi 16-99 du 15 avril 1999 modifiant et complétant certaines dispositions de la loi 024-92 du 20 août 1992 et de la loi n°29-94 du 18 octobre 1994 portant institution du Conseil Supérieur de la Magistrature

- Loi 15-99 du 15 avril 1999 modifiant et complétant certaines dispositions de la loi n°023-92 du 20 août 1992 portant statut des magistrats en République du Congo
- Loi fondamentale du 19 mai 1960 relative aux structures du Congo
- Loi N°078-010 du 15 février 1978 portant révision de la Constitution de 1967 (RDC)
- Loi N°74-020 du 15 Aout 1974 portant révision de la constitution du 24 juin 1967.
- Loi organique n° 08/013 du 05 août 2008 portant organisation et fonctionnement du Conseil Supérieur de la Magistrature
- Loi organique n°06/020 du 10 octobre 2006 portant statut des magistrats.
- Loi organique N°3/1996 du 29 mars 1996 portant organisation, fonctionnement et compétences du Conseil Supérieur de la Magistrature de la république du Rwanda
- Marcel WETSH'OKANDA KOSO, *République Démocratique du Congo, la justice militaire et le respect des droits de l'homme – L'urgence du parachèvement de la réforme*, une étude d'AfriMAP et de l'Open Society for Southern Africa, publication du réseau open Society Institute, Johannesburg, 2009
- MBUY-MBIYE TANAYI, L'état de la justice congolaise, Discours de rentrée judiciaire, Kinshasa, décembre 2008, in www.justice.gov.cd
- MONUC, *La situation des Droits de l'Homme en RDC au cours de la période de juillet à décembre 2006*, 8 février 2007
- NATIONS UNIES, *Rapport de l'expert indépendant sur la situation des Droits de l'Homme en République démocratique du Congo*, Doc. A/HCR/7/25, 29 février 2008, in http://daccessdds.un.org/doc/UNDOC/GEN/Go8/115/59/PDF/Go811559.pdf?)
- NATIONS UNIES, *Rapport du Rapporteur Spécial des Nations unies sur l'indépendance des juges et des Avocats, additif, mission en République Démocratique du Congo.* Doc. A/HCR/8/4/Add.2, § 39, 11 avril 2008 (disponible en ligne sur http : //daccessdds.un.org/doc/UNDOC/GEN§Go8/128/48/PDF/Go812848.pdf ?).
- Nicole DUPLE, « Les menaces externes à l'indépendance de la justice », in *Deuxième Congrès de l'AHJUCAF*, Dakar 7-8 Novembre 2007.
- VUNDWAWE te PEMAKO, *Traité de droit administratif*, Larcier, Bruxelles, 2007

QUESTIONS OF CONSTITUTIONAL COMPLIANCE WITH THE ORGANIC LAW ON DECENTRALIZED ENTITIES IN THE DEMOCRATIC REPUBLIC OF CONGO: FOCUS ON THE MONT-NGAFULA MUNICIPALITY IN THE CITY OF KINSHASA

By **Paulin PUNGA KUMAKINGA***

INTRODUCTION

At a first glance, reflections on the constitutional compliance of the organic law n°08/016 of 07 October 2008, which relates to the composition, structure and function of the decentralized territorial entities and their relationship with the state and provinces is not easy. The exercise may even be deemed futile, in as much as it relates to a law that was scrutinized and passed, its constitutionality check before its promulgation.[272]

Despite the law having been declared to be compliant with the constitution to the letter, this does not prevent a scientific reflection on its compliance to the letter and spirit of the constitution.

This paper has endeavoured to highlight and discuss the clauses of this law considered to be contrary to the spirit, even if on the face it does not seem to pose any constitutionality problems.

This study therefore will take a critical look at the conformity or non-conformity of the application of certain legal clauses to the spirit and even to the letter of the constitution.

Thus, two concerns will in e addressed: firstly, to highlight certain aspects of the law which are in compliance with the letter of the constitution, and secondly, aspects not deemed compliant with the spirit of the constitution.

I. PROVISIONS OF LAW N° 08/016 IN COMPLIANCE WITH THE LETTER OF THE CONSTITUTION

Law n° 08/016 of 07 October 2008 on the composition, structure and function of decentralized territorial entities and their relationship to the state and the provinces[273], is an application aimed at complying with the constitution of the Republic as per article 3 and especially paragraph 4.[274]

*Assistant at the Faculty of Law at the University of Kinshasa, Member of CODESRIA

272 According to article 160 of the constitution of the Democratic Republic of Congo, 47th Gazette of the DRC special edition of 18 February 2006, especially in paragraphs 1 and 2, the Constitutional Court is entrusted with the constitutionality of laws and acts having force of law. The organic laws, before their promulgation, and internal regulations by parliamentary chambers and by congress, of the National Independent Electoral Commission as well as the Superior Audio Visual and Communications Council, before implementation, should be subjected for scrutiny before the Constitutional Court which declares their compliance. Thus, the High Court of Justice in compliance with article 223 verified the conformity of this organic law before its promulgation by the Head of State, and has therefore consequently passed it to comply with the republic's constitution.

273 *Journal Officiel de la République Démocratique du Congo*, 49ème année, n°spécial, Kinshasa 10 Octobre 2008.

274 Paragraph 4 of article 3 of the constitution stipulates that the composition, the structure, the function of these territorial decentralized entities as well as their relationships with the state and the provinces are fixed by an organic law.

In fact, the constitution of 18 February 2006 opted for decentralization as a means of managing certain territorial entities of the Republic. After having enumerated them in article 3, it brought out principles of self-government, self-management of their human, economic, financial and technical resources[275]

I.1 The principle of self-government and self-management applied to law n° 08/016 of 07 October 2008 (article 3 of the constitution)

The principle of self-government and self-management of the decentralized territorial entities *postulates that these entities, which include the towns and municipalities,* wards and the sub locations. These territories have their own bodies capable of decision making on governance, resources that can be mobilised to meet the needs of the respective populations, without interference from the provincial administration and even less from the central government.

As can be seen, self government and self management first and foremost imply the existence of bodies certified to preside at the head of these decentralised territorial entities.

I.1.1. Self government, organic and legal autonomy.

The city, *the municipal, the estate and the leadership* in principle, in compliance with the law enabling legislation establishing them have their own bodies essentially formed by members freely elected by their respective citizens.

Since this study focuses mainly on one territorial entity (the municipality), it is important therefore to dwell a bit on the municipal structure. However, it should be noted that, according to the DTE law, there are two forms of municipalities: the municipal as the headquarters of the territory and the municipal as the headquarters of the town with a population of at least 20,000 inhabitants, to which a Prime Minister's decree will have conferred the status of a municipal[276]**.** Our study is based on this second category of municipalities, in this case the municipality of Mont-Ngafula, which is an entity forming one of the subdivisions of the city of Kinshasa.

A. Components of the municipality

As per the terms of the law under examination, the municipal components include the municipal council and the municipal executive panel.[277]

The Municipal Council is the deliberating organ of the municipal. Its members are called municipal councillors. They are elected under the provisions of the electoral law.[278]

The municipal council acts by decisions which are essentially administrative and police regulations on various issue recognised by law and all of municipal interest[279]**.**

The municipal council decisions are not legislative acts in the manner of provincial laws and edits; they are administrative taken by a the decision making organ[280].

---

275 CRf a write up on the motives of the organic law n°08/016 of 07 October 2008, JORDC, 49th year ...*op.cit.*

276 Art. 46 paragraph 1st of law n°08/016…..,idem.

277 Art. 47 of law n°08/016 of 07 October 2008

278 Art. 48.

279 Art. 50.

280 PUNGA KUMAKINGA, P., "The relationship between the municipal and the province. Legal and financial autonomy ", Communication presented during the second seminar on the Rule of Law organized by Konrad Adenauer Foundation and the Faculty of Law of the University of Kinshasa, December 2009, p.9.

Besides the municipal council, the legislator creates a college of executive council which acts as the management and execution organ of the municipal council's decisions. It is composed of the Mayor, the Deputy Major and two other members known as *"deputy burgomaster"*[281].

The Mayor is in charge of the municipality. He heads the municipal executive college. He has the following duties*:*

1° To ensure smooth administrative operations of his jurisdiction;
2° As a legal police officer with general competences;
3 Acts as a civil officer;
4° To coordinate municipal budget;
5° represents the municipal in justice and vis-à-vis third parties;
6° executes the laws, the edits and the national regulations as well as the urban and municipal regulations;
7° maintains public order in his jurisdiction[282].

The municipal structure that we have just briefly described is not yet effectively operational. In fact, it is "awaiting the organization of urban municipal and local elections by the Independent National Electoral Commission instituted by the constitution, the authorities of the different decentralized territorial entities currently in office are managed in compliance with the clauses of decree-law n° 082 of 02 July 1998 bearing the statute of authorities entrusted with the governing of territorial constituencies".[283]

It should be pointed out however, that all the authorities currently heading DTE were appointed in compliance with the decree-law mentioned above, except the Provincial Governors who are no longer under this legal category. The province has been elevated to the position of a political entity by the constitution.

Thus in compliance with this decree law of 02 July 1998, the President of the Republic appointed the municipal Mayors and Deputy Mayors in accordance with ordinance n°08/057 of 24 September 2008. The mayors were appointed by the President of the Republic upon recommendation of the Minister for Local Government as per article 3 of the decree-law n° 082.

Decree-law n°082 established the mayor and the municipal consultative council as the municipal organ. The municipal consultative councils had not been constituted since 1998. Consequently, the mayor remained the only municipal organ but with a deputy and an office chief acting as the municipal secretary who took charge in the absence of both the mayor and deputy. He or she takes care of administrative matters and coordinates all the municipal activities and services.

B. Autonomy of the municipal organs

A befitting question to ask here is whether the municipal organs are actually autonomous. In other words, have the municipal authorities in place today as appointed by the central government been guaranteed autonomy?

The answer to this question is both yes and no. Yes, because in decentralization, it is not the election by local organs which renders them autonomous. The autonomy of a decentralized

[281] Art. 55
[282] Art. 60.
[283] Art. 126 of law n°08/016 of 7 October 2008

entity is based on responsibilities or local affairs as recognized by law. No, because as long as the municipal organs' appointment is done by the central government, their autonomy is somehow weakened.

In a state where the decentralized authorities habitually consider themselves as "simple agents to carry out decisions by the central government, and even simple creatures of the hierarchal authority"[284], it definitely difficult to conceive that the appointments will have no influence or bearing on their behaviour in vis-à-vis the hierarchy.

Such is the situation characterizing the DTE as they await the organization of urban, municipal and local elections by the Independent National Electoral Commission.

I.1.2. Self-government and self-management of the financial resources

It was decreed that the provinces and the decentralised territories should have financial resources from which they would enjoy self-management[285].
Talking about these decentralised territorial entities, the constitution provides that they benefit from self-government and self-management of their own economic, human, financial and technical resources.[286]

The constitution goes further to say that „the central government finances and those of the provinces are separate[287]". In the provincial of finances, there is envisaged an equal distribution between the provinces and the decentralised territorial entities[288].

Owing to this, the legislators took the caution of organizing the resources of the decentralised territorial entities by dedicating to them a whole chapter in law n°08/016 of 07 October 2008. It includes the resources of a decentralized territorial entity which comprise the basic individual tax, revenue and local taxes.[289]

The minimum tax is paid exclusively for the benefit of the municipals, the wards and/or, for the sub locations[290]. This basic tax has already been implemented in the Democratic Republic of Congo by ordinance law n° 71-087 of 14 September 1971.

As per the provisions of article 4 Para. 1 of this ordinance law, those liable to pay the basic individual tax includes adults residing in DRC, with the exception of women who undertake activities within the household.

To clarify this further, we will look at the terms of reference of the clause, the second paragraph which stipulates: "one is considered to be a resident in the Democratic Republic of Congo if:

a) one, irrespective of nationality, has taken up permanent residence in the DRC;
b) has his "residence" in the Republic, and has based his family, his activities, the head-quarters of his business and his occupations there;

---

284 MABIALA MANTUBA NGOMA, P.," *The Foundations of Decentralization*", in MABIALA MANTUBA NGOMA, P.(dir.) '*The Decentralization Processes in the Democratic Republic of Congo, Kinshasa,*" Publications of the Konrad Adenauer Foundation, 2009, p.49.

285 VUNDUAWE te PEMAKO, F., *Treaty of Administrative Law*, Bruxelles, éd. Larcier, 2007, p.508

286 Art. 3 paragraph 3 of the 18 February 2006 constitution.

287 Art. 171.

288 Article 104 of law n°08/01 clearly stipulates that the finances of a decentralized territorial entity are distinct from those of the province. This is an application in conformity with article 171 of the constitution.

289 Art. 108.

290 Art. 109 al. 2

c) has established the headquarters of his fortune in the country. Headquarters here refers to the place from where the properties are administered, or from where the owner oversees their administration or from where he only is absent for brief periods[291].

Several years later, the legislator deemed it appropriate to remove the expatriate from this category of the basic individual tax to place him in another category provided for by the decree-law n°119/2000 of 9 September 2000 as modified by the law n°005/2003 of 13 March *2003*[292].

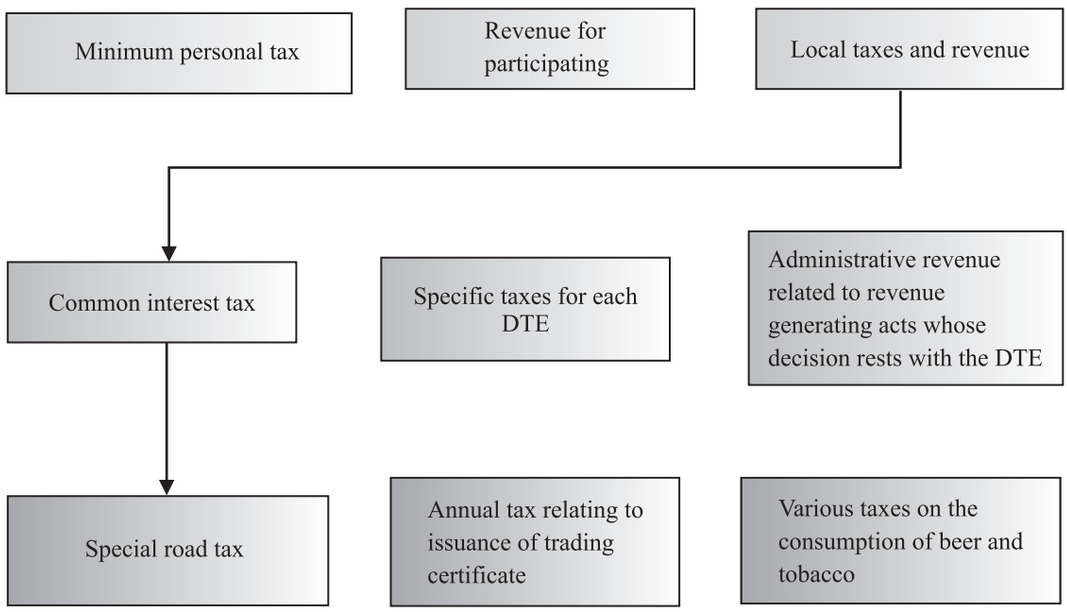
Besides the basic individual tax, the legislator created participation revenue for the benefit of the DTE, including "the profits or the income from their participation in capital in the public enterprises, societies of mixed economies and the short-lived associations with economic profitable objectives"[293].

Clearly neither the town, municipal, the ward nor the sub location can touch this revenue without depositing an amount in a public enterprise as established by the 07 July *2008*[294] legislation.

The resources belonging to the DTE coming under this category are taxes and local revenue which "specifically include taxes of municipal interest, taxes specific to each decentralized territorial entity and the administrative revenues bound by the generating acts from which the decision is derived"[295].

To give a clear picture of the resources categorisation and by the legislator for the benefit of the decentralised territorial entities, refer to the schematic description below.

Table I. DTE Resources (article 108-114 of law n°08/016) [296]



[291] CRf. Legislative provisions bearing on minimum personal tax (ord.-law n°71-087 of 14 September 1971), in MBOKO DJ'ANDIMA, JMF., *General Tax Code* 2 éd., Kinshasa, PUC, 2009, pp. 178-180.

[292] Article 1 of this decree-law stipulates that there is a minimum personal tax created for expatriates residing in the Democratic Republic of Congo and not engaged in activities recognized by the Revenue Authority. MBOKO DJ' ANDIMA, JMF., *op.cit.*,p. 195.

[293] Art.110.

[294] For more information, read law n°08/010 of 07 July 2008 setting the rules relevant to the structure and management of the state portfolio, *Official Gazette of the Democratic Republic of Congo*, 49th special edition, , Kinshasa 12 July 2008.

[295] Art. 111 of law n°08/016. *op.cit*.

[296] **Source:** We designed this table so as to give a clear picture of the financial resources reserved for the DTE by the legislator.

Evidently, these revenues will be ready for mobilisation when the law in question effectively becomes operational and dependant on the outcome of the urban, municipal and local elections that will have implemented the pertaining institutions.

Meanwhile how do the DTE operate and in particular the Municipality of Mont-Ngafula which is the centre of focus in this study?

Currently, the DTE essentially operates from to the administrative taxes and some local revenues collected on the basis of local authority decisions.

The revenue collected by the Mont-Ngafula Municipality in 2009 for example is five times inferior to that ceded back by the city of Kinshasa. This is to say that the municipality essentially depends on the city (province) of Kinshasa, at the risk of mortgaging its financial independence.

The diagram below clearly shows the financial state of the municipality of Mont-Ngafula in 2009.

Table II. Synthesis of revenue of the Municipality of Mont Ngafula in 2009 ([297])

ART	LITT.	LIBEL	BUDGET 2009
02	01	License to sell alcoholic drinks and crafts	3,338,500
02	012	Certificate to display in municipal	48,360,000
03	012	Inheritance tax	8,800
03	06	Certificate of tax on acts of civil status	17,468,000
03	07	Certificate of land registration	12,650,000
03	15	Annual professional fees	36,866,500
		Authority to begin a business	
05	04	Legal fees and customary procedure	990,000
05	05	Fines and forfeiture order	1,650,000
06	02	Certificate on physical fitness	137,500
08	01	Tax on maintenance on roaming livestock	1,100
08	02	Tax on veterinary inspection	7,535,000
09	01	Trade tax	
11	01	Tax certificate on the sale of bike and carriage plates	24,750
16	01	Tax certificate on tree felling	6,464,000
17	01	Tax certificate for planters and breeders	20,752,500
17	02	Canoe tax	85,800
		Total own revenue	**156,332,450**
30	12	Retrocession	803,268,102
		General total	**959,600,552**

[297] **Source**: This table shows the different revenues received by the Municipal of Mont-Ngafula in 2009 as obtained from its Budget Services Unit.

The law states that "the decentralised territorial entities have a right to 40% of the national revenue allocated to the provinces"[298]. The criteria used for sharing these resources among the decentralised territorial entities are based on production capacity, surface area and population[299].

If the distribution of these national resources respected the constitution to the letter, that is to say at 40%, the distribution between the decentralised territorial entities would be carried out by the province. Currently, resource allocation respects neither the letter nor the spirit of the constitution. In fact, whereas the constitution advocates for these allocated resources to be retained at source, the law maintains the retrocession carried out by the province for the benefit of the decentralised territorial entities. This arises from reading and interpretation of articles 115 and 116 of the law in question. We will come back to this point with more detail in the subsequent points relevant to the clauses that are not in compliance with the spirit of the constitution.

II. PROVISIONS OF THE LAW N° 08/ 016 THAT DO NOT CONFORM TO THE CONSTITUTION

The issue to be discussed here is pertinent to the relationships between the decentralised territorial entities with the State and the provinces.

In fact, the Mayor, the Burgomaster, head of the ward and the chief of the sub location are local executive authorities and represent the State and the province in their respective jurisdictions. They therefore take up the responsibility of running the operations of the State and provincial services of the respective administrations as per the clauses contained in the articles 82 and 86 of the current law[300].

II.1. State representation in the decentralised territorial entities

In order to correctly discuss the issue of State and provincial representation in the DTE, it is important right from the beginning to tackle the question of relationships between the State and the province.

In fact, article 3 of the constitution is the basis for establishing autonomy envisaged by the constitution for the benefit of the provinces and the DTE. This article in paragraph 1 disposes that the provinces and the decentralised territorial entities of the Democratic Republic of Congo enjoy legal status and governed by the local organs.

Furthermore, the constitution has been enriched by stating that the provinces are organised in conformity with the principles articulated in article 3.[301]. Obviously these principles refer to self-government and self-management.

To further clarify the distinction between the State and the province, the constitution states that the central government finances and those of the provinces are separate[302].

Obviously, the constitution had in mind a distinct and clear separation between the central authority and the provincial or local authority.

---

298 Art. 115 law n° 08/016……*op.cit.*
299 Art.116 al.2
300 Art. 93 of the law n°08/016……*op.cit.*
301 Art. 196 of the constitution……..*op.cit.*
302 Art. 171 of the constitution…….*op.cit*

From this point of view, the local organs, or better still, the local authorities called upon to manage these entities are transformed by the principles of self-government and self-management of their jurisdictions.

Consequently, the principle of double functionality which appears in the legislation setting up the decentralisation[303] is, in our opinion, is contrary to the spirit of the constitution. To this end, the fact that the provincial Governor is equally the State representative in the province may, in our opinion, threaten the autonomy he enjoys[304].

The issue of representation is one of the major problems that decentralisation encounters[305], It comes from the recurrent debate on the role of decentralisation in the reinforcement of democracy in Africa.

Whereas some agitate for local democracy, that is, really autonomy at the grassroots, others supporting the principle "insist on the priority of spreading out of the central State all over the national territory, with a view of affirming national unity, installing, reinstalling or reaffirming State authority, and bringing administration closer to the subjects".[306]

This latter opinion is one that has really influenced the Congolese legislator to the extent of losing vision the picture that the constituent had of the local authorities' autonomy. To be convincing here, it is necessary to go back to the Congolese constitutional history.

To this effect, the question of State representation in province was already the preoccupation of the fundamental law of 19 May 1960 in particular articles 180 to 184 deals with the State's representation concerning "State commissioner"[307].

The State commissioner thus appointed had in province the following prerogatives:

- Manage the State services that exist in the province;
- Ensure coordination between the provincial and central institutions.
- Take the necessary measures of implementation in case of emergency of the required regulations under law in the province, an ordinance-law, if two consecutive reminders are addressed to the President of the Assembly or to the president of the provincial government and remain unanswered[308].

The option taken by the fundamental law of 19 May 1960 was abandoned by his successor in 1964. This one has in effect made the provincial governor head of the provincial executive and the president's representative in the province at the same time[309].

---

303 It is about law n°08/012 bearing fundamental principles relative to the self-government of the provinces, JORDC, 49th year special edition of 31 July 2008 and law n°08/016 bearing on the composition, structure and functioning of the decentralized territorial entities and their relationships with the provinces …*op.cit*.

304 PUNGA KUMAKINGA, P., *op.cit*., p.7.

305 GOMES OLAMBA, P.N., " The Role and Responsibility of Decentralized Authorities in the Emergence of Local Democracy in BAKANDEJA WA MPUNGU,G., MBATA BETUKUMESU MANGU,A. et KIENGE KIENGE INTUDI,R. (dir.), *Participation and responsibility of actors in the context of democracy emergence in the Democratic Republic of Congo (Act of Scientific Day of the Faculty of Law of the University of Kinshasa, 18-19 June 2007),* Kinshasa, PUK, 2007, p.30.

306 Idem.

307 article 180 of the fundamental law of 19 May 1960, *Moniteur Congolais*, 1st year, n°21bis of 27 May 1960 stipulates : « a State Commissioner is, in each province, the representative of the Central Government ». TOENGAHO LOKUNDO, F., Constitutions of the Democratic Republic of Congo. From *Les constitutions de la République Démocratique du Congo. Joseph Kasavubu to Joseph Kabila*, Kinshasa, PUC, 2008, p.47.

308 Art. 184 of the fundamental law……., idem

309 Art. 103 of the 1st August 1964 constitution, Moniteur Congolais, 5th year special edition of 1st August 1964, in TOENGAHO LOKUNDO,F .,*op.cit*., p.79.

Why would the constitution of 1964 prefer to remove the office of the State Commissioner at the same time transfer his prerogatives to the province governor?

The constitution of 1st August 1964 does not provide any answer to this question. However, the report published by the Luluabourg constitutional commission gives an explanation. In fact, "the commission thought it wise to abolish the post of the State Commissioner provided for by the fundamental law in order to avoid any possible conflicts between the Provincial Executive Head and the State Commissioner"[310].

In our opinion, this choice arises purely subjectively; for usage of conditional shows that there was no historical fact on which the commission based its argumentation leading to suppression. It is public notoriety that the policy under the regime of the fundamental law was characterised by agitation and that the relations or the relationships between the various authorities were marked by frictions. However, we are tempted to believe and to affirm that no flagrant case of opposition between a State Commissioner and a Provincial Government can be cited may have influenced the Constitutional Commission of Luluabourg to the extent of abolishing this position. Besides, the competences of the provincial administration and those of the State Commissioner having been clearly defined, the slightest hint of conflict would be settled before a competent judge. This in principle is the logic of the rule of law.

May be it is this historical Luluabourg Commission argument which influenced the legislation of 2008 to also make the local authorities province and State representatives.

II.2. Local authorities as State and provincial representatives

As illustrated from actual and historical constitutional perspectives, the option consisting of transforming local authorities into central government representatives as adapted by the legislator, contradicts the spirit of the constitution. The intended objective was that these authorities would break away from the often abusive power of the Congolese central government.

In fact, the centralising tradition of the Democratic Republic of Congo, cushioned by the second regime in the 80s had a profound effect on the local authorities to the extent that they were unable to see themselves as autonomous. Mabiala Mantuba[311], in his writings says that after more than 32 years of dictatorship, the provincial administrative and local authorities got used to waiting for all decisions to come from Kinshasa.

Since the break in 1964 with the option of the fundamental law, the Congolese constitution that came after had always kept the local authorities in this double role; local authority and representative of the central government. The legislators of 07 October 2008 apparently did the same thing by tradition; they followed in the footsteps of his predecessors.

If the constitution of 18 February 2006 had in mind such a hybrid statute of the provincial and local authorities, it would have clearly mentioned it in the text, as had done by its predecessor of 1964.[312]. Having not said it *expressis verbis*, it strengthens our belief that this was not their intention. Consequently, the 07 October 2008 legislator deliberately moved away from this line of thought of the constituent.

---

310 Constitutional Commission, "Explanatory Memoirs of the Constitution", *Moniteur Congolais*, 6th year, special edition of 5 October 1965, p.95

311 MABIALA MANTUBA NGOMA, P., The Foundations of Decentralization ……*op.cit.* p.49.

312 Article 103 of the constitution of 1st August 1964 stipulates that the Province Governor that he is the head of the provincial executive; he represents the President of the Republic in the province. TOENGAHO LOKUNDO, F.,*op.cit*, p.79.

According to the legislator,[313] the Mayor, the Burgomaster, head of the ward and the head of the sub location coordinate and supervise in their respective entities, services whose authority is from the central government or from provincial authority.

What does it mean to coordinate and to supervise the services that arise from central and provincial authority? Isn't this a decongestion understood as "the general administration of all the public services of which the State agents carry out the management under direct authority and the hierarchical power of the central authorities?"[314]

How do we reconcile the head of the same organs the decongestion with the autonomy and self government which postulates that "the structural independence which makes the organs of a collectively self governing do not derive hierarchical power and disciplinary measures from the central government"[315] ?

Municipal administration is made up of municipal public services s that arise from the central government whose management is entrusted to the burgomasters, at the same time decentralised authorities, that is to say autonomous and decongested agents of the State. This creates a fundamental problem as clearly brought out by Jean Michel Kumbu-ki-Ngimbi[316]. He states that the sanction on central government in case of mismanagement as duly vested in the burgomaster may be negative and bring about questioning of his authority.

The burgomasters currently in office in the municipality of Kinshasa are aware of this difficulty but prefer to be in harmony with the central government and the province rather than attract criticism. This is for the time being precarious due to lack of an electoral court.

The other option susceptible to stigmatisation concerns the management of financial resources, mainly through retrocession in the principle of transfer of resources to the DTE by the province.

II.3. The principle of retrocession of revenues of common interest to DTE

Without the legislator expressly providing for it in the law, the principle of retrocession is brought out in the reading and interpretation of articles 115 and 116. In fact article 115 stipulates that the decentralised territorial entities have a 40% right of revenue allocated to the provinces. Article 116 states that the distribution of resources between the decentralised territorial entities is operational upon the criteria of production capacity, the surface area and the population. The edict determines mechanisms of distribution.

A reading of the two clauses reveals that the 40% revenue allocated to the province by the central government is divided by the latter and forwarded to the respective DTE.

This option highlights two problems. The first problem is that of non-conformity to the constitutional principle of the retention of revenue at source. The second problem is one of eventual conflicts that would be brought about by this distribution based on the criteria of production, surface area and of production. At a closer examination, this criteria is not cumulative, it is alternative. In fact, an entity such as the municipality of Gombe may produce

313 Art. 94 law n°08/016 of 07 October 2008…….*op.cit.*
314 VUNDUAWE te PEMAKO, F., *op.cit.*, p.407.
315 KUMBU-ki-NGIMBI, JM.," *Legal Framework of Decentralization in the Democratic Republic of Congo*", in MABIALA MANTUBA NGOMA, P.(dir.), *op.cit.*, p.58.
316 Idem, p.69.

a lot but its population is well below that of Kimbanseke. In this case then, which criterion should prevail in the allocation of revenue to the municipality of Gombe?

Whilst the law gets an effective application in the DTE, retrocession is already operational. The contribution of income based on the revenue coming from three Government State Financial Corporations: OFIDA, DGI and DGRAD. This was written four years ago by Evariste Mabi Mulumba[317]. He goes further to add that "the retrocession rate to the benefit of one province bears on the revenue generated by these State Corporations in this province"[318].

Discussing the operations of the retrocession in the city of Kinshasa, Evariste Mabi Mulumba[319] wrote that this distribution is carried out 40% for the towns and 60% for municipalities.

In another study published by the same author after the promulgation of the law in question, we read that with regard to resources from revenue of a national character, the DTE have a right to 40% of the part of revenue of a national character allocated to provinces[320].

We see that the city of Kinshasa has in principle 40% of the national revenue allocated to the city by the government of the Republic.

The fundamental question we must ask ourselves at this juncture is whether the provinces do indeed receive the 40% revenue as stipulated under the constitution. To answer this question, we must first state, as Noël Obotela Rashidi, [321] that the retention of 40% at source has not as yet been implemented. Contrary to this, it was agreed for the paying institution to make permanent deposits to organisations affiliated to the Central Bank set up for the benefit of the provinces. Thus in this way, the central government still keeps the initiative of this subject.[322].

Elsewhere, during his meeting with provincial assemblies' presidents and delegates of the on 3 August 2009, Adolphe Muzito, head of central government had the following to say "not to count on the retrocession which comes in support to the provincial revenue "[323].

It is very clear here that the central government does not apply the constitution with regard to the retention at source of the revenue of a national character. Rather, it holds on to the retrocession of which it does not even reassure the provinces[324]!

How then is this province retrocession by DTE applied? How is the current situation presented in relation to the Mont-Ngafula municipality in the city of Kinshasa? Let's take a look at this through this table which presents the financial situation for the year 2009.

317 MABI MULUMBA, E., "For a Good Governance of the Decentralized Administrative Entities ", *Congo-Afrique*, n° 402-403, February-March, 2006, p.115
318 Idem.
319 Idem, p .117
320 MABI MULUMBA, E.," Decentralization and the Fiscal Problem ", *Congo-Afrique*, n°432, February 2009,p.130.
321 OBOTELA RASHIDI, N.," Afrique-Actualités", *Congo-Afrique*, n°437, September 2009, p.555.
322 Idem.
323 OBOTELA RASHIDI, N.," Afrique-Actualités", *Congo-Afrique*, n° 438, October 2009, p. 637.
324 OBOTELA RASHIDI, N.," Afrique-Actualités", *Congo-Afrique*, n° 438, octobre 2009, p. 637

Table III: Budget 2009: Transfer expenses to the provinces and DTE ([325])

Province	Voted credits	Credit after disbursement	Commitments	Liquidations	Orders	Payment
Kinshasa	197,781,247,235	197,781,247,235	125,398,458	8,802,739,678	8,528,169,362	8,528,169,362

As can be seen, during the financial year 2009, the city of Kinshasa received the sum of ***8,528,169,362FC*** from the Central government after all necessary financial deductions.
If we refer to the table II which synthetically takes up the revenue of the Mont-Ngafula Municipality during the financial year 2009, the result is that the city of Kinshasa retrocedes to this municipality the sum **31,143,672 FC** instead of the 803,268,102FC provided for in the budget being 4%.

Regardless, we maintain that neither the bill of law n°08/016 on the DTE, nor the practice in operation respects the wish of the constitution of 2006 concerning the allocation of revenue of a national character to the provinces and DTE by the central government. Nonetheless, the city of Kinshasa holds on to the criteria of the population and of production to retrocede to the municipalities, much as it does it on the bases of pure forfeit. This is the case of what is currently happening where the city has, since January up to today retroceded forfeiture in the month of May a sum of **4,000,000 FC** which was disbursed to all the municipalities of Kinshasa!

CONCLUSION

In as much as the constitution was promulgated by the Head of State after its scrutiny before the High Court of Justice, the organic law n°08/016 of 07 October 2008 on the composition, structure, operation of the decentralised territorial entities, their relationships with the State and the provinces formally conforms to the constitution.

However, we think that some of these provisions, appearing in articles 93, 94, 115 and 116 are in contradiction with the spirit of the constitution. The fact is that the legislator has marked local authorities as well as State and provincial representatives not likely to promote their autonomy as envisaged by the constitution. The principle of retrocession which also proceeds from the contents of articles 115 and 116 is completely contrary to the constitutional principle of retention at the source of the revenues of a national allocation to the provinces by the central government.

REFERENCES

Constitutional Commission, "Explanatory Memoires of the Constitution", *Moniteur Congolais*, 6th year special edition, 5 October 1965.

Constitution of the Democratic Republic of Congo, Official Gazette of the DRC 49th special edition of 18 February 2006.

Constitution of 1st August 1964, Moniteur Congolais, 5th year, special edition of 1st August 1964.

GOMES OLAMBA, P.N., " The Role and the Responsibility of Decentralized Authorities in the Emergence of Local Democracy", in BAKANDEJA WA MPUNGU,G., MBATA BETUKUMESU

[325] Source: This table has been extracted from the State General Budget File during the fiscal year 2009 in its chapter dealing with transfer of expenses to the provinces. It was provided to us courtesy of the Secretariat General of Budgets; preparation and monitoring of budget.

MANGU,A. et KIENGE KIENGE INTUDI,R.(dir.), *Participation and responsibility of actors in a context of emerging democracy in the Democratic Republic of Congo (Act of scientific day of the Faculty of Law of the University of Kinshasa, 18-19 June 2007),* Kinshasa, PUK, 2007.

KUMBU-ki-NGIMBI, JM., "Legal Framework Decentralization in the Democratic Republic of Congo", in MABIALA MANTUBA NGOMA, P.(dir.), *The Processes of Decentralization in the Democratic Republic of Congo*, Kinshasa, Publications by the Fondation Konrad Adenauer, 2009.

The Fundamental Law of 19 May 1960, *Moniteur Congolais*, 1st year, n°21bis of 27 May 1960.

Law n° 08/016 of 07 October 2008 bearing composition, structure and functioning of the decentralized territorial entities and their relationship with the state and the provinces, *Official Gazette of the Democratic Republic of Congo*, 49th special edition, Kinshasa 10 October 2008.

Law n°08/010 of 07 July 2008 setting the rules relative to the structure and management of the state portfolio, *Official Gazette of the Democratic Republic of Congo*, 49th year special edition, Kinshasa 12 July 2008.

Law n°08/012 bearing fundamental principles relative to self government of the provinces, JORDC, 49th year special edition of 31 July 2008.

MABI MULUMBA, E., "For a Good Governance of Decentralized Administrative Entities ", *Congo-Afrique*, n° 402-403, February-March, 2006.

MABI MULUMBA, E.," Decentralization and Fiscal Problem ", *Congo-Afrique*, n°432, February 2009.

MABIALA MANTUBA NGOMA, P.," The Foundations of Decentralization ", in MABIALA MANTUBA NGOMA, P.(dir.), *The Processes of Decentralization in the Democratic Republic of Congo,* Kinshasa, Publications by Konrad Adenauer Foundation, 2009.

MBOKO DJ'ANDIMA, JMF. General Tax Code, 2 éd., Kinshasa, PUC, 2009.

OBOTELA RASHIDI, N.," Afrique-Actualités", *Congo-Afrique*, n° 438, October 2009.

OBOTELA RASHIDI, N.,» Afrique-Actualités», *Congo-Afrique*, n°437, Septembre 2009.

PUNGA KUMAKINGA, P., "The Relations between the Municipals and the Provinces. Judicial and Financial Autonomy", Paper presented during the second seminar on the Rule of Law organized by Konrad Adenauer Foundation and the Faculty of Law of the University of Kinshasa, December 2009.

TOENGAHO LOKUNDO,F., *The Constitutions of the Democratic Republic of Congo. From Joseph Kasa Vubu to Joseph Kabila*, Kinshasa, PUC, 2008.

VUNDUAWE PEMAKO, F., *Treaty of Administrative Law,* Bruxelles, éd. Larcier, 2007.

MILITARY REFORMS IN THE DEMOCRATIC REPUBLIC OF CONGO (FARDC) REFLECTIONS ON THE ROLE OF THE INTERNATIONAL PARTNERS

BY JOSEPH CIHUNDA HENGELELA*

"The politics of *a State lies on its geography"*
Napoleon Bonaparte

INTRODUCTION

The Congolese have agitated for military reforms since the collapse of Mobutu's single party regime in the early eighties. Given the political revolution that has not offered the state a chance to undergo a peaceful transition, the aspirations of the people have not been taken into consideration by the political powers that at that time made use of the same army to cling on to power. During this period, the Congolese army failed to protect the citizens in the interior of the country from occupation by foreign forces. Henceforth, the Congolese soil became more often than not, a theatre for confrontation of foreign armies or land where these armies indulged in the exploitation of the mineral resources. After the death of five million people within a period of five years, massive rapes of women and girls and the presence of armed foreign militia on the Congolese territory; a situation which has been both harmful to the flora and fauna and acting as an alibi for tempestuous intervention by foreign force, reforms in the Congolese armed forces was becoming an absolute necessity in the design of the Third Republic if DRC was to become a democratic state adhering to the rule of law.

The reform of the Congolese Army as well as that of the National Police and of the Information Services seemed a pre-condition for consolidation of democracy and the processes of the installation of a rule of law. Such a reform process which requires enormous financial and material means could not have effectively achieved its purpose without the participation of DRC's international partners. The present study analyses the processes of military reform by focusing on two ideas emanating from Civil Society and Congolese researchers on one part and on the other, political and military powers of the country. The role of International Partners in the military reforms is crucial in this study. This work is based on the military reform documents designed by the Army Chief of General Staff, on adapted or legal texts under discussion in parliament and on the interviews carried out on the ground particularly in Kinshasa.

I. FARDC (Armed Forces of the DRC) REFORMS AND DEFINITION OF THE MAIN AXES

The study of the reform of the Congolese army may be the object of discussions guided by the apprehension of what the players concerned may make of it. It should be noted that in the framework of the emergence of a rule of law, the issue of the army and other security

* *PhD studentS in Public Law /University of Kinshasa, Consultant at the Electoral Institute of Sustainable Democracy in Africa (EISA/RDC) and Assistant to the Executive Director the Institute for Democracy, Governance, Peace and Development in Africa, (www.idgpa.org). He is also a member CODESRIA. Tél : +243 81 039 90 60, Email : jcihunda@yahoo.fr, jcihunda@idgpa.org.*

services is of concern to all even if the management of these services falls under the responsibility of governors who must conform to legal instruments in their reciprocal relations. However, the Army Constitution must meet the people's expectations, that is, to protect and to guarantee the defense of their territory. Mr. Camille Nkoa Atenga gives evidence of this link between the people and the army when he asserts that *"Companies get soldiers conforming to the idea that they themselves believe in, the image that they want to portray to the outside. This goes in agreement with the relationship that they wish to cultivate with the international companies in all its dimensions."*[326]

Thus, we have chosen to check the status of Congolese public views the military reform and legal framework that accompany it to try and evaluate the correspondence between the expectations, the aspirations and decisions of the governors.

I.1. Imperativeness of the Congolese army reforms as felt by the Congolese

The importance of peace is felt more by those who witnessed the horror of war. The Congolese in Kinshasa lacked water and electricity for several days; and even more; the populations of the East who suffered continue to suffer the repercussions of the war have a greater urgency to build an army that gives them security. This is why it was important to give a hearing to the Congolese who gave their views on the army and its mission in the context of the beginning of the 21st century. The illusion has been made the work of Congolese researchers carried out by the Catholic Church since 2003 in this field. Mwayila Tshiyembe already insisted that the foundation of a democratic rule of law rests also on the constitution of a national army endowed with a capacity to be dissuasive and credible defense.[327]

I.1.1. Technical and strategic data in the setting up of the Congolese army

The constitution of an army bases itself on a statue on separation and clarification of responsibilities between the civil and military authorities; a career management plan, the structures of access to economic rights, social and cultural or the military condition[328]. This last demand sums up the conditions for better life and work. The new army must be professional in its commandment, management, training and recruitment.

A. Political and strategic conditions

The future of the DRC runs the risk of being mortgaged for "A state that does not design a defense concept adapted to the needs of the people, to its potentialities, to its character, fails in its principle and condemns itself to submission, may be to its disappearance". If the DRC recalls the good memories of "African Vocation" and the "resort to Authenticity", two principles of diplomacy under the regime of Mobutu, the new army should allow Kinshasa to contribute to the peace keeping forces, either under the United Nations, the African Union or under the Central African sub region (Central Africa and the Great Lakes)[329].

---

326 Nkoa Atenga C., *Les armées africaines à l'heure de la démocratie et des droits de l'homme*, Vanves, 1996, p. 36.

327 Mwayila Tshiyembe, *Géopolitique de paix en Afrique médiane. Angola, Burundi, République Démocratique du Congo, République du Congo, Ouganda, Rwanda*, Paris, L'Harmattan, 2003, p. 137.

328 Ibidem.

329 Idem, p. 139.

B. Living and working Conditions

Living and working conditions of soldiers in the new army is improved as seen through the following rights: housing, healthcare, children's education, training and the appropriate gear, promotion on merit and seniority. It is equally improved by guarantying military salaries. Army's efficiency depends on equipment, reconstruction of schools and military training centres new public spirit (loyalty, neutrality, the duty of confidentiality, access to justice for all soldiers even in times of war); the new defense doctrine based on the "forces projection", given the immense weight demonstrated by the aggression and the occupation by Rwanda and Uganda[330]. To avert the fate, "the strategy of localization of forces" must be the backbone of the «forces projection » doctrine.

Once trust is restored between a sovereign people and its reformed army, the Congolese Nation should take care of widows and of orphans of service men who have died in the battlefield. The entire country must acknowledge those who died in the battle front, by taking care of their bereaved families. The new soldiers must do that which they took an oath of office- to defend the country, an ultimate sacrifice. In return, the nation must commit itself to improving their living conditions; those that will not lead them to violate military regulations in order to ensure their survival and those of their families. As a railing or thermometer of the barracks climate, the civil and military powers should put in place a structure or a commission mandated to check on the life of soldiers, by listening to their complaints; by finding immediate and appropriate solutions with the necessary means.[331]

C. Characteristics of the new Congolese Army

The new army must be designed as an institution mandated to carry out permanent defense of the Democratic Republic of Congo in all circumstances. It protects its territories against all forms of aggression and its decision making and commanding units are shared between democratically elected civil authorities and military authorities well versed in the art of war, legally delegating this mission.[332] The new army is a public defense service mirroring reflection of freedom, where obedience and a citizen's virtue are reflected in the power of combat in defense of democracy. It is this dialectic relation which legitimizes the usage of force by the army, as a resort to action founded in law and executed in compliance to the laws[333].

A new army should consist of combatants rather than deserters; one that should protect the people, not looter. An army is first and foremost the incarnation of the supreme spirit of sacrifice for the country, for the homeland, the nation and for the state[334]. Tomorrow's army should not be composed of former rebels or by the Government's non combatants. The army training strategy through the integration of the soldiers who lived through the conflicts revealed its limits and enabled the defense and security system of the Congolese state to be paralyzed by infiltrations of elements working for the benefit of neighbouring countries and specially Rwanda and Uganda[335]. The Pweto War in Katanga in 2000 and the offensive launched against the disgraced General Laurent Nkunda are examples of the infiltration in the current national army.

---

330 Mwayila Tshiyembe, *Géopolitique de paix en Afrique médiane*…op. cit., p. 138.
331 Kamana Tshibengabo, *R-D Congo : La défense nationale à l'impératif. Patriotisme et Souveraineté*, Paris, L'Harmattan, 2004, p. 109.
332 Mwayila Tshiyembe, *Géopolitique de paix en Afrique médiane*…op. cit., p. 137.
333 Ibidem.
334 Kamana Tshibengabo, *op. cit.*, pp. 105-106.
335 Kamana Tshibengabo, *op. cit.*, pp. 104-105.

To completely overhaul such a mentality, it would be necessary to place at the head of the future Congolese National Army superior officers who are competent and at the same time patriotic. This means putting the interests of the country and nation first; the territory's integrity, the sovereignty of the nation, the protection of persons and their property, as well as the protection of the republics institutions[336].

The recruitment must offer legal guarantees: the right to equal public employment opportunity to all under the Congolese law and intellectual based on competency[337]. We suggest that a choice amongst the best of the Congolese should be done to constitute a new army, demand of a basic training equivalent to a high school certificate or bachelor's degree if this is to be a place of excellence and not of mediocrity, like FAZ. Added to this is the respect for equal competence, ethnic and regional balance. The objective is to avoid that under the pretext of the « one indivisible nation», the governors only recruit from their ethnic groups to the detriment of other ethnicities and regions of Congo[338].

The first step of re-establishing the military honor is to put an end to the army being a dumping ground for the undisciplined, delinquents, careerists' or former business men of the ex-Mobutu companies. To this end, the future soldiers should have finished at least the fifth year cycle of secondary education and then done their Civil and Military Service. On a voluntary basis, they may join the army in order to continue with higher studies[339].

*I.1.2. Territorial structure of the national defense and the protection of strategic site***s**

The territorial structure of the National Defense should equally correspond to the protection of the country's strategic sites. If it is about the mining areas whose occupation impacts on the functioning of State institutions and gives the enemy means entry. Three areas deserve special attention in the military activity on DRC soil.

A. Kisangani zone (Eastern Province)

The town of Kisangani is without any adequate defense. This town should have been transformed into a military fortress. Formerly, this Lumumba stronghold had an air force base and a naval base. A National War school should also be established here to discourage all those neighbouring countries of the East[340] attempting to cross the national borders.

The Eastern Province, occupying a territory as large as France, is without any meaningful military facility. It has no possibility of holding the enemy while waiting for reinforcement from Kinshasa or elsewhere. That is why enemy intrusion was easy in 1997 and 1998. Since the second aggression of August 1998, Rwanda and Uganda, using heavy fire arms fought thrice to control the town of Kisangani[341]. A naval force stationed in the Port of Kisangani should be transformed into the local air force. The troops can use whichever means in case of foreign invasion. The neuralgic defense centre of all the north-eastern area of our country is located in Kisangani[342].

336 Idem, p. 107.
337 Mwayila Tshiyembe, *Géopolitique de paix en Afrique médiane*…op. cit., p. 138.
338 Ibidem.
339 Kamana Tshibengabo, *R-D Congo : La défense nationale à l'impératif*…op. cit, 111.
340 Ibidem.
341 Kamana Tshibengabo, *R-D Congo : La défense nationale à l'impératif*…op. cit., p. 111.
342 The Ugandan army can reach Kisangani by road in two weeks; this strategic site should be equipped with a force able to reach the Ugandan border within a week by road, and even Kampala by air within a short time.

B. Muanda-Kitona-Inga-Mbanza Ngungu (Bas-Congo)

The Muanda, Kitona, Inga and Mbanza- Ngungu sites are very strategic to the Congolese State. The 2 August 1998 war demonstrated the importance of these sites in the military strategy against the DRC. The Rwandese occupation of these sites and cutting off electricity from Inga Dam, was a calculation aimed at putting pressure on the political power in Kinshasa and incite the public to raise against the governors, a move that would have facilitated the progression towards Kinshasa but strangely enough, it is the contrary effect that was achieved.

The air transportation of Rwandese troops operation was an extraordinary exploit as observed by Kamana:

> *"The targeted area had an aerial base (Kitona) and a naval base (Muanda) - both taken by the enemy without firing a single short. The road to Kinshasa was thus free. The Atlantic coast should then equally become a fortress, to be able to protect the country's political capital. From this painful experience, Kitona should be doubled up with another military base in the region, which would provide relieve in case the former was overrun in order to avoid a blockage of the coastline by the enemy"*[343].

The Mbanza- Ngungu military base did not stop nor slow down the Rwandese troop's progression to Kinshasa. The experience proved that this base was not the capitals lock. Thus this military site should be modernised or backed up by another base with armoured tanks and heavy artillery. In between the two military bases exists a strategic site which is the Inga Dam.[344] A takeover of Inga places Kinshasa in a vulnerable state given its strategic location. By trying out this experiment, the Rwandese troops incurred the wrath of the people of Kinshasa who resisted fearlessly.

C. Kolwezi (Katanga) and Mbuji-Mayi (Kasaï) zones

Kolwezi was twice caught up in challenges of the Katanga paramilitary police and was strategic because this town constituted an entry point into the economic capital of the country. The two attacks from Angola and Zambia, against Kolwezi in the south Katanga, in 1977 and 1988, aimed at taking over the control this mining town. The Rwandese troops and their local allies from the AFDL proved these two decades later. The RCD/Goma announced severally that the imminent fall of Mbuji-Mayi and Laurent Désiré Kabila had made of Mbuji-Mayi his first defense device. Kamana Tshibengabo remarked that:

> *"If Kolwezi and Mbuji-Mayi had fallen, the central government would not have had the necessary means to resist. A form of conquest is drawn here: the enemy attacks the vulnerable sites to get easy victory and thus demoralizes the aggressed people, while at the same they aim for the useful sites to boost their war efforts."*[345]

I.1.3. Relations between the civilians and the military in the context of the new army

An army based defense system as demonstrated has its limitations. It is necessary to come up with a defense system which must be adapted to the country's realities and one which can easily be put into place. The development of a defense system should take into account

[343] Kamana Tshibengabo, *R-D Congo : La défense nationale à l'impératif*…op. cit., p. 113.
[344] Ibidem.
[345] Kamana Tshibengabo, *R-D Congo : La défense nationale à l'impératif*…op. cit., p. 114.

the history's data as well as the future perspectives[346]. The defense and security system must be founded on two fundamental principles: the principle of subordination and that of specialisation. Subordination is a principle in which all action by the armed forces and the police must be subjected to the initiative and authority of the political civil power. As for specialisation, it signifies that the territorial defense against all forms of aggression is invested in a special institution namely the Armed Forces; the population's security and permanent surveillance in the territory's hinterland is the first priority of the national police[347].

From past experiences the following facts became clear: a single military force cannot be victorious. Victory implies a close collaboration between the military, civil politics and economy. The harmonisation efforts should consist in imposing to the military and the police an attitude transforming them into brothers and protectors of people and their property. A well disciplined and well behaved army and police force is likely to enjoy cooperation from the civilians and gets key information to carry out their operations in times of crisis as well as in times of peace.

A. Methods of harmonising relations between the civilians and the men in uniform

The creation of a mixed training structure for the army such as the Institute of Higher Education for National Defense brings together civilians, military, professionals from diverse backgrounds. The courses duration of up to several months provides an opportunity to freely discuss, harmonise their different points of view and to get used to team work in the matter of defense. For the police, The Police Academy serves as the framework of action so that the police and civilians develop the feel of group work in the field of security and the surveillance of the hinterland.[348] Military service should be made compulsory to all the Congolese citizens aged between 18 and 50 years. This obligation was engraved in the conscience of the Congolese during the years of our country's aggression by the Rwanda-Ugandan forces.

Different inter ministerial defense committees should be established in the sectors of food, scientific research and information. Each committee should be headed by a civilian with superior authority from the bottom up to head of state. The Police and the Army should be encouraged to hold open days allowing civilians access to their facilities, to familiarise them to realities of the two institutions, to open dialogue between the civilians and the military on questions related to defense and security. Organisation of sports competitions in order to unite a perfect existence of heart and spirit of this partnership in the security system is the strategy of harmonising relationship between the civilians and the military.

B. The conduct required of the man in uniform

The man in uniform should be an exemplary citizen both in his private and public life. When carrying out his duties, he should behave correctly in compliance with the law; to police and military regulations. In private, the man in uniform should avoid acts which may dishonour his job and discredit the state. The citizen in uniform has the duty to give free service to any citizen in difficulty[349].

---

346 CENCO, The state and its special services. *Public Administration and Rule of Law. (Training Module for parish animators of the Justice Commission and the State's local agents)*, Kinshasa, Commission Episcopale Justice et Paix, 2003, pp. 52-53.
347 Idem, p. 52.
348 Idem, p. 64.
349 CENCO, *L'Etat et ses services spécialisés*…op. cit., pp. 65-66.

The citizen in uniform is forbidden from carrying out businesses. He should be apolitical. The soldier and the policeman do not engage in political activities. As a custodian of the state, the citizen in uniform protects all the political players. The lack of political involvement of the army and police does not mean that the citizens in uniform are not aware of the political debates or have political views. The citizen in uniform do not subscribe to any political party simply because their mission requires positive neutrality. The armed forces are the country's rampart. As soon as the forces align themselves behind one man, or a group of men (political party) become a dangerous and serious threat to the people who do not belong to their political affiliation. In this way, the forces become a threat to the country[350].

It is for these reasons that the men in uniform are forbidden to engage in businesses. Soldiers do not undertake commercial lucrative activities. They are expected to keep a constant watch over the state. Commercial activities take up a lot of time. Even more they lead to a greed for wealth. A rich general does not go to the war but he may provoke a war in order to acquire wealth.. In addition, as soon as a citizen in uniform carries out lucrative activities, he is tempted to misuse his status in order to operate illegally[351].

C. Conduct expected of the civilian political power

In exchange for the obligations of the man in uniform, the state should guarantee him or her all that he needs both on the professional and individual levels. Professionally, a soldier needs to be well trained, well equipped, well fed and well sheltered. At the personal level, a soldier should not lack for anything. Their salary should be used to pay for urban transport, show tickets, and to make small savings. As soon as the state abandons these obligations, a soldier becomes a danger to the country[352].

In the perspective of the new national army, it is imperative that the political players resolve the problems upstream. Practically, a defense and protection system adapted to the country's realities needs to be designed; to watch over the operations of the national army and police by respecting the criteria objectives of designations of those responsible for these services[353]. For this, ten suggestions for the reconstruction of the new army are proposed:

- Progressive demobilisation of the current troops;
- The same recruitment quota for all the provinces;
- The creation of new training centres;
- The rehabilitation of specialised military branches: Air Force, Navy, Ground Troops, Engineering Services, Transmission Services, Security Services;
- The creation of an Air Force answering to the real needs of the country in matter of defense and security;
- The creation of indispensable Air and Naval bases in all the provinces ;
- The instauration of a compulsory civil and military service of all Congolese who have finished the second cycle of secondary education;
  The placing in compulsory reserve of all soldiers retained under the terms of "Tenth Use" ('Dixième utile');
- The construction of military camps outside the big agglomerations ;
- The creation of Military and Naval Academies in the Eastern Province.

---

350 Idem, p. 67.
351 Idem, p. 68.
352 CENCO, *L'Etat et ses services spécialisés*…op. cit., pp. 65-66.
353 Idem, p. 69.

The ideas given by the Congolese constitute their conception of the army called upon to protect the integrity of the Congolese territory which is the most precious communal property of the Congolese Nation. In the Army's Reform Plan, how have these ideas been integrated and to what degree of the Constitution and of the laws of the Republic relative to FARDC have these principles been adapted?

I.2. Major Orientations of reforms following the plan of the Chief of General Staff and the legal foundations of the new Congolese defense system

The army reform vision as conceived by the political and military authorities may be summed up as follows: it must be guided by ten guidelines which are: youth and performance, the new operational division into defense zones, the affirmation of the defense doctrine to the triple echelons of interventions (Cover Units, Quick Response Units, Mayor Defense Units), reform costs taking into consideration the budgetary realities of the country and the intervention of the military partners cooperation especially in the field of infrastructure (construction of barracks and hospitals).

I.2.1. Analysis of the National Army Reforms Plan

The Ministry of National Defense and of Veterans in close collaboration with the General Chief of Staff elaborated an Army Reform Plan whose first milestone was presented at the round table on reform of the security sector held in Kinshasa 25 to 26 February 2008. This plan focuses on four points going from diagnosis on the current army to the key reform points passing by the objectives and the strategies to achieve them.

A. Diagnosis of the DRC Army

The specialists attached to the *FARDCs* Chief of General Staff came up with a diagnosis, which they themselves deemed to be harsh, bearing six points that are important for analysis On the legal plan, the legal texts which govern the Armed Forces turned out to be unsuitable for reasons already mentioned: law n°04/023 of 12 November 2004 bearing the general structure of the Defense and Armed Forces created under the empire of the transition constitution[354] should be revised to conform to the current Constitution of 18 February 2006. Whereas law n° 081-003 of 17 July 1981 bearing the Statute of the Careers of the State's Public Service does not take into account the army's own specificities.[355]

On the morphological plan, the National Army presents a composite image with elements in its midst from armed forces under the former regimes, rebellions, militia and armed groups having at times fought the loyalist forces in the interest of neighbouring countries. It is about the soldiers of the Zairian Armed Forces (FAZ, 1971-1997), Congolese Armed Forces (FAC, 1997-2003), armed wings of the Congo Liberation Movement (MLC 1998-2003), (RCD 1998-2003), Congolese Assembly for Democracy, Liberation Movement (RCD/KML), of ex-Maï-Maï and ex-Tigres (former Katanga policemen who came from Angola in 1997)[356]. Such a diverse grouping of forces was not conducive for cohesion within the army. In addition, it created a geographical and ethnical disequilibrium in the composition of the FARDC personnel in violation of the pertinent provisions of the constitution.[357].

---

354 Articles 178 to 190 of this Constitution were entirely dedicated to the army. See DRC transition Constitution 04 April 2003, *Official Gazette* 44th year, special edition of 5 April 2003.

355 Chief of General Staff, *Plan de réforme de l'armée*, Kinshasa, 2009, p. 2.

356 Chief of General Staff, *Plan de réforme de l'armée*…op. cit, p.2.

357 Article 183 of the transition Constitution …*op. cit.* stipulates that « The recruitment in the DRC's Armed Forces uses

At the equipment planning level, the lack of a transparent procurement policy, management and maintenance of the equipment means that the FARDC does not have enough materials. Most are old, obsolete and often not practical. The transmission means are completely outdated and insufficient. At the infrastructure level, the units do not have permanent garrisons where their families can stay in security without fear of being evicted in the absence of the head of the family. Therefore basic infrastructures are insufficient, dilapidated, and even so places nonexistent. The army men construct their own dwellings. At the operational level, the units have a very weak operational capacity and experience great difficulties in projections because of the insufficiency of projection sectors and logistical means.[358].

At the structural level, the current army situation is not adapted to threats and challenges which face the country. This structure is based on the current politico-administrative subdivision balancing the military regions[359] with the provinces as dismemberment of the state.

B. Objectives of the FARDC reforms

The reform therefore targets the creation of a Republican Army, which is professional, modern, balanced, credible and dissuasive capable of defending the DRC in compliance with the national imperatives.[360]. As a professional army, the Congolese army should have a well trained and devoted personnel, well equipment both in terms of quality and quantity, be a disciplined army ; have a budget and enough funds ; have a sound military doctrine ; be a persuasive, credible and respectable army ; an army with a dynamic leadership with impersonal structures, reliable and stable[361].

The modernisation of the Congolese army should have an adaptable doctrine; the appropriate technology; a dynamic leadership, be well educated and trained; have an adequate functioning communication system; have the capacity to respond quickly to any disaster, have flexible structures, have logistical autonomy and maintain a satisfactory level on all fields. The characteristics of a balanced army oblige this institution to be in tune with the national budget, have provincial representation and respond to operational demands with all its components. It should be an army able to meet all its needs at any given time. The idea is to bring FARD to prepare, employ and maintain the defense capacity in relation with the constitutional, legal and regulatory obligations.[362]

C. Global Strategy of the army reform

The global strategy of the armed forces takes into account one part of its mission, the doctrine of usage of its means, of diagnosis of the actual situation, different possible threats and of the country's budget. The plan targets in a three phases goals of attaining a modern, professional, republican, correctly equipped army, transforming in a new system of credible defense, at the dimension and vocation of the country.[363] The implementation of the army reform should be in three phases. The first phase goes from 2009 to 2011 which constitutes

objective criteria but considers physical aptitude, basic level education and a equal representation of all provinces. ».

358 Etat-Major général, *Plan de réforme de l'armée*…op. cit, p. 3.

359 According to Pr. Vunduawe te Pemako F., *Traité de droit administratif*, Bruxelles, Afrique Editions-Larcier, 2007, p. 454 «The military region is a constituency made up of Land Forces. *It is the equivalent of an administrative province under the command of the Military Region Commander* ».

360 Chief of General Staff, *Le profil des forces armées de la République Démocratique du Congo*, Kinshasa, p. 11.

361 Chief of General Staff, *Le profil des forces armées*…op. cit., p. 12.

362 Idem, p. 13.

363 Chief of General Staff, Army Reform Plan,…op. cit, p. 3.

the reestablishment of MONUSCO. FARDC reorganisation is becoming an emergency in view of the fact that it should be brought to contribute to the surveillance of the vulnerable border points and to begin the training of personnel of the new army by using all available means.[364]

The second phase which will be from 2011 to 2016. It is one designed to increase the power of FARDC which will translate notably into the creation of the Rapid Response Unit (Unités de Réaction Rapide (URR) capable of carrying out actions of force. This phase should be followed by the creation of Key Defense Units (Unités de Défense Principale (UDP)) with full equipment. The third phase is comprised of the period 2016 to 2025. This period is designed to optimise Congolese National defense. The army will be able to ensure effective territorial defense through its own autonomous means. This period is the one which will equally see the increase and participation of the Congolese Army in peace keeping operations.[365]

D. A study of the guidelines of the army reform plan

At the onset of the diagnosis made of the state of the Congolese Armed Forces, it emerged that ten guiding principles formed the foundations for the new army to build on the ashes of those that the Congolese State had severed.. These principles cover rejuvenation, training, and equipment up to the definition of the financing sources of this reform itself.

a) Rejuvenation of FARDC military personnel

Rejuvenation of the armed forces goes through a plan of action of retiring soldiers who have attained the retirement age and recruitment of new personnel called upon to take up duties. In this reform framework, it was proposed to retire all soldiers aged 60 years and above; in a way to begin the second legislature of the Third Republic with a young army.[366] It is due to this that in 2009, the Ministry of Social Affairs supervised the retirement of 46, 090 soldiers. At the same time, those aged 65 years and above whose number stands at 1, 283 were called to leave the army.[367].

By 2010, the reform will have seen the retirement of 2,331 soldiers aged between 65 year and more and in 2010 4,615 aged 60 years and more in 2011. It is obvious that the retirement of soldiers who have had a brilliant career in the army must be assisted to recover and integrate. It may be suggested that the generals and colonels who go on retirement should be integrated in diplomacy or in the territory as advisors to Governors in security measures. For the other categories, the state could find the mechanism to recycle them in society[368].

A solidarity fund with state subsidies could also be set up for the benefit of the retired soldiers. To fill the gap left behind by these departures, the reform provides for the recruitment of 10,000 young soldiers in 2009 which has already started. Given that in the three year period 8,229 soldiers go on retirement and taking into account the inaptitude rate, deserting and others estimated at 30%, it seemed reasonable to fill in this gap with 10,000 elements from the right from the word go so as to maintain at level the projected volume that is an army of 140,000 soldiers[369].

---

364 Ibidem.
365 Chief of General Staff, Army Reform Plan, …op. cit, p. 4.
366 Idem, p. 4.
367 Ibidem.
368 Idem, pp. 4-5.
369 Idem, p. 5.

b) Training and continuous training exercises

It is important to reopen the military schools, the training and education centres for the training youths as well as for the upgrading of the specialists. This reopening starts with the rehabilitation of the existing infrastructure, the acquisition of pedagogical material and the training of trainers. In order to harmonise the teaching and training programs, the commission suggested the creation of a general in command of the military schools, a structure arising from the General Chief of Staff with an aim to avoid the dependence of the military schools on the Ministry or on the forces[370].

c) Acquisition of modern equipment

In order for the Units to be operational, it is important to respect the structural table (ST) and the staff table (ST). This begins with the acquisition of individual and communal equipment, armoured vehicles and aero planes for combat and for troop transportation, floating material, correct transmission material as well as engineering for construction and for combat[371].

d) Improving the living and working conditions of the Congolese Military

The Army Reform places man at the heart of the improvement concerns by prioritising the social and professions conditions which go through the increment of the rate of the household budget which for end 2009 stands at 15$/H/month up to de 30$/H/month in 2011. It is up for revision to factor in medical care at a suggested rate of 3$/H/month, and to take care of funeral expenses. It is time to grant a minimum treatment of 65$ for the last soldier at the end of this year as a way of replacing the ration converted to money (RCA) currently given to soldiers of all grades. The road map gives a global estimation of the costs. Improving the soldiers' professional conditions requires that the management of their careers be coded in legal and regulatory bills.[372]

e) New territorial organization of national defense

The territorial defense organisation was revised to avoid the continued conflicting of the military structures with politico-administrative subdivisions. After analysing the settings and threatening factors, the country was subdivided into three defense zones (Zdef). A Defense Zone is an inter-force territorial entity in which the Ground, Air and Naval Units operate under one command[373].

The Defence's geographical map was subdivided into three zones. The first zone encompasses the city of Kinshasa and the provinces of Bandundu, Bas-Congo and the Equateur. The second Defense Zone is composed of the provinces of West-Kasaï, East-Kasaï and Katanga. The third zone covers the provinces of Maniema, North-Kivu, South-Kivu and the Eastern Province. This subdivision into Defense zones arose from historical, strategic, economic and political settings as well as permitting the recovery of all executives by eliminating the phenomenon « dispo » and executive units[374].

---

370 Chief of General Staff, Army Reform Plan, op. cit, p. 5.
371 Ibidem.
372 Idem, p. 6.
373 Ibidem.
374 Ibidem.

The historical reasons justify the country's subdivision into three Defense Zones from the fact that the Public Force to ANC and the Army Units were articulated round three groupings. The Group Command had the responsibility in the territory of hiring troops; which reduced the time taken in order transmission, intervention and supplies. At the strategic level, each of these zones suffered similar threats: attack from elements hostile to the regime working in collaboration with, or getting support from neighbouring countries[375].

The first Defense Zone was faced by threat from Angola and Congo-Brazzaville. The second Defense Zone, as a result of her natural and mineral resources faced threat from Angola, Zambia and from Tanzania. Threat for the third Defense Zone came from Rwanda, Uganda in the East, and from Sudan in the North-East. Threats come from South Sudan, even as it is getting ready to proclaim her independence. On the plan to reabsorb personnel, there is the possibility of appointing 16 generals, 204 superior officers and 1,639 soldiers per defense zone[376].

On the economic plan, the Constitution of 18 February 2006 provided for the change from 11 provinces to 25 in addition to the city of Kinshasa. To avoid the secessionist desires by certain politicians who would find security in smaller gatherings, it is necessary to organize large gatherings in which would be found several cultural and ethnic realities. This would allow the military to transcend the ethnic divide.

The new territorial Defense structure presents many more advantages than disadvantages. Specialists advocate for the concentration of military means and the reduction of delay reaction in case of threats whereas the politicians want to divide the country into smaller geographical units by creating small new provinces. The army creates large groupings to better cement the national unity and finally the usage of a bigger number of generals and superior officers[377]. The most obvious disadvantage, at first sight, is having the control of large amounts of money at the disposal of one commander. The risk of this concentration is mitigated by the implementation of a chain of command and a leadership development which are completely separate[378].

f) Responsibility in the "Implementation" and "leadership development" chain of command

The "Implementation" chain of command gets its justification from the Constitution. The Head of State is the commander in chief of FARDC and the only one in charge of their implementation. He is assisted by the Chief of General Staff who coordinates the activities of the Commander in Chief on the strategic plan. At the operational level, the Zdef Commander assumes the operational command of all units engaged in action zones under the command of the Chief of General Staff on orders from the Commander in Chief. In times of peace he ensures training of the units through the military bases[379]. At the strategic level, he is represented by the units of the base (Ground Military Regional Forces, Air Force and the Navy equivalents) with their support and input, whose responsibility consists of implementing on the ground units of a similar service[380].

375 Chief of General Staff, *Army Reform Plan* …op. cit, p. 7
376 Ibidem.
377 Idem, p. 8.
378 Idem, p.11
379 Ibidem.
380 Idem, p. 12.

The "Implementation" chain of command demands that before enlisting Units within the operational chain of command, their personnel is recruited, administered, instructed, housed and trained. This task is entrusted to the Forces' Generals as well as to their regiments for conditioning, without any interference in the field of operations commanding. In his capacity as the one in charge of the defense policy, the Minister of Defense is responsible for the mobilising resources necessary for the entire development of the armed forces and of the infrastructure indispensable for defense. This is why he appears on this chain although he does not command.[381]

g) Redefinition of the forces employment doctrine

The forces employment doctrine retained gradual defense on three levels of intervention: at the first level the Cover Units and the Quick Response Unit at the second level. At the third is level is the Key Defense Unit. The Cover Unit is a first echelon charged with observation, surveillance and alerting. It is made up of Infantry Brigades, naval and air units located in the zone capable of engaging any enemy in the surroundings before eventual reinforcement[382]. The reform proposes that the personnel in the Cover Units be composed of 217 officers, 780 vice-officers and 2,500 troops per unit (total 3, 000 men)[383].

The Quick Response Units intervene at the second echelon. These are the aero mobile infantry units, projectable through aerial and naval means. They should be able to intervene at very short notice in a sector at war. They are characterised by great mobility, firing power, autonomy of action, special permanent training and limited term of service. The personnel of these units are composed of 177 officers, 597 non-commissioned officers and 1,932 troops per unit (in total 2,706 men)[384].

The Key Defense Units intervene on the third echelon to 'seal the fate'. They are made of tanker units, heavy artillery and of the mechanized artillery. They are characterised by heavy fire, weak vulnerability and by the possession of performing material. The personnel in each unit are composed of 310 officers, of 1,342 non-commissioned officers and 3,021 troops (in total 4. 673 men)[385].

h) Rehabilitation and construction of the military infrastructures

There is an urgent need for the construction of military camps starting with the garrisons in the East where there is a 2/3 FARDC concentration. Two models have been suggested: the model of Battalion-Camp for the Cover Units and for the Quick Response Units and the Camp Brigade model and for the Key Defense Unit[386]. The military base at Kitona and Kamina will be rehabilitated while those at Walikale and Gombari will be constructed for the third Defense. Military schools, teaching and training centres will also be rehabilitated. As a first step, it will be important to construct at least a Reference Hospital in each Defense unit. The option of construction of the Armed forces Headquarters in Kinshasa was retained to enable the current building which houses the Chief of General Staff at MDNAC. It is the same for the construction of Headquarters for the three Defense Zones and that of 10 military regions. The rehabilitation of the landing airstrip of Kamina and Kitona are in the

381 Chief of General Staff, *Army Reform Plan* …op. cit, p. 12
382 Ibidem.
383 Idem, p. 14.
384 Idem, p. 17.
385 Idem, p. 21.
386 Idem, p. 29.

pipeline given that the two airstrips are threatened by erosion. The construction of facilities for the naval units and a logistical base by the Defense Zone are also in the pipeline.[387].

i) Implementation of the army reform calendar

The reform is projected in three phases going from 2009 to 2015, a duration of 7 years. This reform takes into account the realities and the constraints of the country's budget. The short term phase goes from 2009 to 2011. This should boost the army reforms allowing entry of the second legislature a rejuvenated army even if not yet as professional. The middle term phase goes from 2012 to 2016, which is 5 years after an evaluation of the first phase. The long term phase is from 2017 to 2025 being a duration of 9 years. Evaluations accompany each phase before going on to the next.[388]

j) Sources of funding for Army Reforms

The Army Reform is essentially based on its own resource mobilisation. Input from the partners play a secondary role, the already identified sources of finance are:[389]

- In the National Budget, 12% of the revenue is allocated to the Armed Force, that is 240,000,000 USD ;
- A South African company 'Divine Inspiration' proposes under the framework of drilling for oil to accord 120,000,000 USD for three years;
- A Maltese Bank has offered to loan 30,000,000USD to the Air Force;
- Within the Chinese framework of cooperation, China is ready to give a donation to the FARDC reform.

The Army Reform Plan has not suggested any change concerning military justice which is susceptible to contribute to the eradication of impunity, a cause of indiscipline in the National Army. The Reform Plan is equally quiet on the nature and quality of the civil-military relations. These relations however, constitute an evaluation criterion in an army to embed the rule of law and democracy. The gaps in the Army Reform Plan can be overcome by the various legislative framework on which all the military activities in the Democratic Republic of Congo are founded.

I.2.2. Legal framework of the reformation of the defense system of the Armed Forces of the Democratic Republic of Congo (FADRC)

In a democratic state, the existence and function of any given institution must be based on a constitutional and legal foundation. Upon this view, delegates to the inter-Congolese Dialogue reaffirmed the necessity to '*set up law and order based on (…) the military's subordination to civilian authority*'[390]. Thus the transition period was geared towards setting up a restructured and integrated national army.

A. Constitutional base for national army reform

The Constitution of 18th February 2006 dedicated six articles to the armed forces. These provisions lay down the fundamental principles of the organisation and function of the army.

---

387 General Chief of Staff, *Army Reform Plan* …op. cit, p. 29.
388 Idem, p. 30.
389 Ibidem.
390 §4 of the preamble of the Constitution of the Republic, Official *Journal* 47th year, special edition of 5 April 2003.

From a reading of these provisions, the Constitution determined the character of the kind of army the Republic needs, its composition, its mission, its recruitment and management procedures as well as the role of the members of the army.

a) Constitutional principles relating to the composition, nature and missions of The Armed Forces of the Democratic Republic of Congo (FADRC)

The armed forces comprise of the land forces, the air force and the navy, together with their support services[391]. Memberships at all levels are required to take into account the objective criteria linked both to physical ability, adequate training, and proven morality as well as to an equitable provincial representation[392]. This constitutional disposition does not expressly take into account a gender dimension. The stipulations of Article 14 of the Constitution cannot be followed to the letter. In other words, it is difficult to foresee parity in the army when one knows that integration is voluntary and equally depends on physical abilities. In any event, the few women who find themselves there will benefit from special care especially in terms of promotion and grades.

The mission of the Armed Forces of the Democratic Republic of Congo (FADRC) is to defend the territorial integrity and national borders. In peace time, it participates, in the economic, social and cultural development as well as in the protection of the citizens and their property within the confines laid down by the law[393]. The Armed Forces of the Democratic Republic of Congo (FADRC) are a republican entity serving the entire nation. Diversion of these to personal ends attracts treasonable charges. It is apolitical and subject to civilian authority[394]. Organising military, paramilitary or private militia groupings or running a youth army attracts treasonable charges [395]. The Congolese experience proves that political authority guards are often transformed into private militia though funded from the national budget. Sadly the Special Presidential Division (DSP) is one of the examples of this "militarisation" of a part of the army. After Mobutu, the transition of the Special Presidential Security Group (GSSP) to the Republican Guard (GR) during Laurent Désiré Kabila rule gave no guarantees against this diversion phenomenon of the Armed forces.

b) Constitutional principles relating to the organization and functions of the FADRC

The organisation and function of the armed forces remain within the domain of the legislature[396]. Nonetheless, the Constitution has instituted a Supreme Defense Council whose mission is to give advice on matters of defense[397]. The Supreme Defense Council is headed by the Head of State and in his absence or disability, by the Prime Minister[398]. An

391 Art. 187, Para. 1 of the Constitution of the Republic, Official *Journal* 47th year, special edition of 18 February 2006. This provision differs slightly from section 179 of the Transitional Constitution of April 2003 in that it enlists support services.

392 Art. 189 of the Constitution of the Republic, Official *Journal* 47th year …op. cit..

393 Art. 187, al. 2 of the Constitution of the Republic, Official *Journal* 47th year …op. cit. Article 178 of the Transitional Constitution of 2003 stipulated that "The mission of the Democratic Republic of Congo forces is to defend the integrity of national territory against external aggression and, under the conditions laid down by law, to participate in economic, social and cultural development and to protect persons and property".

394 Art. 188 of the Constitution of the Republic, Official *Journal* 47th year …op. cit.…op. cit.

395 Art. 190 of the Constitution of the Republic, Official *Journal* 47th year …op. cit.

396 Art. 191 of the Constitution of the Republic, Official *Journal* 47th year …op. cit.

397 Art. 190 of the Transition Constitution stated that the Supreme Defense Council gives its assent to the proclamation of a state of emergency, martial law and the declaration of war. The Supreme Defense Council advises on all matters relating to the formation of a national army, structured and integrated disarmament of armed groups, supervision of foreign troops withdrawal and all matters relating to national defense.

398 Art. 189 of the Transition Constitution determined the composition of the Supreme Defense Council for this period as

organic law determines the organisation, the composition, the attributes and the function of the Supreme Defense Council[399].

B. Legal bases for the reform of the national army

Three types of laws relevant to army reform can be analysed within the framework of this study. Firstly, Law n°04/023 of 13 November 2004 provides for the general organisation of the Defense and Armed forces whose modification project is currently under discussion/ debate in Parliament. It is followed by the law project relating to the status of the FADRC military personnel and lastly, laws on military justice.

a) Law on the general organization of the Defense and Armed forces

The organisation of the army is stipulated under Law n° 04/023 of 13 November 2004. It is further elaborated under the Transition Constitution of 2003.This law was thitherto the legal text dedicated to army reform. Putting into account the intermediary changes with the entry into force of the Constitution of 18 February 2006, the modifications and adaptations were deemed necessary in terms of national defense. It was important henceforth to do without these innovations imposed by the army reform process.

After an explanatory memorandum the legislature affirmed the necessity of reforming the Congolese army in these terms: "*Consequently, for the Democratic Republic of Congo's survival as a State and Nation, there arises a serious problem of redefining and organizing its entire forces and structures of defense*[400]". Under this obligation, the law project defines the modalities and the conditions of operation for the forces (Art 6-14) and lays down the organisation and missions of the FADRC.

The modifications of the law project builds from the past and recent armed forces experiences taking into account the country's geopolitical and geostrategic importance. Under these innovations, the commander-in-chief will have under him one or two deputies. The Bill also regulates the Head of State's position as the special chief of general staff. Other key units include the health service corps, the logistics corps, the civic, and patriotic and education services corps, and social work; communication and information services and the general command of the military colleges[401].

The law project proposes to transform the FADRC into a skilled army. To this end, it is called upon in peacetime to participate in economic, social and cultural development as well as in the protection of the public and their property. In wartime or state of emergency or in requisition of the armed forces, they provide protection of people and property as well as the country's fundamental interests within or outside the national territory. The DRC armed forces are equally called upon to participate in rescue operations in the event of natural catastrophes and calamities. The armed forces will carry out humanitarian missions,

---

follows: "... membership of the Supreme Defense Council shall comprise: the President of the Republic, the four Vice-Presidents of the Republic, the Minister for Defense, the Minister for Internal affairs, the Minister for Decentralization, the Minister for Foreign Affairs, the Chief of General Staff of the Armed Forces, the Chief of Staff of the Land Forces, Chief of Staff of the Air Force and the Chief of Staff of the Navy."

399 Art. 192 of the Constitution of the Republic, Official *Journal* 47th year …op. cit

400 Senate, Bill amending and supplementing Law No. 04/023 of 13 November 2004 on the general organization of the Defense and Armed Forces, Kinshasa / Lingwala, Palais du Peuple.

401 Senate, Bill amending and supplementing Law No. 04/023 of 13 November 2004 on the general organization of Defense ...op. cit.

peacekeeping and conflict resolution within the framework of the United Nations, African Union, SADC, and CEEAC and within the framework of other agreements that are binding to the DR Congo[402].

b) Law project on the status of the FADRC military personnel

With regard to their career management, DRC armed forces staffs are governed by the country's law on personnel Public Services Career Statute[403]. This law was considered inappropriate for the armed forces work, necessitating the setting up of a special law which would incorporate the specifics of public military function. This law project seems crucial for reform since it deals with the soldiers' family and living conditions. Equally, it incorporates the soldiers' future after loyal service in the army. The success of the ongoing army reform will be better appreciated through the social well-being of the Congolese armed forces members.

The law project lays down recruitment procedures, career management, and social benefits plans and institutes regulation for military discipline. Military training is given top priority. The provisions of Articles 9 to 109 and 176 to 196 of the said law project are aimed at motivating and encouraging the best among the Congolese population to serve their country. Their effective and efficient application could turn the army into an enviable profession for young university graduates. Another quality of this law project is the regulation of military discipline; the indiscipline among the military and acts of impunity carried out by recalcitrant soldiers are some of the evils plaguing the Congolese army. This disciplinary regulation can be applied with a measure of severity so as to eradicate the phenomenon. To achieve this, martial law must play its role.

c) Legislation on Congolese military justice

Reforms in military law have been ongoing since 2002 when the legislature separated the former military justice code from the judicial military code. The joint code was responsible for the procedure before military jurisdictions and a military penal code establishing the offenses and penalties pertaining thereto. According to Professor Akele Adau, '*…the organisation's growth, the numbers and the criminality within the Armed forces as well as the necessity to conform to international instruments duly ratified by our country has militated in favor,…of reform… and military justice*[404]'. The underlying philosophy behind the military justice reform momentum is that this justice was conceived as one which "*prolongs, supports and reinforces military discipline by referring itself to the legal and regulatory basis that entrench it in a constitutional setting*[405]".

Has this justice reform activity run for almost 10 years achieved its objectives? Many studies carried out both by the Congolese and foreign observers demonstrate that despite the past or ongoing efforts, the Congolese legal system[406] in general and the military justice system

402 Senate, Bill amending and supplementing Law No. 04/023 of 13 November 2004 on the general organization of Defense ...op. cit.

403 Law on the status of Career Staff in the country's Public Services, *Journal Officiel du Zaïre*, 22nd year, No. 15 1 August 1981.

404 Akele Adau P., "Military Justice Reform in the DRC. The new transitional Judicial and Military Penal Law: A soft landing for the Court of Military Order", *Congo-Afrique* (January 2002) n° 361, p. 547. See also Akele Adau P., "Military justice in the DRC justice system. What reform?" *Congo-Afrique* (January 2001) n° 351, pp. 79-124; Akele Adau P., "The Court of Military Order: the nature, organization and competence" *Congo-Afrique* (January 1997) n° 311, pp. 541-570.

405 Akele Adau P., "Military justice Reform in the DRC" …*op.cit.*, p. 563.

406 Mvioki Babutana J., "The Congolese justice system: Status and Future Prospects", in Mabiala Mantuba-Ngoma, Hanf

in particular, suffer from problems both in terms of organisation and administration of military justice. The report by UN Secretary-General, Ban Ki-Moon of 30th March 2010 is explicit in this regard.

Mr. Ban Ki-Moon pointed out the failure of the legal sector in these terms: '*Civilian justice operates on less than 1% of DRC's national budget, and no administrative structure is in place, be it for financial or personnel management, providing business follow-up, budget preparation, purchasing or asset management. Cases of interference of civilian servants in the administration of justice and corruption frequently arise, hence the appointment of 200 magistrates to deal with professional code of ethics and anti corruption practices*[407]'.

Regarding military justice specifically, the UN Secretary-General's brief is unequivocal:

> '*Institutions of military justice,* he writes, '*continually come up against problems similar to those encountered by the civilian institutions; there is a notable shortage of military judges and prosecutors, and, for the 818 military magistrates required, only 350 are in place. The mechanism for military justice suffers from policy pressure or from interruptions in the chain of command, and the mechanisms used for providing the magistrates' security in war zones are insufficient. Within the said period, the MONUC and PNUD trained 665military justice personnel*[408]'.

Ban Ki-Moon's sentiments are not exaggerated: indeed, they are in line with the Congolese government's request for Technical Evaluation Mission '*for military tribunal support including provision for equipments…*' The aspect of military justice does not appear on the reform plan and raises several questions. Is this a deliberate omission justified by the fact that the process in this area started in 2001 and after extravagant drifts of the former Military Order Court established at AFDL's ascension to power? Could its age hide all the dysfunction of this justice? Aren't the causes and effects not clear to the reformers to relate between the indiscipline decried within the FADRC to the evil destroying the military justice? These questions demand an evaluation of FADRC's reform plan travel warrant.

I.2.3. Evaluation of the road map put in place for the Congolese army reform plan

Every reform process evaluation for the DR Congo's army must, for the time being, focus on the first phase (2009-2011). The concept of this phase was similar to the one on the reestablishment of security over the entire national territory. Moreover, it had to undergo a similar reorganisation as the FADRC would enable them to efficiently fulfil their constitutional mandate even after the departure of international forces. In view of these challenges, it is appropriate to get concerned about the progress of the Congolese army reform process. Admittedly some significant progress has taken place, thus opening a ray of hope for the future; but more effort is required from the Congolese government as well as from international partners.

With the progress of the reforms, one notes that during the Dongo insurrection in Equateur province, the Congolese Government demonstrated its capacity to independently deploy FADRC personnel and National Police during security crisis within defense Zones 1 and 2.

T. and Schlee B. (dir.), Democratic Republic of Congo: A democratization at gunpoint, Kinshasa, Konrad Adenauer Foundation Publication, 2006, pp. 175-193.

407 Thirty-first Secretary-General's Report of 30 March 2010, §44, www.un.org (Viewed on 15 april 2010)

408 Thirty-first Secretary-General's Report of 30 March 2010, §50, www.un.org (Viewed on 15 April 2010)

In his report to the Security Council, the UN Secretary-General noted the following: '*FADRC and PNC elements have been deployed by air through government effort, with the assistance of highly efficient battalions who had recently received training facilitated by Belgium and South Africa. Moreover, the soldiers were well equipped, trained and disciplined; they carried with them food rations ready for use for a duration of several days; and they were specially equipped to carry out the operations involving the use of perfected communication materials including notably satellite telephones* [409]'.

The Dongo experience cannot hide the stagnation affecting the Congolese army reform process. This situation is particularly worrying with the impeding elections scheduled for 2011. Security issues may weigh negatively against the electoral process as was the case in 2006 during which it favoured the candidate supported by the establishment exercising political-military leadership in Congo since 1997. It is still important to look for the causes on the stagnation of the Congolese army reform process.

For observers of militaries and defense issues, lack of political goodwill was held unanimously as one of the principal causes of this lethargy. The emergence of a politico-military and racketeering leadership involved in the illegal exploitation and mineral resource trafficking will be a constraint to the birth of a professional army totally submitted to civilian rule. Such an army would be a threat to the current military and civilian elites who serve the armed forces to maintain their positions and the benefits they derive from it. Army reform needs to be patriotic and an absolute priority for consolidation of democracy and peace. In the same vein the Secretary-General maintains that „*without a deep transformation of the army and the police, including a rigorous selection of the security service personnel, and the restoration of the legal system, the perspectives of sustainable peace and stability will dwindle considerably*'[410].

Besides the lack of political will, financial and operational constraints that negatively impact on the army reform process must also be factored in. At the operational level, the Congolese government is expected to conduct the reform while at the same time take care of the military operations mainly in the eastern provinces and endeavour to establish its authority over the entire national territory. Government authorities feel more or less cornered by the fact that they have to reform in the midst of insufficiency of budgetary allocations given the enormous needs of the Armed Forces.

This is such a critical question that cannot be left solely in the hands of politicians. Parliamentarians who have not yet successfully exercised meaningful control over the army and security services need to include in their agenda sessions to urgently deal with this issue within the remaining three parliamentary sessions. The need therefore arises to turn to international cooperation in order to hasten the reform. International partner support can be summarised by an accompanying guidance, training and provision of equipment, which the Congolese government is not able to provide alone in the short-term.

II. THE ROLE OF INTERNATIONAL PARTNERS IN THE CONGOLESE ARMY REFORMS

The role of international partners consists of technical, financial and material assistance. The international community can also exert influence on the Congolese political authorities to accelerate the army reform process. These international partners are either multilateral or bilateral.

409 Thirty-first Secretary-General's Report of 30 March 2010, §42, www.un.org (Referred to on 15th April 2010)
410 MONUC Magazine, number 47, May-June 2009, p. 12.

II.1. Support from multilateral partners

In essence, there are three multilateral partners involved with the Congolese army reform process, namely, the UN through MONUC which, since 1st July 2010 became the UN Mission for Stabilization in Congo (MONUSCO), the European Union through common action for reform of the security sector in the DR Congo, the SADC and CEEAC.

II.1.1. Contribution of the UN through MONUC/MONUSCO

Over the last half century, the UN has been involved in the Congolese crisis e mandated to facilitate the formation of a new army since 1960[411]. From the beginning of the 1+4 transition, the UN got involved in army integration through an intermixed process. After the establishment of political institutions resulting from the elections, MONUC's mandate with regard to the security sector was clarified by resolution 1756 (2007) of the Security Council. Under this resolution, MONUC gave short term training to FADRC's integrated brigades and reinforce the police force to serve as the government adviser in matters of judicial and security sector. It was involved in capacity building, including the military justice system and provides support the initial planning of reform for the security sector. These tasks will be accomplished in coordination with other partners[412].

A. Training and accompaniment for FADRC

One of the key legal instruments stated in resolution 1856 (2008) which recommended that MONUC provide military training, including in the field of human rights, international humanitarian law, child protection and prevention of violence against women, to various members and units of integrated brigades were deployed by FADRC to eastern DR Congo.

Other Security Council resolutions have also adopted this approach to modify the mandate of MONUC with regard to Congolese army reform. MONUC has trained and provided support to the DR Congo's armed forces (FADRC) during military operations against the FDLR by providing logistical support.

It should be noted that the MONUC and DR Congo's armed forces (FADRC) have developed a joint operations plan to gradually increase military pressure on the FDLR in areas where FDLR controls commercial activities and illegal exploitation of natural resources.

Eight FADRC battalions whose supervision and logistical support are provided by MONUC were deployed in four operation triangles in the Kivu regions.

In the field of collaboration, a joint operational directive of MONUC and FADRC gave a detailed plan for coordinating the operations against the FDLR and defined the logistical support that MONUC provided to FADRC within the framework of the jointly planned operations[413].

In 2006, MONUC set up a training project to integrate brigades in order to increase their operational capacity and to enable them to independently guarantee their security and defense missions.

---

411 Gendebien PH, *UN intervention in Congo 1960-1964*, Paris-Kinshasa, Mouton &Cie -IRES, 1967, pp. 145-168.
412 MONUC Magazine number 48, Volume VIII, January-March 2010, p. 15.
413 MONUC Magazine, July-August 2008, p. 9.

MONUC's military branch in charge of the security sector reform had set up a pilot project for a period of three months to test and evaluate the program in three FADRC battalions before expanding it to the rest of the troops. This was known as the 'Main Training Project' (MTP). Three training sites were selected, namely Rwampara in Ituri, Nyaleke in North Kivu and Luberezi in South Kivu. From July 2 to September 22, 2007, 750 soldiers were trained in each of these three centres. From 5 November 2007 to 1 February 2008, 750 FADRC elements were trained at Rwampara, and 1500 at Nyakele and 1500 in Luberezi.

Between late 2008 and 2009, MONUC had conducted training for trainers at Luberezi and Nyakele. More than 300 military received training on personnel management and general military skills. These courses have helped improve the skills and military ethics in FADRC. However, FADRC has undergone difficulties due to lack of individual, group and camp equipment, as well as training related material.[414].

MONUC's action in the security sector seems to have laid more emphasis on armed groups. Some UN troops were accused of having "ambiguous relations" founded on the illegal exploitation of mineral resources. Hence the need to redefine the mandate of the UN mission in that field.

B. MONUSCO mandate related with military reform

The Mission of the United Nations for the Stabilization of the Congo, MONUSCO, was born of the reconfiguration of MONUC, necessitated by the demands of the Congolese Government and the realities on the ground. This reconfiguration was designed to strengthen national capacities on matters of security. To this end, the Technical Assessment Mission dispatched by the Secretary-General Ban Ki-Moon to Congo, has sought to develop, in collaboration with MONUC, a project according to which MONUSCO shall provide training and possibly basic equipment and support the construction of barracks for some FADRC units which form part of the military base as the first phase of the government's military reform plan[415].

According to the UN Secretary-general's recommendations, Resolution 1925 of the Security Council of 28 May 2010 gave mandate to MONUSCO in line with the legislation pertinent to reform FADRC's and develop an army reform plan. To assist the Congolese government strengthens its military capacities, including military justice and military police, harmonisation of the activities were carried out and exchange of information facilitated on data. Where the government made a request for assistance in setting up FADRC and military police battalions, support to the institutions of military justice and mobilisation of donors was done to provide material and other necessary resources[416]. Action by MONUSCO was done in consultation with international partners among whom included the European Union.

II.1.2. Intervention by the European Union via UESEC

The EU action in favour of reforming the security sector in DR Congo is based, among others, on Decision EUSEC/1/2010 of the Political and Security committee held on the 18 May 2010. It established a Committee of Contributors for European Union's mission advice and assistance in reforming the security sector in the DRC (DRC UESEC). [417] The decision

[414] MONUC Magazine, number 48, Volume VIII, January-March 2010, p. 7.
[415] Thirty-first Secretary-General's Report of 30 March 2010, §86, www.un.org (Referred to on 15th April 2010).
[416] Resolution 1925 of 28 May 2010, §12, www.un.org (Consulté le 15 avril 2010).
[417] Official Journal of the European Union, L127/14, 2010/297/PESC of 26 May 2010.

follows another under Title V of the EU Treaty. It amended and extended the Mission's joint action to provide advice and assistance on security in the DR Congo[418].

A. UESEC's achievements since inception

Since December 2005, the UESEC mission, whose original mandate included contribution to the integration of operations of the Congolese army and the project ‚Chain of payments', has diversified its activities to include modernisation of the administration and human resources within the military. This action aims to support the Congolese authorities' efforts to establish a modern and effective administrative structure within this public institution. The mission has directly provided advice and technical assistance to the Congolese authorities. To this end, advisers have been assigned to work with military authorities in Kinshasa as of April 2006 and others took office with the Staffs of four military regions in March 2007[419].

Nearly 4 years later, UESEC advisers were deployed in Kivu in eastern Congo to oversee the monthly salary payments of brigades and to assist the Congolese authorities in the implementation of mechanisms to ensure greater transparency of financial flows. The UESEC gave technical, financial and logistical support to the military biometric census.

At the conceptual level, the European Commission also participated in drafting the law on the status of the military. Draft regulations, administrative, financial, administrative processes and systems analysis were developed to support the restructuring of FADRC administration. A project to install a computer network is currently funded by the EU and its Member States to the tune of 2, 5 million Euros. Computer training for trainees carried out for 150 people for the first module, 60 for the second module, 45 and 25 persons respectively for 3rd and 4th modules[420].

B. Current UESEC achievements

The UESEC continues to provide support to the Congolese authorities in the distribution of military identification cards, which is at the final stage of biometric census of the Congolese army. The distribution started in the district of Kinshasa and Bas-Congo and gradually spread across the entire territory.

In addition, the mission has begun the rehabilitation of the NCOs Training School in Kitona in the of Bas-Congo province. The renovations, which include 30 school buildings and 20 residential buildings, are supervised by a UESEC member deployed on site. A third key activity is the training of administrators in 15 towns, coupled with the distribution of over 7,000 permanent administrative guidelines.[421].

The other projects relate to the integration of gender and human rights into military activities, food self-sufficiency through military farms, and management of renovation and equipping of information technology facilities in the military regions. As part of military reform, political and military authorities have identified the need to create a business school for junior officers and NCOs. The various studies conducted to date by the Congolese military (FADRC) propose to recreate a school of administration in Kananga and UESEC has demonstrated its willingness to run the school[422].

---

418 Official Journal of the European Union, L172/36 FR, 2 July 2009
419 www.eusec.rdc.eu (Viewed on 20 August 2010).
420 www.eusec.rdc.eu (Viewed on 20 August 2010).
421 Ibidem.
422 Ibidem.

MDNAC and UESEC services worked in the same direction to find a common strategy which consisted of organising the first training session at GESM in Kinshasa. The basic assumptions of the study done at Kananga was training about 100 students at a go, housing 60 officers and 160 non-commissioned officers, technical autonomy (electricity, water and sanitation) for the school and the use of military personnel trained at Kananga. Setting up a business school was highly necessary to for finalise the ‚Administrative Modernization' project without which the sustainability of UESEC's action in the DR Congo could not be guaranteed[423].

The last multinational partners are African who include SADC and CEEAC.

II.1.3. Contribution by SADC and CEEAC

All the sub-regional organisations within the DRC, namely SADC and CEEAC have in their respective charters provided for military branches for peace operations amongst themselves under the auspices of the African Union and UN. For SADC, there was a brigade in charge of peace issues[424].

FADRC members participate in training and courses organised within the framework of the Regional Economic Community. CEEAC has also organised training sessions and brigade training for peacekeeping operations in the Central African region. A FADRC brigade participated in all the military exercises held within this framework and in the CEEAC peacekeeping mission in Central Africa[425].

II.2. Contribution by bilateral partners

The bilateral partners play an active role in the Congolese military reform. They include countries with which Congo has maintained good diplomatic relations for a long time. They have expressed interest in helping their common partner. In reality, each partner involved in this process has objectives to protect on account of the geostrategic position of the DR Congo. For this reason, these partners, whether African or Asian can be categorized according to whether they belong to the cartel formerly called the "Troika".

II.2.1. Traditional Troika partners

According to the 1990s, Congolese troika countries were the United States, France and Belgium. Also known as „friendly countries", they were directly involved in the political crisis following the onset of the democratic process. The states still lend their support to Congo's military reform process.

A. The Kingdom of Belgium

Belgium is the most important bilateral partner involved with Congo's military reform. Given its historical links, Belgium has played an active role in the UESEC action. At the bilateral level, Belgium trained the first brigade who served at the base of the new Congolese army and which conducted itself positively during the events of Dongo mentioned above.

---

423 Ibidem.

424 Cfr. SADC Stanby Brigade Standard Operation Procedures. Part III: Operations, June 2008.

425 For more details read CEEAC Seminar on security sector reform. Modalities of the armed forces and police reorganization, Kinshasa Memling Hotel, from 13 to 15 January 2009

Belgium has also set up a rapid response brigade based in Kindu. Following the military reform plan, Belgium was able to assist in the creation of rapid response units, the reopening of schools, education and training centres. Belgium's contribution is expected also in the acquisition of engineering and medical materials.

B. The Republic of France

France is the third Troika partner. It participates as a multinational member of the European Union and bilateral levels. At the multilateral level, France has delegated 5 officers to the General Staff on behalf of MONUC and a Deputy Chief of Staff in charge of reforming the MONUC security sector (army, police and justice). Under the UESEC, France has 10 officers with the mandate to reform FADRC's administrative chain, which must be separated from the operational chain to avoid mandate overlaps and the phenomenon of ghost workers[426]. This task led to the FADRC's identification exercise by the granting of biometric ID cards. The census established the DRC armed forces (FADRC) had152,000 registered members against those presented as 350,000.

In the bilateral context, four projects were completed which involved training and infrastructure rehabilitation. With regard to training, France has engaged in capacity building. A French officer was assigned to the General Staff. An operational centre is attached to the General Staff since 2007and the same would be done to all other military regions. The setting up of these facilities is subject to the decision of the Congolese authorities. Equally, an instructor has been assigned to conduct cadet training each defense zone[427].

The EMG School at Kinshasa has benefited from activities organised with the assistance of France, with a French officer primarily responsible for managing the military college. This project started in 2009 and ended in March 2010. A selection test for the second intake was organised before the end of June where 48 trainees had to undergo training for six months. France has dispatched aid workers to form a FADRC battalion on behalf of CEEAC at Mbanza-Ngungu.

The training detachment had the support of French forces in Libreville. France also trained DRC's company participating in the MICOPAX in July 2009 in the Central African Republic. It trained two FADRC companies which participated in the Kwanza exercise in Angola as part of pre-positioned force of CEEAC[428].

According to Colonel Oliver Demeny, the needs presented by the Congolese government with regard to the military boil down to education and individual training courses. To meet these needs, France used Libreville (ERVN) and Cameroon (ESMDD) school support systems. France's commitment however is limited by her military budget and human constraints due to its peacekeeping commitments under UN and NATO. Another limitation is the fact that the DR Congo is not France's "satellite state". In any case, France has military cooperation whose maintenance or growth depends on the goodwill of the Congolese government[429].

---

426 Interview with Colonel Olivier Demeny, Defense Attaché at the French Embassy in the DR Congo, Kinshasa, 31 May 2010.

427 Interview with Colonel Olivier Demeny, Defense Attaché at the French Embassy in the DR Congo, Kinshasa, 31 May 2010.

428 Ibidem.

429 Idem.

C. The United States of America

The Obama Administration is interested in security situation in Africa, particularly in the African Great Lakes. The U.S. President had set four policy priorities for this region: security, promotion of democracy, economic aid and the fight against AIDS. In the security sphere, the United States has decided „to provide African countries with training, equipment and the logistics necessary for their stability[430]". To reform the Congolese military, the U.S. has released $ 35 million for the training of light infantry. This training aims to help develop a professional military that respects civilian authority and provides security for the Congolese people.

The formation of this battalion whose passing out ceremony took place on 17 February 2010 in Kisangani in Oriental Province, involved 1,000 FADRC soldiers. These soldiers are receiving training from U.S. instructors for a period ranging from 6 to 10 months in tactics of small military units, food preparation, maintenance, prevention and HIV/AIDS awareness. Considerations related to human rights and respect for these rights during military operations is incorporated into every aspect of training[431].

II.2.2. Other Western bilateral partners: The United Kingdom

United Kingdom's contribution to the reform of the Congolese army focuses on training and military infrastructure. Activities relating to the training of FADRC military include on one hand 1000 FADRC members and other government agencies trained in the English language in order to have them participate in peacekeeping missions internationally[432].

About 50 soldiers studying culinary art for peacekeeping purposes have been trained in planning and supporting the soldiers in the area of nutrition[433].

In November 2009, lecturers from the Sandhurst Royal Military Academy in the United Kingdom, on a two-week visit to the DR Congo, also trained several senior officers on British management techniques and counter-insurgency. At the same time, the British Embassy announced on arrival in Kinshasa that more training teams in FADRC's military intelligence, logistics and catering as well as advanced courses in personnel management would be conducted. The draft 'English for Peacekeeping' should be expanded by opening up new centres in Kisangani and Kananga[434].

In terms of infrastructure, the United Kingdom has built new kitchen facilities at a cost of than $150,000 which will henceforth be used to train other chefs in the FADRC. The United Kingdom is building 16 new classrooms as well as the logistics base in central Kinshasa. The UK will undertake the renovation of the Headquarters and Training Centre for the communications sector. According to British diplomatic sources, the United Kingdom remains committed to reforming the security sector and will continue to support FADRC.

II.2.3. African bilateral partners: South Africa and Angola

South Africa and Angola are the only African partners involved in the reform of the Congolese army. South Africa, like Belgium, helped train the first brigade of the new Congolese

430 www.lepotentiel.com (Viewed on 24 February 2010).
431 www.lepotentiel.com (Viewed on 24 February 2010).
432 British Embassy, "DRC-UK military cooperation on the right track", *UK in DRC*, 4th edition, p. 3.
433 Ibidem.
434 Ibidem.

army. According to army reform forecasts, South Africa will help with the acquisition of floating material, training of rapid response units and FOMAC training battalions on behalf of CEEAC. Angola on its part provided instructors who trained a thousand soldiers and policemen especially at Kitona. There are divergent views among the Congolese about the contribution of these two African countries currently consolidating their dominance in the Democratic Republic of Congo.

II.2.4. China, the traditional Asian partner

In the context of this study, China is the only Asian partner committed to supporting the Congolese army reform. The reform plan has opened the door to partnership with China particularly in the construction of the new FADRC headquarters, the acquisition of personal equipment and acquisition of arms and ammunition. It is possible that trade contracts in arms against mining resources may be signed to enable the army to have the equipment needed to become more professional.

The contribution of international partners is necessary but not sufficient to reform the army. It is incumbent upon the Congolese Government to demonstrate willingness to accelerate army reform by harnessing the opportunities offered to them.

CONCLUSION

During its existence as an independent state, the DR Congo has experienced the importance of the military as a tool for domestic policy and a strategic instrument for relations between nations. It follows that a credible and effective military is an asset to guarantee political stability, economic growth and social cohesion. Given these assumptions, the Congolese army in its various denominations, has not contributed to the preservation of political independence which in fact had struggle to achieve. Economically, it has exacerbated the destruction of the economic fabric in militarising commerce and indulging in looting in the early 90s. On the social front, the Congolese military has managed to instil popular imagination a certain superiority of men in uniform over the civilian who have became very vulnerable in the face of his demands.

These unfortunate experiences have generated the idea of the type of army required in the DR Congo. After developing the reform plan and legal documents which allow its application, the process seems mired in inaction due to lack of clear political will. The danger facing army reform is to see it become the sole business of the President of the Republic and a group of soldiers, which could lead to „militisation“ of the new army. It is urgent therefore for the army reform process to be placed under the control of both policy makers (Parliament) and citizenry (the civil society organizations and churches). International partner contribution is essential, but requires coordination to avoid duplication. As long as the army question is not resolved for good in Congo, peace remains shaky.

REFERENCES

Akele Adau P., « La Cour d'Ordre Militaire : sa nature, son organisation et sa compétence », *Congo-Afrique* (Janvier 1997) n° 311, pp. 541-570.

Akele Adau P., « La justice militaire dans le système judiciaire congolais. Quelle réforme ? », *Congo-Afrique* (Janvier 2001) n° 351, pp. 79-124.

Akele Adau P., « Réforme de la justice militaire en DRC. Le nouveau droit judiciaire et pénal militaire transitoire. Un soft landing pour la Cour d'Ordre Militaire », *Congo-Afrique* (Janvier 2002) n° 361, pp. 547-568.

Ambassade Britannique, « La coopération militaire DRC-Royaume-Uni au bon fixe », *UK in DRC*, 4ème édition.

CENCO, *L'Etat et ses services spécialisés. Administration publique et Etat de droit. (Module de formation à l'intention des animateurs paroissiaux de la Commission Justice et Paix et des agents locaux de l'Etat)*, Kinshasa, Commission Episcopale Justice et Paix, 2003.

Constitution de la République, *Journal* Officiel 47ème année, numéro spécial du 18 février 2006.

Constitution de la transition de la République Démocratique du Congo du 04 avril 2003, *Journal Officiel*, 44ème année, Numéro spécial du 5 avril 2003.

Constitution de la Transition, *Journal Officiel* 44ème année, numéro spécial du 5 avril 2003.

Etat-Major général, *Le profil des forces armées de la République Démocratique du Congo*, Kinshasa.

Etat-Major général, *Plan de réforme de l'armée*, Kinshasa, 2009.

Gendebien PH, *L'intervention des Nations Unies au Congo 1960-1964*, Paris-Kinshasa, Mouton &Cie-IRES, 1967, pp. 145-168.

Journal Officiel de l'Union Européenne, L127/14, 2010/297/PESC du 26 mai 2010.

Journal Officiel de l'Union Européenne, L172/36 FR du 2 juillet 2009.

Kamana Tshibengabo, *R-D Congo : La défense nationale à l'impératif. Patriotisme et Souveraineté*, Paris, L'Harmattan, 2004.

Loi portant Statut du Personnel de Carrière des Services Publics de l'Etat, *Journal Officiel du Zaïre*, 22ème année, numéro 15 du 1er août 1981.

MONUC Magazine numéro 48, Volume VIII, Janvier-Mars 2010.

MONUC Magazine, Juillet-Août 2008.

MONUC Magazine, numéro 47, Mai-Juin 2009.

Mvioki Babutana J., « Le système judiciaire congolais : Etat des lieux et perspectives d'avenir », in Mabiala Mantuba-Ngoma, Hanf T. et Schlee B. (dir.), *La République Démocratique du Congo : Une démocratisation au bout du fusil*, Kinshasa, Publication de la Fondation Konrad Adenauer, 2006, pp. 175-193.

Mwayila Tshiyembe, *Géopolitique de paix en Afrique médiane. Angola, Burundi, République Démocratique du Congo, République du Congo, Ouganda, Rwanda*, Paris, L'Harmattan, 2003.

Nkoa Atenga C., *Les armées africaines à l'heure de la démocratie et des droits de l'homme*, Vanves, 1996.

Résolution 1925 du 28 mai 2010, www.un.org (Consulté le 15 avril 2010).

Séminaire de la CEEAC sur les réformes des secteurs de sécurité. Module sur la réorganisation des forces armées et services de police, Kinshasa, Hôtel Memling, du 13 au 15 Janvier 2009.

Sénat, Projet de loi modifiant et complétant la Loi n° 04/023 du 13 novembre 2004 portant organisation générale de la Défense et des Armed forces, Kinshasa/Lingwala, Palais du Peuple.

Standard Operation Procedures SADC Stanby Brigade. Part III: Operations, June 2008.
Trente-unième Rapport du Secrétaire général du 30 mars 2010, www.un.org (Consulté le 15 avril 2010).
Vunduawe te Pemako F., *Traité de droit administratif*, Bruxelles, Afrique Editions-Larcier, 2007.
www.eusec.DRC.eu (Consulté le 20 août 2010).
www.lepotentiel.com (Consulté le 24 février 2010).

REFORMING CONGOLESE NATIONAL POLICE AND INTERNATIONAL PARTNERS CONTRIBUTION

By **Anne-Marie NSAKA-KABUNDA***

INTRODUCTION

Africa's current situation indicates a lack of security, peace, democracy, underdevelopment, poverty, disease and death: all these combined evils continue plague the African. This situation is described by Pierre de Charentenay who observes that Africa is sidelined from the world's economic mainstream, alienated from developed areas of knowledge, kept outside the poles of wealth (...) and rejected from the margins of development; it offers a spectacle of violence and corruption[435].

Africa is one of the world regions where most violence and exclusion are practiced. Many years of closed and volatile political systems have destabilised the fragile societies by the exercise of power over extraction of profits at the expense of many. In turn, the exclusions have bred frustrations and given birth to armed and unarmed opposition. They have rekindled tribal conflicts and strengthened isolationism. Alphonse Ntumba Luaba adds that the Great Lakes region now offers the face of a troubled and desolate landscape[436].

The democratisation of the continent is a key factor in its quest for peace and stability[437]. Democracy is a guarantee for development and peace. The relationship between development and peace has been emphasized by many authors.

According to Andrea Riccardi, "there are whole areas plunged into misery by violence and to the economy. They can be cause for great despair, with nothing to bolster hopes for a better future for themselves or at least for their children. Desperation causes uncontrollable reactions, including anger towards a rich world that they discover thanks to the global media, and which they consider responsible for their poverty. Large areas of poverty and despair are ideal breeding ground for breeding molecular civil war and promoting the development of terrorism"[438].

There can be no peace, democracy, or development without security: democracy and development on the other hand engender security and peace.

The choice of the subject is driven by the fact that the DRC is a young country attempting to build a constitutional dispensation in a nation marked since its colonial past by an oppressive

* Assistant at the Faculty of Law, Doctorate student in Law PUBLIC/ UNIKIN, CODESRIA Member, Email: nsakamar@yahoo.fr

435 *De Charentenay P., "L'Afrique dans les marges", Etudes, n°4022, 2005, p.149*

436 *Lukunda Vakala-Mfumu, R, International conference on peace, security, democracy and development in the Great Lakes region: shell or compelling need for re-launching a democratic Congo. Some thoughts on the process. Editions CEDI, Kinshasa, 2004, p.11.*

437 *Cihunda Hengelela, J., Regional security and settlement of armed conflicts in Africa. Contribution of the Republic of post-apartheid South Africa, degree thesis, Faculty of Law, University of Kinshasa, 2005, p.6*

438 *Riccardi, A, La paix préventive, Salvator, Paris, 2004, p.15.*

administrative regime through the conduct of soldiers, police officers, intelligence service personnel, civil servants and other public administration agents. It has been observed that every person exercising some authority in the name of the State arrogates himself the right to oppress the ordinary citizen. It may be noted that the virus eating the country is that of the notion that one is doing public service. There is necessity to „rebuild" the State in the conscience of every citizen[439].

The ideals enshrined in the Constitution which regulate the country since its promulgation on February 18 2006 is to "build in the heart of Africa a constitutional order and a strong prosperous nation founded on true political, economic, social and cultural democracy". The birth of this constitutional order necessitates the reform of public institutions, including those operating in the security sector such as the national police[440].

The interest raised by this study consists of advancing the debate on the issue of reform of the police in the DRC. In effect, sensitive as it may be, the police in the DRC still remain a mystified domain attracting many names: "State secret", "military secret", "defense secret", "and professional secret"[441] hence any public debate on this issue is not open to everyone. Few efforts have been dedicated to this subject due mainly to the opacity surrounding the organisation and function of the police.

National police officers have become agents of insecurity[442]. Hence the necessity to reform the police into instruments for service and development[443], consolidation of democratic political institutions and setting up law and order in Congo Kinshasa[444]. Actually, the PNC is composed of elements with peculiar history and as a result, they often manifest atypical behaviours, the upshot of inequitable training. Among the PNC numbers, one not only finds former constables and civil guards from the gendarmerie and civil guard of Mobutu's regime, even widows and orphans of military officers whose tasks, demeanour and relations with the Congolese populace are different but also military officers, combatants of belligerent factions, militias and others. One would then understand that the Congolese people need to take security in their own hands, in the words of President M'zee L. D Kabila.

Recourse to literature, rare as it was, on Congolese national police and texts that organise was a great asset to this research. It enabled a clear understanding of the police service and to consider their reform in order to enable them to play their expected role, consolidate the law and order h being set up now in the DRC.

The police are a multifaceted idea, not limited to the silence of arms. It also has political, economic, military, social, and even food dimensions. It goes without saying that in the framework of this work, we insist on the role of international partners in the military and institutional reform by reviewing police reform in Congo, its crises and challenges in

---

439 *CENCO, The State and its specialized services. Public administration and constitutional order, CEJP, Kinshasa, 2003, p.1*

440 *Constitution of the Democratic Republic of Congo, 18 February 2006, paragraph 2 of the Preamble.*

441 *Vunduawe Te Pemako, F., Under the shadow of the leopard: The truth behind Mobutu Sese-Seko's reign, Editions Zaïre Libre, Bruxelles, 2000, p.156-157.*

442 *Mpinga Tshibasu, J., Proceedings of the National Forum on Human Rights in the DRC. Assessment of the situation in the DRC, Kinshasa (Centre catholique Nganda), 25 to 29 October, ONDH, 2004, p.43.*

443 *Mbata Mangu, A., "The conflict in the Democratic Republic of Congo and the protection of rights under the African chater",* African Human Rights Law Journal, vol. 3, n°2, 2003, p.239.

444 *Mpongo Bokako, E, "The theory of civil-military relations", in Bula-Bula, S, for the development of Congolese legal thought Liber Amicorum Marcel Antoine Lihau, PUK-Bruylant, Kinshasa-Bruxelles, 2006, p.236.*

transformation in the context of the democratic emergence and the development demands in our country.

I. THE ORGANIZATION AND OPERATION OF THE CONGOLESE NATIONAL POLICE

The security services in the general sense (army, police and other specialized services) are the principal instruments by which the State exercised its oppressive power over the citizens. The image that the population forms about the State is in part attributed to the manner in which these institutions carry out their duties[445] (CENCO 2003: 49).

The Congolese national police are, in the terms of Article 182 de Constitution of February 18 2006 and Article 5 of the decree-law n°002/2002 of January 26 2002, a force in charge of overseeing security and public peace, maintaining g order as well as close protection of senior officials.

The statutory mission statement of the national police can be deduced as follows:

- Guaranteeing security and public peace;
- Maintaining and restoring public order;
- providing close protection for senior officials.

The law on the organisation and function of the Congolese National Police is part of the security sector reform and addresses the pressing need to provide the country with a police force that is efficient, civil, democratic, republican, apolitical, professional and organised like other police forces internationally[446].

Indeed, the development of the police and security sector of any nation, especially after a long period of dictatorship punctuated by numerous armed conflicts, as in the case of the Democratic Republic of Congo, is essentially anchored on the basis of structured and a daring reform agenda.

Such reform cannot be truly and fully realised except through rational organisation of the sector. This can not only ensure that it outlives any political situation, but also its continuity and effectiveness by sustainable structures, adequate equipment and material resources, as well as through continuous renewal of people who inspire and guided by national interest.

The inauguration of the National Police in 2002 from the ashes of the ex-public service forces, urban police, Gendarmerie and Civil Guard as enshrined in the Decree-Law No. 002/2002 of 26 January 2002, had a laudable and main objective to urgently provide the country with an effective national police force capable of ensuring public safety throughout the national territory, but sadly without giving it the tools for f succeeding.[447].

Though noble in spirit, the Decree Law of 2002 erred by including the above mentioned personnel in the police force. They included ex-combatants of the warring factions, all types of retirees, intellectuals untrained in police work and even widows and orphans of ex-

---

445 *CENCO, op.cit, 2003, p.49.*

446 *Article 5 of decree-law n° 002/2002 of 26 January 2002 on the institution, organization and function of the Congolese national police*

447 *Read the Network for Security Sector Reform and Technical and Strategic Group, First Edition, May 2009, Kinshasa/ Centre Lassalien de Kinshasa Article.*

soldiers and policemen. Far from establishing a professional police force, the Decree-law created an unusual, jobless delicate police institution.

Additionally, many of the traditional police tasks which had previously been performed by other units were endowed with coercive enforcement powers. However, as per the constitutional provisions, particularly Articles 182 and 183 paragraph 2, it the national police, more than any other institution, which the constitution permanently assigns the responsibility to carry out security missions throughout the national territory[448]. Hence the origin of the principle of unification within the national police of all the hitherto scattered police forces.

Currently however, the current organic Law on the National Police, in particular Article 104, incorporated only three of these, namely:

- The Directorate General of Migration's border police
- The judicial police;
- The Central National Bureau - Interpol, abbreviated as BCN- INTERPOL.

Our concern is that the Congolese National Police (PNC) was stripped of its military character in a bid to give it a set-up and duties specific to a modern police with a civil character.

It is therefore important to uncompromisingly rethink the national police s organisation and operation in order to meet the requirements of a democratic and constitutional state.

The National Police is responsible for public safety, security of persons and property, maintaining and restoring public order and the close protection of VIPs. It is apolitical and at the service of the Congolese nation[449]. It cannot be diverted to meet personal ends. The National Police shall work throughout the national territory in accordance with the Constitution and laws of the Republic.

I.1. Missions of the national police

The missions of the national police are grouped into three sections:

- The tasks that run daily regular at the initiative of various officials of the National Police;
- The extraordinary missions, running on written legal requisitions or requests for assistance from the various authorities not directly commanding the national police, but entitled to call it to action in the national interest;
- Special missions running as a substitute, support or assistance of special services.

Title 2 of the Police Act also aims to put an end to the coexistence of two types of police, namely that of prosecutors and the National Police[450]. This merger will simultaneously integrate the Interpol office to the national police.

This envisaged merger is essential to effectively repress suspected criminals taking into account the means available to the national police. It does not in any way diminish the

[448] *Articles 182 and 183, paragraph 2 of DRC's Constitution of 12 February 2006.*
[449] *Article 183 of the Congolese Constitution of 18 February 2006.*
[450] *Article 104 of decree-law No. 002/2002 of 26 January 2000, op.cit.*

Public Ministry's authority over judicial police officers grouped within our national police, who by law remain under the orders of the ministry and exercise their judicial functions under its direction and supervision.

I.1.1. Ordinary missions

Regular missions occur on a daily basis without a requisition from the authorities. They are performed as part of normal police service. They are aimed at identifying and preventing public disorder, crime, gathering evidence, apprehending the perpetrators and bringing them to before the courts of law.

Other tasks also include: general information, fight against organised crime, environmental and natural resource protection, safeguarding safety and hygiene, road safety, communication and transport, border control, customs and migration, disaster rescue, international peacekeeping missions, reconstruction and development.

The PNC is responsible for ensuring that public peace, protection of persons and property, maintenance and restoration of public order and provision of close protection to senior state officials. Continuous monitoring of the national territory is also undertaken in order to enforce the laws and regulations of the Republic constituting the essence of their mission[451].

I.1.2. Extraordinary and special missions

Extraordinary missions are those whose execution occurs only by virtue of written requests from the administrative or judicial authorities.

The Congolese National Police (PNC) can, depending on the circumstances, be called upon to carry out special missions that are that run under substitute, support or assistance to other services.

Within the framework of these missions, certain members of the PNC personnel are seconded to other services such as, diplomatic or consular missions.

They participate in the fight against fraud, contraband, poaching and theft of precious substances by providing assistance to the organs and specialised services competent in the matter. It assists the mining enterprises in the protection of their patrimony.

The PNC pursues, in line with information issued by competent authorities, any military deserter or one improperly absent from their unit, and takes upon themselves the measures prescribed by the laws and regulations of the Republic. In all cases, they inform the unit commander where the concerned officer is attached..[452].

I.2. The structure of the Congolese national police

The national police are composed of four structures, namely[453] :

- The police Supreme Council;
- The General Office;
- Police Units.

[451] Articles 17 and 18 of organic Bill on the organization and function of the Congolese national police
[452] *Art 20 of Bill on the police, 2002, op.cit.*
[453] Art 23 and 25 *of Bill on the police, 2002, op.cit.*

I.2.1. The Supreme Police Council

The SPC is a consultative organ of the government on police and security matters. This council is responsible for carrying out studies and publishes notices on all questions to do with its missions. It is required to develop an elaborate national police code of ethics and set out the national criminal policy and oversee its implementation.

In cases of appointment, succession duties and, where appropriate, the removal of general officers and senior police officers, the national police Supreme Council is consulted.

The council is composed of: the minister in charge of interior; the justice minister; the commissioner-general of the national police; the inspector-general of the national police; group commissioners[454].

I.2.2. The General Commissioner of the Congolese national police

The General Office is under the authority of a General Officer known as the commissioner-general of the national police, assisted by deputies, one of whom is in charge of the missions and information and one in charge of administration and logistics.

The commissioner-general together with his deputies are appointed, can be removed from office if necessary and dismissed, by the president of the Republic in consultation with the Supreme Defense Council on the advice of the Supreme Council of the National Police.

The deputy commissioner-generals deputise the commissioner-general. Each deputy commissioner-general assists the commissioner-general in the supervision of services according to their respective functions.

The commissioner-generals nonetheless assume the overall duties entrusted by the commissioner-general with delegation of signature. In case of absence or inability, the national police commissioner-general is replaced by one of the deputy commissioner-generals in accordance with their instrument of appointment.

The General Office of the national police comprises:

- Central commands;
- Central services
- Specialised national training.

The detailed organization and function of the national police commissioner-general's office are spelt out by decree of the prime minister[455].

I.2.3. The central commands and the provincial commissioner

The police central command comprises two to five provincial units. It is placed under the authority of the Group Commissioner with the rank of divisional commissioner or a general officer of police.

---

454 *Art 26 projet de loi sur la police, Idem*
455 *28 and 29 of the Bill, op.cit*

Assisted by a deputy, the Group Commissioner coordinates and supports the provincial commissariats in his area of operation.

The Group Commissioner and his deputy are appointed, relieved of their duties, by the President of the Republic, the supreme defense council on the advice of the National Police Supreme Council[456].

The provincial post is a command structure of the police units at the provincial level. It is placed under the authority of a provincial commissioner assisted by two deputy provincial commissioners, one of whom is in charge of operations and information and the other in charge of administration and logistics.

The provincial police commissioner and his deputies are appointed, dismissed or otherwise revoked, by the president of the Republic upon the recommendation and advice of the Supreme Council of the National Police.

II. RIGHTS AND OBLIGATIONS OF POLICE PERSONNEL

Apart from the rights and obligations laid down for state public officers, career police officers in the national police are subject to complementary provisions.

II.1. Rights and privileges

Every career police officer enjoys the following rights and privileges:

- protection in the exercise of his functions;
- hardship allowance

In the exercise of his duties, protection for the police officer is guaranteed by law judicial protection and Financial stipulated by the Act for the autonomous status of the body police career.

The hardship allowance refers to the payment of a monthly financial amount to the police officer, allocated to him for his permanent availability. The conditions of the grant are determined by the law on the autonomous status of the career police officer body[457].

II.2. Obligations and incompatibilities

In carrying out duties, police officers must respect and protect human dignity, defend and protect human rights, humanitarian rights as well as the fundamental rights and liberties of individual in accordance with international and national standards in force. In particular, they have to watch over the protection of women's and children's rights at all times and places.

They cannot for whatever reason give in to or inflict, provoke or tolerate acts of torture, cruel inhuman or degrading penalties or treatments. They are expected under all circumstances to ensure the protection of the nation's interests. Thus, they must, under oath, serve with loyalty, dedication, integrity, dignity and respect for the laws and regulations of the republic.

[456] *Art. Of the Bill, 2002, op.cit*
[457] *Art 67 to 74 of the Bill, 2002, op.cit*

Any occupation, whether incidental or exerted either by the individual himself or by proxy, is inconsistent with a police officer's character if it is likely to impair the performance of duties of the office, the dignity persons or which may morally or materially subject the officer to private or special interests.

It is notably forbidden for any police officer to run for an elective post or any other public office, publish a newspaper or periodicals of any kind, contribute to its administration or regular writing or, publish articles, even if anonymous, or publish books without prior permission of the Commissioner General of the National Police, unless they are scientific, academic and of a professional nature[458].

II.3. Policeman disciplinary and legal regimes

Career police officers are under a disciplinary regime laid down by Law based on the autonomous status of the career officer. Military discipline and regulations governing members of the armed forces are not applicable to national police personnel.

Disciplinary matters are be dealt with by two types of councils, namely, the National Police Board of Inquiry for category A of the police corps and the Discipline Council for categories B, C, D and E of the police corps.

Career police officers are, according to Article 156 of the constitution, under the jurisdiction of military courts for the crimes they commit. To ensure fair trial, if the accused is serving in the national police, the military trial will comprise least three career police officers.

III. REFORMS OF THE CONGOLESE NATIONAL POLICE

The intelligence service had become a major asset for the dictatorial regime of Marshal Mobutu. According to Honoré N'gbanda, benefits of this service were of great value due to its multi-sectoral and multidimensional roles[459]. The Congolese secret service under the Second Republic was considered among the most experienced and best equipped in Africa. Its equipment was supplied during the Cold War by certain Euro-American powers for the protection of the geostrategic interests of the capitalist West in Africa, and especially in Central Africa[460]. Violent and harmful internal wars which would hamper the harmonious functioning of all intelligence services would began with the elite. During this period, the civil guard and the gendarmerie played the role of national police.

First among the consequences noted was the collapse of the national security system resulting primarily in massive human rights violations. The unpaid or underpaid members of the gendarmerie and civil guard, in disobedience to their superiors attributed to a lack of moral authority, descended on peaceful civilians.

It is also worth noting that it was around that time that the enemies of Congo launched their offensive attacks towards the balkanisation of the country. It should also be stressed that the easy and surprising victory of the AFDL forces was due to the breakdown of the security system at the time; a personalised and mismanaged system renounced by the people who were victims harassment and excesses. AFDL's advent to power ushered in a new era of security services in Congo-Kinshasa.

---

458 *Article 75 of the Bill 2002, op.cit*
459 N'gbanda H, 1988, op. cit, p.58
460 N'gbanda H, op.cit, 1998, p. 62

One of the key objectives of the transition was the establishment of a national police force. The memorandum on the army and security forces signed on 29th January by the signatories to the general and inclusive Accord provided for the creation of two police units: A unit for close protection (CPR) in charge of the protection of political leaders and sites of the transitional institutions and a general police unit (UPI). Within the framework of its reforms, emphasis was laid on building the capacity of the police force to ensure security during the electoral period[461]

Nonetheless, the provisions of article 186 of the constitution dealing with organic law allow us to address the issue of reforming the national Congolese police force.

In his letter dated 14th November 2005, the minister for Internal Affairs, pointed out that decentralisation of security forces constituted a joint working group of 25 members, comprising 9 Congolese nationals and 6 expatriates from different countries. They conceptualised, reorganised and reformed the national police force established under the above-mentioned organic law. Its mission was to establish the existing state of the police force and make recommendations that would be used to define a future police force in accordance with the new constitution which would result in the drafting of a bill of organic law on its structure and function.

Following a thorough analysis undertaken by the joint think-tank, it emerged that besides logistical gaps, the existence within its ranks of civil guards and former members of the gendarmerie, soldiers and former disgruntled militia, widows and orphans of police officers and intellectuals without police training, in its current atypical state, this police force could not effectively play a pivotal role in a democratic or constitutional state[462].

Despite the short-comings cited above however, the human resource contained within the national police force made it possible to envisage the necessary reforms geared towards e establishing the rule of law.

That is how, after a series of restoration seminars organized for this purpose, recommendations were made and passed to the government for approval in parliament for the passing of an organic law on the structure and function of the Congolese national police force. In summary, these recommendations are categorized under three aspects: Human and social, improvement of professionalism in the Congolese National Police (PNC) and the acquisition of financial resources necessary for the restoration of the operations of the service.

The MONUC support strategy for this reform was defined by the UN Secretary General in his third special report on MONUC of 16th August, 2006 which stated as follows: "The civil Police of MONUC is expected to accomplish its tasks in three phases.

Initially, during the pre-election phase lasting about eight months, it was charged primarily with preparing and initiating the execution of the five-year national police reform plan, while at the same time commencing the training of some 6,000 local police officers on preparations for the elections.

Secondly, during the electoral phase lasting about four months, it was also charged with additional training on the ground as well as the follow-up and hosting of activities.

---

461 *SEBAHARA P., "La reforme du secteur de la sécurité en RD Congo », GRIP, Note d'analyse, in http://www.grip.org/bdg/g4600.html*, retrieved on *18/05/2010, p.2*

462 *Read articles 156, 82 to 186 of the constitution of the DRC and decree n°002/2002 of 26th January 2002 and also the recommendations of the Joint think tank, reorganization and reform of the Congolese national police force (GMRRR), p.11-15.*

Thirdly, during the post-election period, lasting about six months, MONUC would continue supporting local police units charged with maintaining law and order. It trained additional reserve units and rapid response police, emphasising on border point controls, while at the same time preparing to transfer knowledge to ensure the necessary follow-up and support for the implementation of the police reforms program"[463].

Following this program, MONUC participated in 2005 in the development of the National Plan for police training. Moreover, its police force (Police/MONUC)[464] trained a good number of police officers and gave them substantial help in the form of technical assistance.

The training activities were conducted with the support of MONUC, and other bilateral partners who included Angola, South Africa, France and the European Union[465].

MONUC also conducted intense consultancy activities in aid of the national Congolese Police. This assistance consisted of: Sensitising high level officials on the importance of establishing a democratic police force through seminars, workshops and support in refining and implementing training initiatives; placement of consultants at national and provincial police headquarters; provision of planning advice on the role of the police during the elections and support in the implementation of the said plans; coordination of international aid pertaining to capacity building, particularly training and logistical support[466].

It is within this framework that in 2005, police officers from MONUC were attached to the Inspector General of police and provincial Inspectors, where they offered technical advice on different aspects of police activities[467].

MONUC works with the government of the DRC in building capacity towards a professional police force across the country. Its main objective of the reform is to train and re-train the police; to put in place a legal framework for evaluation of performance; to create a data-base for the management of salary payment and recruitment; and to carry out progressive deployment of policemen and women in different parts of the country[468].

III.1. The need for a reformed police force

During the colonial era, the Force Publique (Army and Police) was an internal police force. Its primary role was to ensure peace and security in areas inhabited or frequented by foreigners, to forecast and quell wars between locals, to ensure that lines of communication were free and to execute legal decrees, to work towards the repression of trade and to reinforce the occupation of certain parts of the country still outside the direct influence of the independent state[469]. The Force Publique remained in that state until independence[470].

---

463 *Mazyambo Makengo Kisala A., La participation de l'organisation des Nations Unies au processus démocratique de la RDC », in Bakandeja wa Mpungu G, Mbata B. Mangu A. and Kienge Intudi R, Participation et responsabilité des acteurs dans un contexte d'émergence démocratique en RDC, Actes des journées scientifiques de la Faculté de Droit de l'université de Kinshasa 18-19 juin 2007, p. 173.*

464 *CESA, "Contrôle démocratique du secteur de la sécurité », Séminaire pour Hauts Responsables Programme, Washington DC, 2004, p.12-13.*

465 *The Police/MONUC was born on 15th June 2001 in application of resolution 1355 adopted by the Security Council on 15th June 2001.*

466 *Sixteenth report of the Secretary General on the United Nations Mission to the Democratic Republic of Congo, (s/2004/1034), 31st December, 2004, §49*

467 *Nineteenth report of the Secretary General on the United Nations Mission to the Democratic Republic of Congo (s/2005/603), 26th September 2005, §52.*

468 MONUC magazine Nº 48-Volume VIII, January-March 2010, p. 8

469 Hil Eynikel, Congo Belge, Duculot, 1984, p. 122.

470 Since colonization until 1966, the DRC police have appeared in all its versions (Force Publique, Police Nationale,

During the period of the Mobutu dictatorship, the Congolese police was incorporated into the army under the name "gendarmerie and civil guard". It evolved into a force of repression against the citizens instead of providing security in times of war and in times of armed conflict.

A reform of the security sector is a necessary step in the process of consolidation of peace in a post-conflict situation. Without it, it would not be possible to clean up the post-conflict politico-military landscape inherited from the war, that is, the realisation of the DDR and the restructuring of the Force Publique[471]. So what can we glean from DRC's post-war restructuring process? What is the status of the process of police force and service reforms in the country?

In the DRC, the UNESCO platform has accompanied civil society, the driving force behind the Nation in reflecting on its rebirth, especially through the police reforms undertaken by the joint think-tank on reform and restructuring of the National Congolese police force, the GMRRR.

It should be noted at this point that in February, 2007, the International Crisis Group, speaking on reforms of the Congolese security sector, reported that: "*The Congolese police force has never been able to enforce any amount of order, to guarantee the rule of law…….some specialized forces such as the immigration police, the ANR and the Republican Guard are parallel structures and are able to escape the traditional chain of command….The army is still weak and could quickly crumble even further if faced with any serious threat….*"

We feel that as in the case of the DRC, most processes of reforming the security sector in Central Africa are facing structural problems; this has to do with lack of a conceptual framework.

In relation to the reform of the Congolese security sector, since the transitional government's advent to power in 2003 to date, nationals, expatriates, official and private entities, security experts and simple practitioners have all stopped at making recommendations without advancing any theoretical dimensions and operational aspects of police structure.

It is no easy task to consolidate peace and to reform a security sector in a post-conflict context without first defining a national security strategy and a national defence policy to guide the planning and scheduling of reforms[472]. Reforming the security sector is an undertaking that requires enormous conceptual effort to arrive at a middle ground between State budgetary resources, the expected number of police and army officers and their operational capacities.

At the level of the UNESCO platform for Central Africa and SADC countries, and in the spirit of the cooperation accord signed on 5th May, 2005, we have at our disposal the conceptual basis and the necessary expertise to complement CEEAC's scientific contribution to this highly complex undertaking[473]. In other contexts, conceptualising security begins at the university level before being appropriated by the ruling class.

Gendarmerie, Garde Civile) as a police force more for the protection of political institutions than people and goods and this, according to the vision of the ruling class.

471 *Séminaire sous-régional sur la reforme des secteurs de sécurité en Afrique central sur la succession des interventions du 13 au 15 janvier 2009,* Kinshasa, RSS TOME II, 2009, p.3 et 4.

472 Booth, K. A security Regime in southern Africa: Theoretical considerations. Southern African Perspectives, N°30, CSAS, P.4.

473 A report of "*World Market Research Center*", published by *Jeune Afrique* in November 2003 placed the DRC and Tanzania amongst the five most vulnerable countries to terrorist attacks in the world.

By way of example, speaking of the security reforms currently underway in the DRC, what is the logic of establishing twenty infantry brigades while the country does not have a single aircraft for transporting troops? It would make more sense to create four brigades equipped with limited means, rather than to have dozens without the necessary logistical or social support forcing them to live off civilians, thereby becoming *ipso facto* a threat factor to human security[474].

Moreover, perfecting a peace process is not an easy thing. Even so, successfully conducting reforms in the security sector without dwelling solely on military and political aspects will be detrimental to the sociological approach. The latter has the advantage of targeting the root causes of crises, violence and armed conflicts, thereby increasing the chances of consolidating peace, security, the rule of law and a return to stability.

III.2. The operation of the Police force under Kabila

This period marks the rule of Laurent-Désiré Kabila followed by that of his son Joseph Kabila. At the initial stages after AFDL's ascension to power, the national police was non-existent. The security of the new rulers was provided by Rwandese and Ugandan military detachments that had accompanied the AFDL to Kinshasa and thereafter by Zimbabweans and Namibians. Laurent-Désiré Kabila was to begin the recruitment of a police force composed entirely of nationals.

This project was interrupted by the second war that broke out in 2nd August 1998. Ugandan and Rwandese soldiers who had mastered military machinery were able to quickly start war from the east and proceed to occupy a good portion of the western part of the country.

The national police reforms' mission was to harmonise all services with the requirements of democracy and a constitutional state under construction since the 2006 elections.

A democratic environment demands practices that are compatible with a transparent management of the sector. These practices relate to funds allocated for the functioning of different branches of the police force, treatment of police officers, building of human and material capacities as well as equipment for the police force.

III.3 The main axes of national Congolese Police reforms

Our concern in this study is to identify the main axes that these reforms will take. In the case of the Congo, the reforms will begin with defining the mission of the national police in relation to the requirements of a constitutional state and democracy.

The second axis relates to police training. It is here that the issue of objective criteria for recruitment of Congolese nationals to the different branches of the national police force will be raised[475]. Apart from physical health, emphasis should be laid on the level of education required and above all, on ethical considerations. As a disciplined force, the national police should not be turned into an instrument of tackling unemployment in the country. The training itself should emphasise the protection and promotion of human rights, the need to improve the relationship between the police and civilians, the role of the police in national development and a sense of patriotism which should be part and parcel of every police officer.

---

474 Elesse Yombentole M. , "Police reforms: The DR Congo experience, police reforms follow-up committee (CSRP)", *Sub-regional seminar on security sector reforms in Central Africa from 13th to 15th January 2009 in Kinshasa*, RSS VOL II, 2009, p.6

475 Art 36 of organic law on the structure and functioning of the Congolese national police

The third axis focuses on financial and material resources. It is possible to have men of integrity who are technically well trained. This in itself is not enough to attain the expected objectives of the reforms. The different branches of the police force should be supplied with the financial and material means necessary to accomplish their duties.

All in all, the spirit of reforms can be summarized as follows:

> "In a democracy, all political decisions are established or ratified by civil servants elected by the people or appointed by elected members. This requirement is also applicable to security and military matters. By virtue of this principle, the army and other security forces should not, as an administration, be involved in decisions pertaining to government policies unless this role has been delegated to them by civic leaders. This applies to basic political decisions (…..) as much as to organizational and structural issues (size, structure, composition, budget and administrative controls of the army. Just as controls are imposed on all public institutions in a democracy, the public system of checks should equally seek to subject the military apparatus to constitutional and legal controls"[476].

III. Challenges facing reform of the Congolese police sector

Such reforms, if faced with certain constraints, can collapse. First, there are constraints related to internal vagaries of national politics. Here, the role Parliament should play a crucial role in checking police services. These checks should be done upstream and downstream. Surrounded by nine countries, the DRC should count on the cooperation of her neighbours, partners and the support of the international community. It is worth noting that currently, in the midst of the restructuring process, the country is faced with a lot of armed militia groups which are not under government control and who challenge all political attempts at creating a unified and structured army. Alone, Congo cannot overcome this challenge. She has to depend on the support of her Western and African partners.

The reform of the PNC is in itself a process faced with many interrelated challenges. It is therefore incumbent upon us to highlight other reforms targeting the structure and operations of the PNC. These include equipment, education and training of police officers, working conditions, remuneration, recruitment, promotion processes, and rights and obligations of police officers.

The complexity of police reforms and involvement of many factors and dimensions in the process are visible at the political level, where it requires the involvement of different ministries alongside the ministry of Internal affairs, one in charge of security (ministry of Justice, Finance, Planning, and Decentralization among others). At this level, there are often tensions between different ministries on matters touching on police reforms. In addition, the decentralisation of the State is itself undergoing reform.

Furthermore, besides reforms pertaining to the structure and operations of the PNC, another important challenge facing reforms is the relationship between the national Congolese police and civilians[477]. As mentioned above, there are several commonly held perceptions that the

---

[476] *CESA, "Contrôle démocratique du secteur de la sécurité », Séminaire pour Hauts Responsables Programme, Washington DC, 2004, p. 12-13*

[477] JUSTAERT A., "Coordination et alignement européens dans la reforme de la police nationale congolaise », In *la sécurité interne en République Démocratique du Congo : Perspectives congolaises et européens,* M.E.S Numéro Spécial Avril 2010, Kinshasa, p. 31

police it not s a public service but a '***public force***'. This perception results in difficult relations between the police and civilians. The composition of the police force and the history of police officers play a major role in this relationship.

From this perspective, police reforms necessitate a 're education' of the police officers themselves as well as a change in the popular perception of the police so that the DRC can have a police force that actually renders service to the community.

III.5. International partners' contribution in reforming the national Congolese police

The reform of the security sector was one of the greatest challenges facing the Congolese State and her international partners.

The activities of the European Union in the DRC have intensified since the global and inclusive accord of 2002, marking the beginning of transition. It has been involved in the security reform process.

This has been through the European Union foreign policy on this matter: First, at the European level, various activities within the framework of European institutions, notably the EU council and the European commission and secondly through bilateral initiatives of EU member states. Another area of coordination is between European actors and other actors of the international community involved in the process[478]. Finally, to add to all these, there is the coordination between these different European actors and the Congolese authorities.

Since 2003, the EU has deployed two military operations and three civilian missions to the Congo under its foreign policy on security and defence (PESD).

In 2003, a military operation was deployed in the North-East of the country to stabilise the region of Bunia and to allow the establishment of MONUC. A second military operation was deployed to Congo in 2006 by the EU, the EUFOR DRC whose mission was to ensure security during the elections. At the civilian level, a mission was undertaken from 2005 to reform the FARDC and another two missions for the reform of the Congolese police force (EUPOL Kinshasa) 2005-2007 and (EUPOL RDC) from 2007[479]. This is how the European Union contributed to Congolese security structures; financially, logistically and operationally, and also in terms of infrastructure, training and equipment.

The European Commission had, under the European Fund for Development (FED) trained and equipped an Integrated Police Unit (UPI). This initiative was continued by the civil commission of the EU council: EUPOL Kinshasa between 2005 and 2007 with the aim of helping the PNC conceptualise reforms. It was financed and supported logistically by the European Commission within the framework of its foreign and security policy (PESC)[480].

Alongside these initiatives by EU institutions, certain EU member states have developed bilateral policies in the PNC reform process. The United Kingdom, more precisely, her Department for International Development (DFID) has the highest budget for police reforms.

---

[478] Mazyambo Makengo Kisala A., "La participation de l'organisation des Nations Unies au processus de démocratisation de la RDC » *in Bakandeja wa Mpungu G., Mbasa Betukumesu Mangu A. and Kienge Kienge* Intudi, R., *Participation et Responsabilité des acteurs dans un contexte d'émergence démocratique en République Démocratique du Congo, Actes des journées scientifiques de la Faculté de Droit de l'université de Kinshasa 18th -19th June 2007*, Kinshasa, PUK, 2007, p. 173

[479] Idem

[480] Justaert Arnout, op. cit, M.E.S, p. 33

Alongside the United Kingdom, there is France and Germany which are involved bilaterally in this reform.

The United Kingdom appeals for multinational cooperation for the implementation of her budget and cooperates with South Africa and Japan in conceptualising and operationalising police reforms.

Apart from those countries which develop bilateral policies, some member countries contribute to the initiatives through their support of the activities of the EU council, UNDP and MONUC among others. Belgium, Sweden and Portugal do not develop bilateral policies but prefer to contribute to the initiatives of the EU, MONUC and other international organizations. As for the member countries, they sometimes enjoy privileged relations with other countries involved in the Congolese police reforms such as Portugal and Angola.

According to resolution 1355 of the United Nations security council of 2001, in support for the demilitarization of the town of Kisangani, a section of the police force was authorised and mandated to evaluate the capacities and the training needs of the national police force. Subsequent resolutions authorised the deployment of United Nations trainers to regions of the country, particularly in the east[481].

The council approved the composition of the police section and mandated it to assist in the creation and training of an integrated Congolese police unit, alongside other duties such as capacity building. Police units were deployed in sensitive areas to assist local security forces in the maintenance of public order in case of trouble and other similar situations without intervening directly. They worked in close collaboration with the National Congolese Police and military and security forces of MONUC.

The activities of the MONUC police are meant to ensure a peaceful environment, to reassure the local people and to promote reconciliation between the authorities and the local people where need arose. They also ensured joint patrols and capacity building[482].

According to resolution 1756 of 2007, MONUC's mandate the on security sector reforms was clear. In addition, the short-term training for integrated FARDC brigades and building the capacity of the police, MONUC received the mandate to serve as advisor to the government in matters pertaining to capacity building for legal and correctional systems within the military justice system. It provided support to the initial planning of the security sector reform. All these tasks were to be accomplished in coordination with other partners.

In collaboration with the government, the United Nations system's team and other partners, the mandate was modified to include elements of support towards strengthening democratic institutions and the rule of law; promoting national cohesion and political dialogue; promoting and protecting human rights as well assisting in developing and applying a transitional justice plan; supporting the organisation on local elections and the promotion of good governance and accountability. This resolution and subsequent ones requested the government and MONUC to develop an integrated plan for ensuring security and stability in eastern DRC through the DDRRR of foreign and Congolese soldiers and promoting cohesion, growth and development

[481] MONUC towards the reconstruction of its mandate, Ian Steel text, translated from English by Yulu Kabamba, MONUC magazine N°48-Volume III, January-March, 2010, p.8

[482] Idem

III.6. Some achievements of MONUC

MONUC police played a major role in ensuring security during the 2006 elections. It was responsible for training 17,303 policemen and women during the pre-electoral period. In 2005, four member countries of the European Union contributed a total of 52 million US dollars for the purchase of 56,000 uniforms, 28,000 equipment and 140 vehicles for ensuring security during the elections. Since then, MONUC police has helped in training over 5,000 more police officers each year. In 2009, 5,125 police officers graduated after successfully completing a training course to enhance their professionalism[483].

The international community has promised support through MONUC for training, equipment and deployment of 5,000 police officers accompanied by judiciary officers to the eastern regions of the country. Their work involves restoring state authority in areas that had been freed from the rebel control by the Armed Forces of the Democratic Republic of Congo (FARDC).

In February, 2009, PNC deployed along the Rutshuru Inasha and Sake–Masisi highways MONUC police advisors which increased from 98 to 148. Three police units, trained by MONUC, were also deployed to Bunia, Goma and Bukavu. To make the national police, judiciary and administrative services in this area functional, the MONUC police put in place joint monitoring teams to observe and direct the teams already deployed[484].

MONUC police therefore participated in the United Nations Support Strategy for the security and stability of the Eastern part of the country. This program, whose budget was estimated at 19.8 million US dollars, contributed to the training of the PNC, the construction of police stations and the purchase of equipment as well as food rations for the PNC deployed in the region.

CONCLUSION

The crisis which has been prevalent in the DRC for a long time is fundamentally that of the State: a fragile state that has led many people to question the very existence of the State in this country. State crisis in the DRC is also a crisis of its security services. The reconstruction and reestablishment of the State therefore also involves the reconstruction of its security services both in their mission, structure and function.

Such a reconstruction requires a consideration of new missions of these services which to contribute to the consolidation of democracy, national reconciliation, peace, the rule of law and the development of the country through respect of human rights. It is therefore important to put an end to the multitude of services which exist and which sometimes function without coordination or transparency. These should be placed under the control and authority of elected leaders. Security is too important a matter to be left in the hands of the military, the police or individual leaders.

Like the FARDC, the national Congolese police are handicapped by its history of integration of militia groups, resulting in a lack of cohesion and serious differences in terms of history, checks and training, Moreover, its operational capacity is limited by lack of vehicles, communication equipment, supplies and related materials. Their remuneration is also weak and wanting.

---

[483] Ian Steel text, translated from English by Yulu Kabamba
[484] Idem

Despite these difficulties, MONUC's evaluation mission noted that some progress has been made in police reforms, notably the adoption by Congolese authorities on 26th October, 2009 of a 15 year strategic plan and a three-year capacity-building action plan for the Congolese national police force.

It is important to "civilize" security services and to "depoliticize" them so that they do not serve any political party, to "professionalise" them and instil a sense of nationalism by putting an end to their chronic "ethnicisation" and regionalisation so that they may regain the confidence of the citizens. One of the factors that have contributed to the inefficiency of these services is lack of legitimacy.

The current constitution of the DRC identifies the basis for reform as deeply entrenched in the security sector. Moreover, security in the DRC is likely to contribute to security in the sub-region and in Africa as a whole.

However, for a country that is barely rising from decades of insecurity, it is necessary to have citizens regain control of security services that have been for a long time at the service of an individual- the President of the Republic. The proper organisation and function of security services requires in its ranks, men and women with a new spirit, or in default, the international community, which is also keen about the reestablishment of the state in this country, is called upon to contribute to the reform of the security sector. This means a new legal framework, new idealogy which will motivate the Congolese people to live in a democratic environment for the promotion of economic and social development and the well-being of all, while contributing to the promotion of peace, development and democracy in the rest of the African continent, starting from the Great Lakes region and Central Africa.

The much awaited reforms may bring a national police the necessary means and benefits to accelerate the change of mentality of police officers and make them really professional and true partners of the citizens. The new police requires a management style characterised by accountability and respect of human rights.

In conclusion, the new doctrine of the reformed police force emphasises the idea of public service as a collection of general interest services managed by the State or its subsidiaries for use by the community of citizens.

National obligations and the risk status of the police force demand that the nation gives the police officer a specific status, a resultant social policy and appropriate equipment.

For national police reforms to succeed there is a very urgent need to reform the man and the institution. The man needs to improve his daily life. It is important to develop a culture of peace and this should be stirred up in the mind of every Congolese citizen.

REFERENCES

1. Assindie Mungala, La reforme des institutions et services de la police, In Succession des interventions RSS Tome II, Chaire UNESCO UNIKIN, 2009.

2. Elesse Yombentole M, La reforme de la police : expérience de la RDC, Comité de suivi de la reforme de la police (CSRP), Sub-regional seminar on the reform of the security sector in Central Africa of 13 au 15 janvier 2009 à Kinshasa, 2009.

3. CENCO, 2003, *L'Etat et ses services spécialisés. Administration publique et Etat de droit*, CEJP, Kinshasa.

4. CESA, 2004, „Contrôle démocratique du secteur de la sécurité", *Séminaire pour Hauts Responsables Programme,* Washington DC

5. Cihunda Hengelela, J, 2005, *Sécurité régionale et règlement des conflits armés en Afrique. Contribution de la République Sud-Africaine post-apartheid*, Degree Thesis, Faculty of Law, University of Kinshasa.

6. Cihunda Hengelela, J, 2007, „Darfour-Somalie : l'Union Africaine sur les traces de l'OUA ?", *Afrique d'Espérance*, n°2, XIVe Année Mars-Août.

7. The Constitution of the Democratic Republic of Congo of 18 Février 2006.

8. The Transitional Constitution of 05 Avril 2003.

9. De Charentenay, P, 2005, „L'Afrique dans les marges", *Etudes*, n°4022.

10. Decree n°002/2002 of 26 Janvier 2002 on the creation of the National Congolese Police Force.

11. Elesse Yombentole, « La Reforme de la police : Expérience de la RD Congo », In Séminaire sous-régional sur la reforme des secteurs de sécurité en Afrique Centrale du 13 au 15 janvier 2009 à Kinshasa, 2009.

12. Lode Vanoost, Le contrôle démocratique des institutions et services de sécurité, In La reforme des institutions et services de la police, Partenariat Africain pour la paix, Séminaire de la CEEAC sur les reformes des secteurs de sécurité du 13 au 15 janvier 2009, Kinshasa, 2009.

13. Lukunda Vakala-Mfumu, R, 2004, *La conférence internationale sur la paix, la sécurité, la démocratie et le développement dans la région de Grands Lacs : coquille vide ou nécessité impérieuse pour le redécollage du Congo Démocratique. Quelques considérations sur le processus*, Editions CEDI, Kinshasa.

14. Mbata Mangu, A, 2003, „The conflict in the Democratic Republic of Congo and the protection of rights under the African charter", African *Human Rights Law Journal*, vol 3, n° 2.

15. Mpinga Tshibasu, J, 2004, *Actes du Forum national sur les droits de l'homme en RDC. Etat de lieu de la situation en RDC*, Kinshasa (Centre catholique Nganda) du 25 au 29 octobre, ONDH.

16. Mpongo Bokako, E, 2006, „La théorie des relations civiles et militaires", in Bula-Bula, S, *Pour l'épanouissement de la pensée juridique congolaise. Liber Amicorum Marcel Antoine Lihau Ebua Libana La-Molengo*, PUK-Bruylant, Kinshasa-Bruxelles.

17. Mpongo Bokako, E, 2007, „Le rôle de l'armée dans la construction de l'Etat de droit en République Démocratique du Congo", in Bakandeja wa Mpungu, G, Mbata Mangu, A et Kienge-Kienge Intudi, R, *Participation et responsabilité des acteurs dans un contexte d'émergence démocratique en République Démocratique du Congo. Actes des journées scientifiques de la Faculté de Droit de l'Université de Kinshasa 18-19 juin 2007.*, PUK, Kinshasa.

18. N' gbanda Nzambo ko atumba, H, 1998, *Ainsi sonne le glas ! Les derniers jours du maréchal Mobutu*, GIDEPPE, Paris.

19. Ngoy Kabongo, 2003, „La constitution d'un service de renseignement efficace, in Les défis de la nouvelle République Démocratique du Congo", Facultés Catholiques de Kinshasa.

20. Nsaka Kabunda A, Secteur de securité congolais : crises et défis, communication lors de la session 2007 de l'Institut sur la Gouvernance Démocratique, CODESRIA, Dakar, Août 2007.

21. Obotela Rashidi, N, 2006, „Afrique-Actualités", *Congo-Afrique*, XLVI (Octobre), n°408.

22. Peju, M, 2000, "Ils voulaient la mort de Lumumba", *Jeune Africaine*, n°2055, Mai-Juin.

23. Riccardi, A, 2004, *La paix préventive*, Salvator, Paris.

24. Sennen, A, 1989, „Pourquoi les Zaïrois n'oublient pas", *Jeune Afrique*, n°2, Septembre-Octobre.

25. Vunduawe Te Pemako, 2000, *A l'ombre du léopard. Vérités sur le règne de Mobutu Sese Seko*, Editions Zaïre Libre, Bruxelles.

26. Wola Mbale Impongo, J, „L'éthique des gestionnaires de la nouvelle République Démocratique du Congo", In les défis

PROSECUTION OF CRIMES COMMITTED BY THE ARMY DURING THE WAR: LOOTING OF PROPERTY AND RAPE

By **MABIALA NKANGU De Gaulle***

INTRODUCTION

It is often written that human life is inviolable[485] and sacred. This is drawn from one of the divine commandments: "*Thou shalt not kill*[486]" and is a fundamental principle enshrined in the Universal Declaration of Human Rights and other national and international texts which expressly prohibit any attack on human life.

Unfortunately, since the beginning, some 1.2 million years have passed without conflict so much so that at regular intervals, the world has become an arena of violent and bloody confrontation.

During the 20th century alone, more precisely, during the period between 1904 and 1905, Japan was at war with Russia. This was followed by China between 1937 and 1945. On 10th May 1940, the German air force completely destroyed Belgian aerodromes and bombed important railway stations[487].

Similarly, between 1914-1918 and 1940-1945, the world went through two main wars which left dark memory for many States; all this came after Germany's conquest of Denmark in April 1940 and her invasion of Norway[488] as well as Hitler's attack on the USSR on 22nd June 1941.

As if that was not enough, from March 1948 to March 1949, there was the Cold War[489], from June 1950 to July 1953. The Korean war[490] took place between 1990 and 1991. This followed the Gulf War after which Lebanese forces became famous in 1982 for their barbaric acts of violence against Palestinian civilians[491] in the Sahara and Chatila camps.

In Africa as well, we have identified several independence movements that resulted in violent struggles characterized by assassination attempts, mutinies, and riots alongside ethnic conflicts, tribal internal wars on the one hand and within State territories, sometimes fuelled and funded by external forces mainly for the purpose of making conquests and exercising political power.

---

* ***Doctoral student in social and economic law, assistant at the faculty of law at the University of Kinshasa, Advocate of the high court, expert on matters of good governance and equitable dispensing of justice.***

485 Also read articles 4 and 5 of the African Charter of the Rights of men and Peoples; 3 of the Universal Declaration of the Rights of Men

486 Exodus 20, 13

487 GALLOY, D, and HAYT, F, *Précis d'histoire du temps présent (1914-1994),* De Boeck Wesmael, Bruxelles, 1994, p.139.

488 *Idem, p.54*

489 *Ibidem, p.66*

490 *Idem, pp 66 and 71.*

491 GALLOY, D, AND HAYT, F, *op.cit, p.77*

It is appropriate to add to this list, invasions undertaken by the military or by individuals seeking to expand their territories beyond colonial borders, in violation of the principle of the "inviolability of borders inherited from the colonial era".

From the above, one can state that there is no war without political, economic, social and cultural consequences on the citizens. It results in victims, and subjects many people to *disease, displacement, deportation, massacres or extermination, and lead to looting, theft of goods and rape of women, children and other distressing, humiliating and inhuman acts.*

The same applied to the Central-African Republic where the former president, Ange Felix PATASSE invited the Movement for the Liberation of Congo (MLC) for a military intervention in the country. The same thing happened in the Democratic Republic of Congo which, between 1996 and 1998, had experienced war of aggression[492] carried out by the Ugandan, Rwandese and Burundian armies who had come in to support rebel forces of the Rassemblement Congolais pour la Democratie (RDC) and other independent armed militia groups resulting in about 3,500,000 deaths and 600,000 refugees and displaced persons.

Beyond these considerations, the concern is to know whether there were any prosecutions or if it is possible to prosecute the perpetrators of the crimes perpetrated during war. If yes, it would be necessary, as a matter of urgency, to establish a mechanism through which this can be done. It must be established in order to determine those legally responsible for atrocities committed during times of war for example the armed forces. Two considerations arise: The responsibility and the right to bring to book perpetrators and the compensation for victims according to damages suffered. One can conclude that beyond the urgent need to identify a competent tribunal to try perpetrators of crimes committed during times of armed conflict, there is reason to wonder whether the victims of acts of rape and looting committed during the war can hope to get redress for the damages they suffered during the period of armed conflict.

This reflection therefore seeks to respond to the problems raised above. A brief look at different modes of intervention by an army in a territory fallen prey to an incursion, invasion and an attack by rebel forces.

I. Different types of military intervention on the territory of a State territory

In world history, war fulfilled two basic functions: used by one party against another as a means of enforcing respect for existing rights that the country resorting to war deemed to have been violated and on the other hand, enforcement of a legal change. It was borne out those countries exercising their sovereignty to resort to war[493].

The use of military force was therefore not subjected to general restrictions by positive law. Over time however, it was unanimously agreed that war was as a result of intrinsic as well as extrinsic causes because of changes in, and the functional needs of, the international community.

---

[492] According to article 1 of resolution 3314 of 14th December 1974, aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other way in a manner incompatible with the United Nations Charter. Moreover, according to the dictionary of international public law, aggression is an armed attack by a State acting first against another State, in violation of the rules of international law.

[493] D"ARGENT, P, *Les réparations de guerre en droit international public,* LGDJ, Bruyant, 2000, p.243.

It is along this line of thought that CLAUSEWITZ wrote,

> *"War is a conflict of big interests settled by blood and that is the only difference between it and other conflicts*[494]*. The economic targets of countries allied to loyalist forces as well as the godfathers of the rebellion should not be seen as a simple case of enjoying spoils of war. It is more of a real wish to have a piece of a lucrative cake".*

In any case, there are several modes of military intervention in the territory of a given State.

I.I Military Intervention on the territory of a given state

Declaration 2625 (XXV) proclaims rather explicitly that *"No State or group of States has the right to intervene directly or indirectly, for whatever reason, in the internal or external affairs of another State"*

Consequently, it goes without saying that not just armed intervention but all forms of interference or any threat directed towards a person of a State or towards its political, economic or cultural machinery are contrary to international law.

As so well stated by the International Court of Justice on the issue of military and paramilitary activities in Nicaragua: "The prohibition to intervene should only be applicable in matters about which the sovereignty of States allows each State a free choice. These matters include the choice of political, economic, social and cultural systems and the formulation of external policies."

As a general rule, States invoke the principle of sovereignty to refuse any external interference and protect certain areas from interference by other States. This principle is often invoked given the respect of rights that it accords to the State is enshrined in constitutional acts of international organisations. Furthermore, according to the writings of Michel Virally, *"Intervention means the involvement of a State in the affairs under the jurisdiction of one or several States with the aim of influencing the outcome*[495]*".*

This means that the element of force is present in the concept of prohibited intervention, and is actually its essence as it is evident in the case of direct intervention using force either through direct military action or indirectly by supporting military, subversive or terrorist activities inside another State[496]. In other words, when a State is in danger of war, or is already facing war, military intervention may be direct or indirect.

I.1.1 Direct military intervention

Direct military intervention is defined as a situation "where there is entry by foreign troops into the territory of a State"[497]. As stated earlier, such was the case with the incursion, or rather, the repeated aggression suffered by the Democratic Republic of Congo between 1996 and 1998 in relation to Rwandese, Ugandan and Burundian armies. The same also happened in the intervention of the MLC[498] in the Central-African republic, on invitation by Ange Felix Patassé, the then president.

---

494 FONTAINE, A, *Histoire de la guerre froide, de la révolution d'octobre à la guerre de Corée*, Fayard, Paris, 1965, p. 7.

495 Cfr. Panorama du droit international contemporain, Cours général de droit international public », Michel VIRALLY, RCADI, 1983-V, Cited by BASUE BABU KAZADI, G, L'action en vue de la démocratie : relecture du principe de non-intervention dans un contexte d'émergence démocratique en République Démocratique du Congo, In *Actes des journées scientifiques de la Faculté de Droit de l'université de Kinshasa, 18-19 juin 2007,* PUK, 2007, p.205

496 FONTAINE, A, *op cit,* p. 567

497 DAVID, E, and SALOMON, J, *Droit de guerre,* Vol III, 17th edition, PUB, Bruxelles, 1978, P. 609.

498 The movement for the Liberation of Congo was a rebel force in the Democratic Republic of Congo led and financed by Jean Pierre Bemba

The intervention was however subject to a double prohibition namely:

- Prohibition from using force[499]
- Prohibition from intervening as prescribed in declaration 2625 (XXV)

I.1.2 Indirect military intervention

Indirect military intervention consists of action in support of rebels in a civil war or armed subversive activities of opposition or secession[500] activities. This indirect military intervention assumes the involvement of a third party in matters under the exclusive jurisdiction of a State, and this, in contravention of the rights of nations to self-determination. Declaration 2625 (XXV) states that: "Each State has the responsibility to refrain from organizing or encouraging the organization of irregular forces or armed groups, notably groups of mercenaries with the aim of making incursions into the territory of another State". Likewise, each State has a responsibility to refrain from organizing or encouraging acts of civil war or terrorism in the territory of another State, participating in it, or tolerating organised activities inside its territory aimed at perpetrating acts when such acts are mentioned in the current paragraph constitute a threat or the use of force.

It is in this context that the frequent interventions by the USA in Santo Domingo, Panama, Vietnam, Granada and Iraq….or of the former USSR in Hungary, Czechoslovakia and Afghanistan are on the one hand openly criticised as constituting the use of force, and condemned as contrary to the basic principles of non-intervention, territorial integrity and non-recourse to the use of force, despite the humanitarian arguments or the application of defense agreements, or even ideological affinity and the fight against terrorism[501].

As has been seen therefore, the above scenario confirms the principle of non-intervention which is the consequence of equality of sovereign States. These States are therefore bound to honor their international obligations in good faith in accordance with the principle of "***pacta sunt servanda"***[502] although it remains that the right to intervene as evidence of a policy of force has in the past led to gross abuse of power and cannot, despite the current shortcomings of international organisation, is accepted by international law. Likewise, intervention is even less admissible in the form in which it is presented here, given that it is the privilege of powerful States and could easily compromise the proper administration of international justice.

But Alas! Wars of aggression, rebellions, and the most serious crimes attracting the attention of the international community are continually being committed in several countries in the world in general and in Africa in particular.

From then on, every State, by virtue of its sovereignty, has the freedom to solicit the help of the armed forces of another State or of a regional or sub-regional organization. This has been the case with the intervention of the armed forces of SADC member countries, more precisely Zimbabwe, Angola and Namibia on official invitation by the government of the Democratic Republic of Congo.

---

499 Art 2§4 of the United Nations Charter
500 DAVID, E, and SALOMON, J, *op. cit, p.56*
501 BASUE BABU KAZADI, G, *op.cit,* P. 184
502 Article 2 of the United Nations charter

In extreme cases, a State may present a request before the UN Security Council for the intervention by UN forces on its territory.

I.2 Intervention by International forces on request by a given State

When a State is no longer capable of ensuring security and peace within its borders, it may request the Security Council to send a UN intervention force for peace-keeping duties.

Peace-keeping operations are subsidiary organs of the Security Council and the General Assembly, of the United Nation organs mandated to create subsidiary organs necessary for their function[503]. According to **Maurice Flory**, United Nations Peace-keeping operations (OMP) are all military or paramilitary operations organised out of necessity due to failure to implement the mechanisms of article 43 of the Charter and sometimes due to failure to use Security Council resolutions.[504] .

The peace-keeping operations (OMP) vary greatly depending on the mandate given to them by the Security Council. These operations can therefore become traditional peace-keeping missions, peace restoration missions, peace enforcement missions, peace protection missions, peace-building missions or even peace consolidation missions[505].

I.2.1. Peace-keeping missions[506]

Peace-keeping missions entail the establishment of UN presence on the ground through the deployment of military and/or police officers and in many cases, civilian officers as well. Their presence requires the consent and cooperation of all parties to the conflict and does not involve the use of force except for legitimate defense[507]. In principle, peace-keeping forces, the "blue berets"- intervene without any designated enemy either to watch over a ceasefire or to defuse a situation on the ground pending a diplomatic solution[508].

I.2.2. Peace restoration mission

The peace restoration mission consists of operations based on chapter VII whose objectives are to work in favour of peace in a State that is a victim of internal conflict to ensure the security of civilians but without a designated enemy.

I.2.3 Peace enforcement mission

A peace enforcement mission is also instituted based on chapter VII to restore or enforce peace by use of force against a well defined aggressor[509].

---

503 Articles 7§2, 22 and 29 of the United Nations charter

504 Flory, M, " L'ONU et les opérations de maintien de la Paix », In Annuaire français de droit international, 1965, p. 446, cited by Yves Petit, Droit international de maintien de la paix, Paris LGDJ, 2000, P. 40.

505 Flory, M, *op. cit, p. 56.*

506 Cfr. Chapter VI of the United Nations Charter

507 PETIT, Y, *Droit international du maintien de la paix, Paris, LGDJ, 2000, p. 41 cited by MAZYAMBO MAKENGO KISALA, A, La participation de l'organisation des Nations unies au processus de démocratisation de la République Démocratique du Congo* : rôle particulier de la MONUC, In *Actes des journées scientifiques de la faculté de Droit de l'université de Kinshasa, 18-19th June, 2007,* PUK, 2007, P. 155.

508 DECAUX, E, *International Public Law,* 5th edition, Paris, Dalloz, 2006, p.3008

509 PETIT, y, *op.cit, p. 65-66*

I.2.4 Peace protection mission

A peace protection mission belongs to the category of preventive diplomacy. Their purpose is to ensure that no disagreements arise between the parties and that existing disagreements do not escalate into open conflict. If conflict erupts, to limit its spread. A peace protection mission may be deployed to geographically contain a national or internal crisis[510].

I.2.5 Peace building mission

A peace-building mission undertakes military tasks such as overseeing a ceasefire or demobilising soldiers, is involved in many civilian tasks. It has the duty of building new political structures after the destruction of previous ones, in most cases, following internal conflict[511].

I.2.6. Peace consolidation mission

A peace consolidation mission is one through which the United Nations is involved on a long term basis in a country, its action thus interfering with the internal order and sovereignty of the State[512].

In all cases, the outbreak of armed conflict within a State, or rather, the military intervention of invited forces, whether solicited or not can be accompanied by serious attacks on human dignity and property. The most striking cases are those where women were skewered or kidnapped by pygmies during the attack on the town of Kalemie in the Democratic Republic of Congo.

Likewise, in Kindu, more precisely in the province of Maniema, an old woman aged 89 recounts that, widowed at age 38, were raped by 20 soldiers, in addition to having her legs severed and her pelvis broken. Next to her was a six year old girl, victim of rape by armed men[513].

Not any less, during the intervention of contingents of the Congolese national police on a mission to restore the authority of the State in the entire province of Bas-Congo following reports of tensions from October 2007, between local authorities and members of the BDK described as terrorists, and accused of practicing satanic rites and other occultist practices, the latter allegedly:

- Beat up local commandants of PNC in the villages of Kinega and Mbanza-Muembe
- Freed all the prisoners from Luozi prison after threatening the local authorities
- Burned alive two men accused of witchcraft in Kinkenge and Bethelemi on 24th and 25th February 2008 etc….

In response, on 28th February 2008, the central government of the Democratic Republic of Congo, using contingents of the rapid response police (PIR) which included the Simba Battalion and the integrated police unit deployed in Kinshasa, conducted operations with the aim of arresting the perpetrators of the afore-mentioned murders[514].

---

510 *Idem, p. 64*

511 PETIT, Y, *op.cit,* p. *65-66.*

512 *Idem,* p.68

513 Périodique des droits de l'homme, Etat de libertés et violations des droits de l'homme en RDC, *In Justice et Démocratie,* 2nd trimester 2005, p. 28.

514 *Read the United Nations special report on the events of February and March 2008 in Bas-Congo, the Human Rights Division of the United Nations Mission to Congo, United Nations High Commission for Human Rights, May, 2008*

Unfortunately, several human rights abuses were perpetrated, some of which were as follows:

- The looting of more than 200 churches and BDK houses, private residences of people not affiliated to BDK, shops, at least two hospitals, a local pharmacy and a Catholic church[515].
- Acts of sexual violence were committed in the areas under the operation to the point that two local police officers of Seke-Banza were condemned to a life sentence for rape committed after the end of the operations[516].

Worse still, in May 2001, on the invitation of the Central African government, Jean-Pierre Bemba's MLC troops entered this country for the first time to counter a coup d'état threat against the then president of the country, Ange Felix PATASSE. However, during the second military intervention which took place between October 2002 and March 2003, the MLC allegedly committed crimes which included, assassinations, rape of women and children and looting. These constitute war crimes[517] and crimes against humanity[518].

From the above, two questions arise:

1. Which court would be competent and law applicable for crimes whose perpetrators were either members of the armed forces of a country under the attack of a rebel force, or are members of a rebel or an attacking force or members of the United Nations forces within the territory of a State during times of conflict?
2. Who would be answerable for the rape and looting committed by these forces during war?

II. The Competent jurisdiction , applicable law for criminal offences committed within the territory of a country during a period of armed conflict

Whenever a person is a perpetrator or victim of a criminal act, the questions arising presents the double problem of determining which court would be competent to handle the case. Secondly, the question of which law would be applicable to sanction the latter for the purpose of restoring the public order that had been disturbed.

As a matter of fact, in principle, when an offence is committed within the territory of a State, the power to crack down on the offender is vested in the State in which the offence was or is committed. That is to say that the power to punish offences committed in a territory is inherent in the concept of sovereignty[519]. It shows that such a crime can only be punished in the country where it was committed because it is only there and nowhere else where people are forced to correct the harmful effects generated by the example of the crime[520], through the example of the sentence handed.

---

515 *Idem,* p. 17.

516 *Ibidem,* p.18.

517 War crimes are atrocities and offences committed against people and goods in violation of laws and practices of war such as assassinations, mistreatment of prisoners of war, murder of hostages, unwarranted destruction of human settlements, towns and villages etc. War crimes are also an offence that involves deliberate violation of rules applicable to international armed conflict and laws and traditions of war. Also read the Geneva Conventions of 12th August 1949.

518 Crimes against humanity are atrocities and offences such as assassinations, extermination, slavery, deportation, imprisonment, torture, rape or other inhuman acts committed against civilians because of their political, ethnic, racial, ideological or religious affiliations. Also read article 2 of law nº 10 of the controls council.

519 MINEUR, G, *Commentaire du code pénal Congolais,* Maison F. Larcier, Bruxelles, 1953, p. 16.

520 Traité des délits et peines, § 21 cited by NYABIRUNGU mwene SONGA, Traité de droit pénal général congolais, 2nd edition, Editions universitaires africaines, Kinshasa, 2007, p.111.

It is along these lines of thought that the State, through legal institutions, prosecutes the perpetrators of acts of sexual aggression and property looting during times of war.

This reality is worth its weight in gold in that in the country where the offence was committed, proceedings are made easier when they take place where the offence was committed. Investigations can easily be conducted, evidence gathered easily and cheaper to listen to witnesses.

This perception is held more precisely by the Congolese law which opted for the system of "*territoriality of criminal law*" which requires that criminal law be applicable to all persons irrespective of their nationalities or that of their victims, who have committed an offence within the territory of the country within which this law is applicable[521].

It follows therefore that crimes committed during periods of armed conflict within the territory of a State, more precisely, the Democratic Republic of Congo are subject to Congolese law and therefore by virtue of articles 2 and 3 of the penal code, article 14 of the civil code, chapter 1, article 2 of the AR of 22 December 1934, Congolese courts are competent within the limits of the texts hereby prescribed.

Nevertheless, in the course of time it was realised that certain States through their legal systems either refused or failed in their legal obligations to investigate and prosecute persons suspected to have committed the most harmful crimes against humanity, rape, looting and unjustified appropriation of property using military force. Most of the crimes were committed on a grand scale and in an illicit and arbitrary manner, during times of conflict and punishment of those found guilty not enforced as their legal systems had fallen apart[522]. Hence the United Nations General Assembly, through resolution 53/105 of 8th September, 1998 created the *International Criminal Court* following the adoption of its statute following the Diplomatic Conference of Rome of 17th July, 1998.

Consequently, the court was granted the jurisdiction to "*judge crimes which deeply disturb the human conscience, the most serious crimes affecting the international community.*[523]" Such *crimes* include crimes against humanity, war crimes, crimes against peace, and genocide. There is a clause that prohibits persons from being tried twice for acts constituting a crime for which they have already been either convicted or acquitted. In other words, a person who has already been condemned or acquitted for crimes falling under the jurisdiction of the ICC cannot be prosecuted before the court for the same offence.

In clear terms, the Court is competent to arrest, judge, repress and sentence or punish perpetrators of war crimes, genocide[524] and crimes against humanity mainly when committed in the context of a general or systematic attack directed against any civilian population and in the knowledge of this attack[525].

It is therefore in recognition of the seriousness of attacks against the international public order perpetrated in all parts of the world in the course of history that the United Nations Security Council subsequently created:

---

521 NYABIRUNGU mwene SONGA, *op.cit,* p. 110
522 Art 18 al. 3 of the Rome statute
523 Article 5 of the Rome statute
524 Genocide is a crime consisting of acts committed with the intention of destroying a national, ethnic or religious group. Cfr Read also the convention of 9th December 1948.
525 NYABIRUNGU mwene SONGA, *op.cit,* p. 118

The international military tribunal of Nuremberg in Germany charged with judging Nazi crimes committed during the Second World War,

The international military tribunal for the Far East established on 19th January 1946 and sitting in Tokyo and,

Two courts charged with judging persons presumed guilty of serious human rights violations in Rwanda and in former Yugoslavia in 1993 and 1994 respectively.

Unlike these *ad hoc* courts whose jurisdiction was limited to crimes committed against civilian populations of a specific State at a given time, the Court enjoys a jurisdiction which is prospective[526]. It universal and permanent so that it is an extension of the national criminal court. It can neither substitute national courts, infringe national sovereignty nor replace the internal systems of justice that have the capacity to establish efficient national courts.

It appears therefore that the International Criminal Court's intervention in the administration of international justice is purely complementary to internal legal systems of States.

The organisation of repression of offences committed during period of armed conflict through the legislation of the Democratic Republic of the Congo

As stated earlier, the right to punish offences committed within the territory of a given State particularly during periods of armed conflict is inherent in sovereignty.

In the case of the Democratic Republic of Congo, besides the legal competence drawn from articles 2 and 3 of the penal code, article 14 of the civic code, chapter 1, article 2 of the AR of 22nd December 1934, punishment for offences of looting of property perpetrated during times of war is found under article 436 of order n°72/060 of 25th September 1972 on the establishment of a military code of justice which states that:

> "Any looting or damage to food, goods or property, committed in groups by the military or by individuals by the use of arms or by brute force, or by breaking through doors or gates, or with violence against people, is punishable by a life sentence".

And article 65 of the act of 18th November 2002 on the code of military justice, which has since been modified to read as follows: "*If the lootings were committed during times of war or in a region under siege or emergency or during a police operation to maintain or restore public order, then the guilty are punishable by death*".

This offence should not be confused with that of destruction of buildings which according to article 110 of the order of 30th January, 1940 and modified on 31st December, 2009 together with its complementary provisions attracts a *maximum of 5 years in prison and a fine of 25 francs or either of the two.*

On this matter, it is worth noting that in both cases, the Congolese law considers "all offences against the laws of the Republic committed during war and which are not acceptable under the laws and traditions of war as constituting war crimes[527]"

526 The International Criminal Court has jurisdiction only over crimes committed after the date the Court came into effect which is 1st July, 2002.

527

Article 174 of the same code further stipulates that:

> *"Also subject to prosecution before military courts, in accordance with existing provisions and the provisions of this code (meaning the code of military justice), are those who during the perpetration of the acts were in the service of the enemy or its allies, in whichever capacity, notably as a civil servant in the administrative, legal or military system or working as agents or appointees of an administration or of members of any group, or who were on any kind of mission on behalf of the group and were guilty of crimes committed after the outbreak of hostilities either within the territory of the Republic or in any area of war operations, either against a national, a foreigner or a refugee in the territory of the Republic, or damage to property of any physical person targeted above and all national moral persons, when these offences, even though committed during or under the guise of war, are not permitted by the laws and practices of war"*

One notices that whether it is a question of rape or destruction and looting of property, Congolese courts are competent to try the offenders, even when these acts were committed during times of war. When the perpetration of these offences involves the participation of a member of the military, the jurisdiction is devolved to military courts.

It is this consideration that should, to a certain extent guide the military leader or warlord of an insurrection on his responsibility to organise the punishment of presumed perpetrators of such acts. They also face the risk of increasing responsibility for abuses that would have been committed by members under their command or authority. But Alas!

IV. Guilt or responsibility for offences committed during periods of armed conflict

When war breaks out within a country, many barbaric and criminal acts are committed by the forces and many women and girls become victims of rape[528] and are sometimes brought into camps to serve as sex slaves and servants. At the same time, looting of private property takes place.

The main question that arises is who would be responsible for offences committed by armed individuals during periods of conflict?

The response to this question is based on a consideration that it is unanimously accepted that criminal matters, the offence just like the responsibility are individual; which, in other terms, is stating that the perpetrator an offence is answerable as an individual before the established courts, except in cases of complicity or joint activity.

It is on the basis of this last aspect of guilt that the ICC jurisdiction, when referred to by the UN Security Council in accordance with chapter VII of the charter, exercised in the territory of member States where a crime has been committed or non-member states where the perpetrator of the crime is from a member State. The Court is also competent in relation to a non-member State which has accepted its jurisdiction for a crimes committed in their territory or which involves its nationals in another non-member State. It emerges that the Court is clearly incompetent over the sovereignty of States although it identifies two types of responsibility: namely: Individual responsibility for crime and the responsibility of military and other senior leaders.

[528] Rape is a sexual relation imposed by the use of fraud or violence on a woman by a man who is not her spouse. Also read VINCENT, J, and GUILLIEN, R, *Lexique de termes juridiques,* Dalloz, Paris, 1970, pp. 353-354.

As a matter of fact, whether the crime is committed individually or jointly with another person, the individual is criminally responsible for these acts which constitute a crime if this person:

- ordered, solicited or encouraged the commission of the crime
- Contributed in any way to the commission or the attempt to commit such a crime by a group of people acting in concert[529].

As such, according to international law, no person can be exonerated from criminal responsibility on account of his or her official position. In other words, individual responsibility does not consider:

- The official position of the person who committed the offence[530],
- The non-applicability of statutory limitation to the offence.

Likewise, a military chief cannot escape criminal responsibility for crimes committed under his command as long as he knew or ought to have known that these crimes were committed or were going to be committed and did not take any necessary and reasonable measures to stop the crimes from being committed.

It is probably in line with this thought that while addressing the British army in 1946, Marshal MONTGOMERY declared:

> *"If the essence of democracy is freedom, then the essence of the army is discipline. The soldier has nothing to say, no matter what it may be (….). It is the duty of the soldier to obey, without asking questions, all the orders given to him by the army, the nation"*[531]. A soldier who obeys orders of his superior is therefore clearing his name, with the understanding that the order supposes "superiority of one party and inferiority of the other; it is given to people subjected to our power and authority"[532].

The above scenario can be roughly illustrated by the Nuremberg cases where the international tribunal charged with trying Nazi crimes committed during World War II had to establish criminal responsibility of the leaders as well as those of agents under orders. Responsibility of leaders arose from having ordered crimes against peace and crimes against humanity, in violation of public order and the law common to all civilized nations[533].

The problem is tricky when it comes to seeking to know who is responsible for acts of rape and looting perpetrated by members of United Nations forces in the country in which they are intervening.

The response to this question is such that in the absence of any extradition[534] treaty between the country of origin of the alleged perpetrator of the crime against humanity or another and the country of the nationality of the victim, the latter is competent to judge on any crime committed on its territory.

---

529 Art 25 of the Rome statute.

530 Art 27 of the Rome statute.

531 VERHAEGEN, *Le refus d'obéissance aux orders manifestement criminels*, paper presented in October 1998 at the seminar of military law and war law, p.1 cited by NYABIRUNGU mwene SONGA, *op.cit,* p. 186.

532

533 NYABIRUNGU mwene SONGA, *op.cit,* p.160

534 Extradition is an international procedure whose objective is to put the author of a crime at the disposal of a foreign State which seeks him to have him face trial or to face his sentence. Cfr. VINCENT, J and GUILLIEN, R, *op.cit,* p.160.

If this State fails to grant justice to victims, especially in form of compensation, the International Criminal Court will find justifiable reasons to exercise her jurisdiction. Besides, the statute of limitation does not apply to crimes committed after it came into effect and does not consider the principle of immunity of Heads of State and ministers in office[535] in prosecuting perpetrators of accomplices to barbaric acts committed against civilians mainly during times of war.

V. Rights of victims of rape and looting committed during periods of armed conflict.

Acts of rape most often accompany looting or rather, the destruction and seizing of property belonging to civilians found in the area.

Worse, the brutality of sexual violence on women and children have produced serious psychological, economic, social and health consequences, such that most of the victims have been infected with **HIV/AIDS** or sexually transmitted diseases, suffer frigidity, impotence and serious and deep psychological problems[536].

The question arises, what are the rights of victims of such abuses? In other words, can victims of abuses perpetrated during time of war obtain reparation for damages suffered to this effect?

As a matter of fact, damages caused by armed conflict are exceptionally huge, in terms of the number of victims and the intensity of the damages. It therefore goes naturally, and in all circumstances, that the victims of violence and trauma, in an environment of equality, have the right to enjoy real access to justice[537], an equitable and impartial legal process and compassion and special care to avoid traumatising them afresh in the course of the legal and administrative process meant to give them justice and redress.

The term 'victim' refers to people who, individually or collectively have suffered some harm, particularly an attack on their physical, mental integrity, moral harm, material loss or a serious attack on their fundamental rights, due to acts of commission or omission constituting a deliberate violation of international humanitarian law[538].

In *casu specie*, there is nothing better for a victim than receiving redress for damages suffered by presenting himself or herself as a civil party. Beyond criminal responsibility, there is an obligation to repair damages resulting from failure to execute a contract (contractual responsibility) or the violation of the general obligation of duty of care to others by his acts of commission or omission under his command[539].

In the law of civil responsibility, redress extends to a mechanism that attempts to return the victim to the state he/she was in before the damage. To achieve this, it is necessary to look at the victims individually and to evaluate the damage they have suffered.

Without the slightest doubt, the objective of adequate, effective and quick redress is the promotion of justice by correcting human rights violations or serious violations of

[535] Resolution 60/147 adopted by the General Assembly of the United Nations on 16th December, 2005
[536] Read the Amnesty International Report 2007, p.31
[537] In modern States founded on conventionality, Justice plays a very important role, that of ensuring public order. It ensures public order by substituting legal punishment for private revenge. It ensures public order when through the effects of its decisions, it safeguards individual freedoms. Basically, justice has only one objective: guaranteeing freedom by defining its limits.
[538] Resolution 60/147 adopted by the General Assembly of the United Nations on 16th December 2005
[539] VINCENT, J and GUILLIEN, R, *op.cit,* p. 307

international humanitarian law. This redress should be according the seriousness of the violation or of the harm suffered.

It is therefore incumbent upon the State, in conformity with her internal legislation and her international legal obligations, to assure the victims are compensated for acts or omissions which can be imputed to her. This will include or that constitute blatant violations of the international human rights law or serious violations of international humanitarian law.

In cases where the responsibility of redress lies with a physical person, a moral person or an entity, the person or entity should ensure redress to the victim or compensate the State if the latter has already compensated the victim.

CONCLUSION

Criminal prosecution for crimes committed by armies during periods of conflict remains to this day a serious problem on the international scene despite the brutality, loss and trauma suffered by civilians everywhere.

At the national level, the victims who are in any case rarely listed have difficulty accessing real redress while immunities, protectionism and the weakness of the legal machinery have an upper hand over preserving and safeguarding human rights.

This partly explains the establishment of the International Criminal Court aimed at contributing, even slightly, towards making irreversible the fight against impunity.

Unfortunately, the latter appears incompetent in relation to heinous crimes committed before it became effective as well as in the case of non-signatory countries.

The victims are still waits to enjoy 'actual' justice that does not have "two weights for two measures".

REFERENCES

I. International conventions and instruments

- African Charter on the rights of Man and Peoples
- The Universal Declaration of the Rights of Man of 10th December, 1945.
- The United Nations Charter, New York, 26/6/1945
- Statute for the Nuremberg tribunal of 14th November, 1945.
- First protocol of the Geneva Convention of 12th April, 1949.
- Resolution 60/147 adopted by the United Nations general assembly of 16th December, 2005
- Resolution 3314 of 14th December 1974
- Convention for the prevention and repression of the crime of genocide of 9th December 1984
- The Rome Statute of 17th July 1998

II. Publications

- BASUE BABU KAZADI, G, « L'action en vue de la démocratie : relecture du principe de non-intervention dans un contexte d'émergence démocratique, Par-

ticipation et responsabilité des acteurs dans un contexte d'émergence démocratique en République Démocratique du Congo », In *Actes des Journées Scientifiques de la Faculté de Droit de l'Université de Kinshasa*, 18-19 juin 2007, PUK, 2007.

- D'ARGENT, P, *Les réparations de guerre en droit international public*, LGDJ, Bruyant, 2000.
- DAVID, E, et SALOMON, J, *Droit de guerre*, Tome III, 17ème édition, PUB, Bruxelles, 1978.
- DECAUX, E, *Droit international public*, 5ème édition, Paris, Dalloz, 2006.
- FLORY, M, « L'ONU et les opérations de maintien de la paix », In *Annuaire français de droit international*, 1965.
- FONTAINE, A, *Histoire de la guerre froide, de la révolution d'octobre à la guerre de Corée*, Fayard, Paris, 1965.
- GALLOY, D, et HAYT, F, *Précis d'histoire du temps présent (1914 à 1994)*, De boeck Wesmael, Bruxelles, 1994.
- KOLB, R, *Droit humanitaire et opération de maintien de la paix internationale*, Bruylant, Genève, 2002.
- LLOPIS, P, *Compétence universelle en matière des crimes contre l'humanité*, Bruylant, Bruxelles, 2003.
- MAZYAMBO MAKENGO KISALA, A, La participation de l'organisation des Nations Unies au processus de démocratisation de la République Démocratique du Congo : rôle particulier de la Monuc, *In Actes des Journées Scientifiques de la Faculté de Droit de l'Université de Kinshasa*, 18-19 juin 2007, PUK, 2007.
- MINEUR, G, *Commentaire du code pénal congolais*, Maison F. Larcier, Bruxelles, 1953.
- NYABIRUNGU mwene SONGA, *Traité de droit pénal général congolais*, 2ème édition, Editions universitaires africaines, Kinshasa, 2007.
- PETIT, Y, *Droit international du maintien de la paix, Paris, L.G.D.J, 2000*
- VINCENT, J, et GUILLIEN, R, *Lexique des termes juridiques*, Dalloz, Paris, 1970.

TRACES OF THE MATTHEW EFFECT IN THE INCOME TAX SYSTEM IN THE DEMOCRATIC REPUBLIC OF CONGO

By **Yves-Junior MANZANZA LUMINGU***

INTRODUCTION

At all times, work is considered key to socioeconomic development. All companies use this method to cope with the vicissitudes of life and ensure a better future more or less by putting itself protected from risks.

Today more than ever, modernisation efforts require that more work in order to be on the same wavelength as our contemporaries. Work enables man to live with dignity. Time is no longer on the stand still. It is neither a case of wait-and-see nor the divine intervention to excess, because manna from heaven belongs to an era long gone.

Thus, the importance of work has without doubt, been well established. As a matter of fact, various fundamental human rights instruments have confirmed the right to work as fundamental rights. This is so in the Democratic Republic of Congo who's Constitution proclaims that „work is a right and a sacred duty for every Congolese" ([540]).

Moreover, if it is now true that hard work and dedication coupled with temperament, culture, moral rectitude be store and sense of honor and are also nevertheless for a significant part compensation.

Since work, as a creature of service, is a way of earning a living. Through work, man strives to improve his financial situation and provide his family with a good education and a bright future. Therefore any effort to make work in a nation necessarily involves an effort to improve working conditions, wages and purchasing power of workers.

Certainly, engaging oneself in the contract of employment, the employee receives in exchange the means to earn a decent life. Although the economic value of the work can sometimes justify differences in pay, if it falls below a certain amount ([541]), certain methods for weight reduction is caused to the employee.

Nevertheless, there are some exceptions which include deductions authorised by law and regulation. . These, as much as they affect the worker's pay envelope, often remain a burden that they do not accept with a clean heart.

This paper proposes to discuss taxes levied on professional earnings in order to present the different tax rules that contribute to the collection. Indeed, there is often *contra legem* practices initiated by some employers sometimes to promote a certain category of staff at

* ***Assistant à l'Université de Kikwit (Bandundu/RD Congo), Doctorant en Droit.***

[540] Art. 36, al. 1er de la Constitution du 18 février 2006

[541] The guaranteed minimum wage (GMW).

the expense of the tax. It occurs when they collude with officials of Inland Revenue. It is also worth mentioning the case of taxpayers who use their influence to evade and interfere with the payment of tax burden on honest people.

Thus, this begins with the assumption that beneficiaries who earn more are the most favoured.

In order to test this hypothesis, data collection was undertaken and achieved through the use of interviews, group observations and the literature review. The interpretation, meanwhile, was conducted by a multidisciplinary and horizontal approach beyond the simple normative exegesis to examine the practices, the actual achievements, obstacles and prospects. In addition, we primarily borrowed from professional organisations, namely those of workers, reports which serve as basis for action to decrypt the inventory of socio-economic conditions of their members, using the political history and sociology.

Being restrictive, this approach is of interest in several respects. Firstly, it fits with the promotion and protection of workers' rights in the context of national reconstruction that requires the socio-economic development of the Congolese state.

Therefore, the assessment of the principle of equality of citizens before the tax through the Matthew effect requires the study of the tax system of remuneration. This approach will define the concept of pay, its components and tax rules attached to them before going through, *in concreto*, the actual realities that affect it.

I.THE INCOME TAX SYSTEM

Income constitutes remuneration received for work in line with contractual obligations.. This is what sustains virtually all employees. Thus the need to provide a worker with a living wage, which is periodic and regular.

Therefore, the tax system that governs incomes should be based on rules that consider the social aspect of this taxable content, a concept that requires clarification.

I.1. Concept of income

Note that *in limine* the term income and wages is often used interchangeably. As part of this discussion of process, we will refer to one or the other concept.

Admittedly, the concept of wages is of great practical interest. To be exact, we must consider two points of view. Salary is, according to conventional design, the returns for work, but now the trend is in line with what Philippe LANGLOIS called a social wage, it should be regarded as worker's income ([542]).

Therefore, it is convenient to explore the concept of income according to its classic idea before analysing its broad definition.

I.1.1.The classical definition

The classic definition of wages and salary is used interchangeably by the Labour Code in Congo.

[542] LANGLOIS, P., *Droit du travail,* 6ème éd., Paris, Sirey, 1987.

Indeed, under Article 7 litera h) of Act No. 015/2002 of 16 October 2002 Labour Code, income is *"the sum representing the total wages that can be evaluated monetarily and fixed by agreement or by the laws and regulations that are due under a contract of employment by an employer to a worker."* In other words, it is any sum or any benefit in return for the provision of work ([543]).

I.1.2. The broad definition

Salary is considered, in its broadest terms, to include social security law, used to calculate the contributions due from the employer and certain benefits paid to insured persons and the law adopted by a very broad definition (...) and includes all amounts received in connection with work ([544]).

Thus, amounts paid in the absence of any actual work done are treated as wages. The doctrine then appealed to the concept of social wage.

LUWENYEMA Lule writes that, if one was referring to the concept of wage itself, being remuneration for the actual work of the worker, it should end on suspension or termination. But the right to contemporary work instead aims to ensure and guarantee continuity of livelihood for the sick the worker or the one on leave ([545]).

The tax law also adopts a broad definition of the term wages, integrating in particular, to wages of many corporate executives who, however, are not bound by an employment contract ([546]). It is also in the sense that the Belgian tax law means workers *"all the officials and public employees whose employment is statutory, professional soldiers, judges, and ministers of public worship"* ([547]) to extend the tax system of applies to their wages or income.

Finally, it should be noted that according to the International Labour Office (ILO), the term wages as defined by ILO Convention, ratified by the Republic of Congo is understood as the broadest and includes statutory family allowances, health care, travel expenses and benefits provided exclusively to facilitate the worker in carrying out his functions.

I.1.3 Elements of the payment system

Under Article 7 h) of the Labour Code, remuneration includes:

- ✓ Wages or salary
- ✓ Commissions
- ✓ Cost of Living Allowance (*COLA*)
- ✓ Premiums
- ✓ Profit sharing
- ✓ Sums paid as a gratuity or additional months
- ✓ Amounts paid for additional services
- ✓ The value of benefits in kind
- ✓ Leave allowance or compensation in lieu of leave
- ✓ Amounts paid by employer when employee is unable to work or the period before and after giving birth
- ✓ Family allowances for the portion exceeding the legal amount

---

543 Comp. LUWENYEMA LULE, *Précis de droit du travail zaïrois*, Kinshasa, Editions Lule, 1989, p. 169
544 LANGLOIS, P., *Op. cit.*, p. 205
545 LUWENYEMA LULE, *Op. cit.*, p. 169
546 LANGLOIS, P., *Op. cit.*, p. 205
547 Commentaire du Code des impôts sur les revenus, n° 20/21. Voy. MALHERBE, J. et THILMANY, J., *Cours de droit fiscal. Impôts sur les revenus*, UCL, 1992-1993, p. 67

Though not part of the elements of payment *(sic):*

- ✓ Health care
- ✓ Housing allowance or housing in kind
- ✓ Statutory family allowances
- ✓ Transport allowance
- ✓ Travel costs and benefits provided exclusively to facilitate the worker in carrying out his duties

In reality, it is not a question of determining whether a certain sum is arrived at as per the payment system. It would be wrong for the legislator to pretend that the advantages indicated above are not the elements of payment, and yet they too form part of it only that they do not follow this same salary system.[548])

A part from wages which is the payment or basic salary, an employee may receive money for various benefits or benefit granted by the employer. The sums thus paid or the monetary equivalent of benefits granted does not have the characteristics of a salary. Of course we must distinguish between amounts which supplement salaries and those that represent either reimbursements or gifts from the employer. It is essentially about the benefits in kind and benefits from other quarters.

Benefits in kind ([549]) are mainly housing and food. Indeed, the Labor Code imposes an obligation on employers to provide benefits to the worker transferred or committed outside the place of employment. Otherwise, the employer pays the worker a substantial compensation. Besides, the employer has food supply food in case the worker cannot, on his own, get himself absolutely essential foodstuffs.

As for the benefits in cash, an allusion is made to gratuities, bonuses, reimbursements of business expenses and allowances.

Gratuities are donations made by the employer to the employee. Philippe LANGLOIS defines this as "money paid by the employer to show his satisfaction with the work that contributed to the profits of the enterprise" ([550]). Their nature is such that they are not directly related to and necessary for completion of work unlike lump sum payments related to performance or productivity related to jurisprudence, doctrine and various collective agreements which distinguish between voluntary gratuity and bonus contract.

With regard to voluntary gratuity or benefits, the employer is free to decide on the appropriateness of this payment and amounts. It is above the wage system and it will not be considered in the calculation of allowance or paid leave. However, the contractual bonus or salary supplement has its source in either the individual contract or in the collective agreement.. In this case, it becomes mandatory and follows the wage system. But it must have the following three characters: constancy, fixity and generality.

---

548 Comp. KUMBU ki Ngimbi, *Droit du travail. Manuel d'enseignement*, Kinshasa, Galimage, 2010, p. 49

549 Art. 138 of the Labour Code.

550 LANGLOIS, P., *Op. cit.*, p. 207

Bonuses are inspired by the employer; it is result oriented, an increased and continuous productivity pegged on quality and low costs. They can be classified as follows:

- *Performance awards:* consisting of an additional proportional to the increase in production.
- *Premiums relating to rewarding the loyalty of employees:* they can also result in seniority pay.
- *Premiums for hardship:* for heavy or dangerous work.

It must be stated that in many cases, the employee receives payments that do not match their work, but relate to the employment contract. The compensation benefits for harm or danger do not form part of wages, while those that compensate for the allowances are included.

Finally, there are business expenses that they are excluded from the wage system because they are not regarded as consideration for the employee's work. Example: transportation costs, clothing allowance.

I.1.4 Rates and payment of wages

Wage rates depend more on public authority or sometimes collective agreements. State intervention in this matter is to the extent of fixing minimum wages (SMIG) ([551]).

A. Wage determination ([552])

Salary is determined either per hour, day, week, and month or per the task. Consequently, we can identify two methods of fixing wages.

- *The salary per time* can be defined as that which results from work performed by an employee without any reference to production quantities. It is the most widespread and simplest method of payment.
- *The performance-related pay*: it is a form of payment which wages vary with the amount of output produced by an individual or team in a given time. This technique of compensation tends to disappear for some reason.

> Psychologically, it tends to establish a competition among workers and thus likely to hamper teamwork. Also noteworthy are the legal and technical difficulties associated with standards of production and the amount to be pay.

Finally, any work beyond the legal 45 hours per week leads automatically to an increase in pay because of the notion of overtime.

B. Modalities of payment of wages

By modalities of payment, we mean time, place and guarantees of the payment of wages. Admittedly, under the circumstance of low income wages, it is important that the worker is paid in coin or currency. This is in line with the law which stipulates that wages must be paid in legal tender in cash. Payment in kind is prohibited but it is possible to use modern methods of payment such as checks, money order or bank transfers. As for the

[551] Cfr Ordonnance N 08/040 of April 30th, 2008 having repealed decrees no 079/2002 of July 3rd, 2002 determining the modalities of fixation (binding) of the SMIG(GUARANTEED MINIMUM WAGE), welfare minima and the exchange value of the accommodation(housing) and no 080/2002 of July 3rd, 2002 carrying(wearing) fixation(binding) of the SMIG(GUARANTEED MINIMUM WAGE), welfare minima and the exchange value of the accommodation(housing).

[552] Art. 89, al. 2 and art. 92 of the labor code.

time and place, the parties are free to determine this particularly as to period. Legislation was however found somewhat limiting which meant that payment of wages carried out at regular intervals did not exceeding one month ([553]), since the primary end payment is to ensure the subsistence of the worker ([554]). It is in this sense that the Congolese law provides that the payment must take place no later than six days after the period to which it relates.

Failure to pay amount to abuse of an employee and could amount to. ([555]) a conviction under Article 321 of the Labour Code. Alain Benabent believes it is common sensual that the employee does not receive his dues or the employer does not want to pay immediately, the employee is at liberty to stop working until they are paid ([556]). But some outside wage supplements in nature at short intervals and the principle of periodicity is eliminated by the use of practices such as deposits, advances and reminders ([557]).

The place of payment is usually the head of the institution, but the parties are free to agree in their individual contracts or collective agreements on a different place. This is only on condition that this place is not a flow drink or a retail store (except for employees who provide already) and that payment is a business day and during the hours of service ([558]).

Finally, the law has provided mechanisms to guarantee wages. This was in contemplation of threats attributable to 'dangers' either from the employer, their creditors or those from the employee.

However, the employer may make deductions in such cases as the ones below ([559]):

- withholding tax (tax on professional earnings)
- contribution due to the National Institute of Social Security deductions for advances, deductions by way of compensation ([560]),
- retained as security and as advances, etc..

To the creditors, an employer's worker has great privilege ([561]) since they are a preferred creditor over other creditors in a liquidation of a company ([562]). In other words, wages must be paid notwithstanding any other claim, even that of the Treasury.

---

553 Art. 99 of the Labor code.

554 NZANGI BATUTU, « L'institution du salaire », in NDOMELO KISUSA Kaïmba et KIENGE-KIENGE Intudi (dir.), *Droits et obligations du travailleur en droit congolais. Apparence ou réalité d'un conflit d'intérêts*, Louvain-la-Neuve, Academia Bruylant, Kinshasa, Editions Kazi, 2003, pp. 113-126

555 The exception of non-fulfillment or *exceptio not adimpleti contractus* is the law which has every party has a synallagmatic contract to refuse to execute its obligation as long as it does not receive the service which is due to him(her). To the one who demands the execution of what he owes, he answers: "fair's fair", " tit for tat ", " law for law ". The origin of this institution would be the canonistes, sensitive to moral concerns with as argument the proverb " *fragenti fidem not is fides servanda* " (we do not have to keep the promise to the one who does not keep his) Cf. Philippe MALAURIE and Laurent AYNES, *Cours de Droit civil*. Tome VI, Les obligations, 6th éd., Paris, Cujas, on 1995, pp. 413-414; Gérard LEGIER, Civil law. Les obligations, 14th éd., Paris, Dalloz, on 1993, p. 84.

556 Alain BENABENT, *Droit civil. Les obligations*, 4ème éd., Paris, Montchrestien, 1994, p. 179

557 Advances are a kind of pre-payment: the receiving employee will not touch more than the remainder of his payment. On the other hand, the advances are loans granted to the employee. Here the employer is entitled to make a restraint only up to the amount authorized by the law (art. 114). Finally, reminders come to complete the salary which was not completely released when it was due.

558 Art. 98 of the Labor code

559 Art. 112 of the Labor code

560 These restraints justify themselves only in case of violation by the worker of the article 52 of the labor code, which article makes obligation(bond) to the worker to restore in good condition to the employer the goods, the products, the sorts(species) and, generally speaking all which was confided(entrusted) to him(her) within the framework of the exercise of his(her) functions(offices).

561 Art 109 and 110 of the same Code

562 Comp. Frédéric-Jérôme PANSIER, *Droit du travail. Relations individuelles et collectives*, 3ème éd., Paris, Editions du Juris-Classeur, 2003, p. 123.

Section 114 of the Labour Code provides that a claim to a wage system is not transferable and cannot be seized.

Thus this method of compensation, its components and allows us to analyse the taxation on professional remuneration (IPR).

I.2. Tax on professional compensation

This IPR study needs to circumscribe its place in the Congolese fiscal order before submitting the taxable income and tax exempt revenues, the taxation rate as well as the rules governing declaration and payment.

I.2.1. The context

The context of professional tax on earnings leads us to present the legal basis for professional tax in general as well as the different categories of professional income.

Under the current Congolese taxation law legislation, professional tax generally is based on Order-Law No. 69/009 of 10 February 1969 on income taxes as amended and supplemented to date([563]).This tax applies to certain categories of professional earnings.

The Law categories this into four areas of revenues from professional activities carried out in the Democratic Republic of Congo, but subjects them to three schemes that use similar principles involving adaptations in their respective implementation ([564]). They are as follows ([565])

- ✓ The profits of all industrial, commercial, craft, agricultural and real estate enterprises, including gifts and benefits granted to any non-related assets in companies other than shares;
- ✓ The various remunerations of all persons paid by a third party, public or private law, without being bound by a service contract, those working in associated companies other than stock or operator of an individual business attributes to himself or to members of his family for their work and pensions, on remuneration of directors, managers, trustees, company liquidators and any persons performing similar functions;
- ✓ The profits of professions, charges and offices, whatever their denomination;
- ✓ The profits other than the first three categories of income.

We note, along with Robert UMBA di Ndanga, that the legal provisions considered as the general on such income have specific regimes while the third specific regime governs both categories of profits ([566]).

Our reflection focuses only on the second category of income, namely on diverse remunerations (...) subjected to tax on professional remuneration (IPR).

---

563 Cfr Art. 1st 3° of the ordinance-law n° 69/009 of 10 February 1969 relating to tax on revenues

564 UMBA di NDANGI, R., *Public Finance. Comments on the principles, procedures, practices from the origins to our day in the DR Congo*, Kinshasa, B.E.C.I.F., 2006, p. 229

565 Art. 27 of the ordinance-law n° 69/009 of 10 February 1969 relating to tax on revenues as under decree-law n° 109/2000 of 19 July 2000

566 UMBA di NDANGI, *Op. cit.*, p. 229

I.2.2. Tax base

Originally, the IPR was defined as a tax on the salaries of all persons paid by a third party without being bound by another contract other that of contract of employment.; that is, IPR taxpayers had to be in a relationship of subordination vis-à-vis the person to whom they serve and who pays them ([567]).

But this criterion of existence of a labor contract was not exclusive because in order to eliminate the possibility of tax evasion, even where contracts had been incorporated, tax legislators felt that a deliberate confusion had been created between the two categories of contract to evade tax([568]).

This definition was challenged in 2000 as it seemed outdated. Indeed, according to Professor Kola Gonze, even people holding political office would be subject to this tax ([569]).This solution had already been included into French tax law where it establishes the difference between salaries and wages: the first term refers to the remuneration according to professional status, while the second refers to the remuneration in respect of a written or a verbal contract ([570]).

We shall thus look at the various taxable incomes before discussing those that are exempt.,

A. Taxable income ([571])

The incomes taxable by the IPR include compensation elements constituting enrichment for the employee. These elements include:

- ✓ Salaries, wages, emoluments, allowances which do not represent the actual reimbursement of business expenses, gratuities, bonuses and other payments fixed or variable, regardless of their qualifications;
- ✓ The salaries of directors, managers, trustees, liquidators of companies, governors, regents and censors and any persons performing similar functions;
- ✓ Salaries and fees of director-generals, delegates, directors and auditors of public companies and mixed economy companies;
- ✓ Salaries, wages and benefits granted to members of public institutions and Career Public Service officers on one hand and, on the other hand, salaries, wages and benefits granted to members of political cabinets([572]) ;
- ✓ The pensions of all kinds, regardless of the circumstances or the manner conditioning their grant, as well as the sums paid by the employer or principal, contractually or not due to termination of work or breach of employment contract or work for hire;
- ✓ The compensation that the operator of an individual proprietorship assumes or assigns the members of his family for their work.

---

567 Ref. Marcel GONTHIER, *Applied tax law*, Foucher, Paris, 2001, p. 174

568 Idem, p. 230

569 KOLA GONZE, *Lessons on Tax Law*, University of Kinshasa, Faculty of Law, 1st degree, 2008-2009 ; Ref. also Decree-Law No. 109-2000 of 19 July 2000 and the Ministerial Circular No. 0023 dated January 9, 2001

570 Christine NOEL, *Tax Law*, Paris, Gualino editor, 2009, p. 336

571 Ref. Art. 47 of Ordinance-Law No. 69/009 of 10 February 1969 on income taxes as amended and supplemented by Law No. 73/003 of January 5, 1973, by Law No. 77/016 of 25 July 1977, by Ordinance-Law No. 84-022 of 30 March 1984 and by Decree-Law No. 109/2000 of 19 July 2000.

572 Ref. comments by Jean-Marie F. Mboko N'DJANDIMA, Tax Code, 2nd ed. Kinshasa, Presses Universitaires du Congo, 2009, p. 114. It should be noted that wages and benefits granted to any person related to the state by a pact or financially are liable to taxation by IPR. This includes wages, salaries, fees, benefits accorded to members of public institutions (Government, Parliament Courts and Tribunals), state officials and public servants etc...

Included among these are the benefits in kind except those specified under Article 48. 3 of the Legislative Ordinance No. 69/009 of February 10, 1969 supra.

From the foregoing, it is noteworthy that taxation is based on the gross amount ([573]). Nevertheless, certain details need to be clarified to enable both employers and employees to explain the system of allowances, pensions and benefits.

Thus, two conditions allow for tax benefits under IPR: that they are not reimbursements of expenses incurred by the employee in cause of duty and that they are not specifically exempted by the law. Apart from these refunds and exemptions, all benefits remain taxable under IPR.

On pensions, there is a difference between free pensions granted and those granted on the basis of previous deductions. The first category includes pensions granted to employees who have reached a certain age or who are unable to work, they amount to treatment and are therefore taxable at IPR. The second category concerns pensions granted on the basis of previous deductions, which are also taxable by the IPR. Note however that alimony and pensions for the death of a loved one are not discussed in this section.

Finally, regarding benefits in kind, namely the provision of food or foodstuffs, free supply of water and electricity, free supply of non-professional clothes, private communication payable by the employer, provision of meals at work, medical expenses, repair and fuel, taxation is based on their actual value.

B. Untaxable incomes ([574])

The following do not fall under IPR's tax base:

- benefits or allowances actually granted to employees to the extent that they do not exceed the statutory rates
- pensions, annuities and allowances granted under the laws governing old age pensions, disability relief or premature death, pensions for the handicapped, widows, orphans and dependants of combatants, victims occupational accidents or occupational diseases and congenital disability; alimony;
- allowances and fringe benefits relating to housing, transportation and medical expenses, provided that:
  - housing allowance is less than or equal to 30% of gross salary.
  - daily transport allowance is equal to the cost of the ticket paid locally with up to four taxi fares for senior officers and four bus fares to other staff members, and, insofar as the necessity and reality of transportation are shown: while the employer is obliged to provide transport for his workers when they reside more than 3 km away from the workplace ([575]).
  - medical expenses are not of an exaggerated character.

---

[573] According to the departmental Circular No. 4133 of 23 December 1988 on the interpretation of Article 48-3 ° of the Ordinance-Law No. 69/009 of 10 February 1969, "gross salary" or " basic gross " refers to the total amount paid in cash as compensation, hence excluding the value of benefits in kind and character of compensation or benefits (housing, transportation, medical expenses, statutory family allowances, etc.) and without deduction of social security or union contributions. Ref. MBOKO N'DANDIMA, *Op. cit*. p. 115

[574] Art. 48 of Ordinance-Law No. 69/009 of February 10, 1969 as amended by the Ordinance- Law No. 84-022 of 30 March 1984 and by Decree-Law No 109/2000 of 19 July 2000

[575] The same principle applies in French law where travel between home and workplace are considered as deductible business expenses, provided that the distance is less than or equal to 40 km. Hamid DJOUNIDI, *Tax Law*, Paris, Hachette, 2000 91

But if these benefits are in excess, additions must be reintegrated to be submitted to IPR. Ministerial Circular No. 0023 dated January 9, 2001 clarified the concept of *exaggerated character* that would justify such reintegration.

JAGENEAU, among other authors, has expressed: "the following do not constitute remuneration elements to be included in the tax base or taxable base: health care, family allowances, travel expenses and transport" ([576]). Francois Duquesne on his part reiterates that in principle, it is upon the employer to reimburse an employee expenses incurred in the course of duty in the interest of the company ([577]).

Gabriel GUERY also confirms that the following must be deducted from taxable income : premiums or transport allowances, since they are intended to reimburse expenses actually incurred by employees to cover the distance between their home and their workplace ([578]); this point of view is expressed in similar terms by Brigitte Hess-Fallon and Anne-Marie SIMON([579]).

The tax base identified above is the economic element which is the source of the tax; its evaluation establishes the tax base, or the amount on which the tax tariff will be applied.

I.2.3. Tax rate

The rate of The IPR rates are progressive and vary between 3 and 50% depending on the annual income brackets. However, the Decree-Law No. 109/2000 of July 19, 2000 as amended and supplemented by Legislative Decree No. 015/2002 of 30 March 2002 on the scheduled taxes on income has introduced a flat rate for IPR for domestic workers and licensed employees.

A. Concept and scope of progressiveness

Unlike the proportional rate which is constant and remains unchanged irrespective of the amount of taxable material ([580]), the progressive rate increases proportionately with the amount.

Application of this rate requires an understanding of the taxpayers' property and income. Moreover, in this case, the field-escalation must be clarified by distinguishing the overall progressiveness or class increments. In the first case, revenues are achieved in full by tax rates that are simultaneously incremental with such income increases. These are divided into classes set beforehand. Each class has a higher rate than the one before, or less than that which follows. It is therefore observed that the overall progression in the tax base is classified in a particular class depending on its size and the rate increases from grade to grade. This method is simple even if it constitutes a factor of inequality, since a minor difference in tax bases is enough to cause taxed disparities between two individuals.

As for the progressive increments by class or by bracket, all incomes, irrespective of their size, are divided into a number of brackets. This arises from the principle that incomes

---

576 JAGENEAU, GH., *Bref aperçu de droit congolais du travail*, Editions Shalamo, Likasi, 2001, p. 26

577 François DUQUESNE, *Droit du travail*, 2ème éd., Paris, Gualino editor, 2003, p. 199

578 Gabriel GUERY, *Pratique du droit du travail*, 11th ed., Paris, Gualino editor, 2003, p. 284

579 Brigitte Hess-Fallon and Anne-Marie SIMON, *Droit du travail*, 16th ed., Paris, Dalloz, 2004, p. 187

580 Comp. BAKANDEJA wa MPUNGU, G., *Public finances. For better economic and financial governance in the Democratic Republic of Congo*, Bruxelles, Larcier, Kinshasa, Afrique Editions, 2006, p. 84

included in the same bracket are aimed at satisfying similar needs and must be taxed at the same rate. Each bracket is determined by an incremental amount. This system is designed to avoid the inconvenience of sudden jumps caused by the overall progression ([581]).

B. Synoptic table ([582])

For remunerations other than those paid to domestic workers and licensed employees, the IPR rate is set in the following manner:

Annual revenue brackets in Congolese Francs	Rates
0 to 72,000	3%
72,001 to 126,000	5%
126,001 to 208,000	10%
208,001 to 330,000	15%
330,001 to 498,000	20%
498,001 to 788,400	25%
788,401 to 1,200,000	30%
1,200,001 to 1,686,000	35%
1,686,001 to 2,091,600	40%
2,091,601 to 2,331,600	45%
Over 2,331,600	**50%**

I.2.4. Tax collection

Individuals, communities, corporations and other legal entities that pay or allocate income in any capacity, are liable before the IPR to taxation as mentioned in Article 27.2° of Legislative Ordinance No. 69/009 of February 10, 1969 as amended and supplemented to date([583]).

This refers only to the legal debt collectors whose burden is to carry out tax deductions. As such they must do a monthly return within the first ten days of the month in which taxable wages were paid or made available to beneficiaries who remain the actual taxpayers. In addition, three methods are generally used for collecting tax revenues ([584]):

- ✓ direct payment by the taxpayer;
- ✓ the levy by a third party;
- ✓ a stamp (which is rarely used).

IPR resorted to the second method, including the deduction by a third party: it is called the restraint system or deduction at source. Ultimately, it is befitting to ask whether the different rules implemented under the tax system on remuneration shall respect the principle of equality of citizens before tax.

---

581 KOLA GONZE, *Lessons of Tax Law*, University of Kinshasa, Faculty of Law, 1st Degree, 2008-2009.
582 Source : MBOKO DJ'ANDIMA, *General tax codes*, 2nd ed., Kinshasa, PUC, 2009, p. 130
583 Art. 77. 2°) of Bill n° 69/009 of 10 February 1969 as modified and applied to date
584 Ref. Grégoire BAKANDEJA wa MPUNGU, *Op. cit.*, p. 85

II. THE MATTHEW EFFECT AND THE PRINCIPLE OF EQUALITY OF CITIZENS BEFORE TAX

In the history of nations, social injustice has often been observed to arise mainly from to the influence or power over others, especially the balance of economic power.. Thus, the holders or beneficiaries of immense wealth have often been the most protected and least taxed. However, it is the poorer people who must constantly bear the tax burden! Hence it is brutal cynicism that the widow of an American billionaire real estate speculator aptly exclaimed, „paying taxes is good for the poor!"

However, before outlining the various forms of tax injustice as found in the remuneration system of the Democratic Republic of Congo, it is important to clarify the scope of the term „Matthew Effect" and the principle of equality of citizens before tax.

II.1. Position of the problem

Correcting the iniquitous plaguing wealth distribution through taxation has hardly inspired policies that generally are in the best interest of the poor by the ruling classes and their representatives, whose constant concern is to transfer tax burdens to others whenever social forces permit.

Ruling classes have always been able to set up structures and provisions such as the „already better off" the „enlightened", holders of the reins of society are not harassed by the taxman, thus justifying the use of the term *"Matthew effect"* in tax matters.

II.1.1. "Matthew Effect"

In a broad sense, Matthew effect refers to the mechanisms by which the more prosperous increase their economic advantage over others.

The term is attributed to the American sociologist Robert K. Merton ([585]). In an article published in 1968 ([586]), he sought to demonstrate how the best known scientists and universities tended to maintain their dominance over the world of research. Consequently other researchers have used the Matthew effect method in other contexts, especially in studies to show why in the learning process, the best learners tended to increase their growth. Derek de Solla Price later gave a more general explanation to the theory of "cumulative advantage" ([587]) and the idea joined the adage that wealth leads to wealth ([588]).In this sense, the Matthew Effect is the phenomenon that allows the more favoured (in any field) to acquire more than others ([589]).

---

[585] Born in Philadelphia, Pennsylvania July 5, 1910 and died in New York February 23, 2003, Robert K. Merton was a student at Harvard, where he studied under Pitirim Sorokin and Talcott Parsons. He is the founder of the sociology of sciences; he comes just before the interactionists and is part of "average range" functionalism. He is the father of Robert Merton, Nobel Prize economist.

[586] Robert K. MERTON, "*The Matthew effect*", *Science*, vol. 159, nº 3810, 1968, p. 56-63. The term *Matthew effect* surmises that the most accomplished, the most popular researchers always get more credit than their colleagues for equal work (often in cases of competitive discovery or collaborations). In the words of Merton : *The "Matthew effect" consists of the accruing of greater increments of recognition for particular scientific contributions to scientists of considerable repute and the withholding of such recognition from scientists who have not yet made their mark.*

[587] Comp. J. Cole et S. Cole, *Social Stratification in Science*, University of Chicago Press, 1973

[588] *The **Matthew effect** phenomenon refers to the rich getting richer.*

[589] Cf. http://www.abcm-concepts.com/2010/02/leffet-matthieu-matthew-effect.html

Jacques BICHOT on his part explores this concept and its impact on policies for reducing social inequalities, and notes a real qualitative inadequacy of social systems (health, education, housing ...) which engenders the stratification and inequality among social classes ([590]).

In the specific context of this discussion, we refer to the *Matthew effect* as a phenomenon of inequalities manifesting itself in the tax system of remuneration in the Democratic Republic of Congo, where low-income earners suffer the burden of taxes while the beneficiaries of large revenues are exempt.

Why then the term *Matthew Effect*? This is derived from a phrase in the Gospel according to St. Matthew: "He who hath shall be given a lot and he will live in plenty, but to him who has nothing, everything will be taken, even that which he possessed." To the rich, it shall be given; to the poor it shall be taken away, which in ordinary language means that the rich get richer, the poor get poorer.

II.1.2. The principle of equality of citizens' before tax

Taxes are cash benefits charged to natural persons and legal entities based on their ability to pay to cover public expenditure and the achievement of economic and social objectives set by public power. ([591]).

As such, they apply certain general principles which, in many states, have acquired a constitutional status. Such is the case with principles of legality and equality.

Legality demands that, unlike other mandatory levies, tax can only be assessed and collected by an enabling legislation.. This principle is enshrined in Article 174 of the Congolese Constitution of 18 February 2010 under which the law lays down rules on the base, the rate and manner of collection of any kind of taxes.

Contribution by public officers constitutes personal obligation for anyone living in the country. Exemptions or tax relief cannot be established except under the law.

On the other hand, the principle of equality aims to achieve equal distribution of taxes among all citizens based on their ability to pay. All taxpayers placed in the same position should be subjected to the same taxation. The fact remains that the legislature is free to determine the rules by which the contributory power of taxpayers should be assessed ([592]).

This principle is very crucial for the mobilisation of government revenue since a shift from this system amounts to negligence demoralises honest taxpayers ([593]).

In France, according to Christian De Brie, „the government promised to lower taxation on high incomes in order not to discourage the richest from earning. Meanwhile, they would benefit from the solidarity of other citizens who would take over half the wages of their servants: they were thus financially motivated to obey the law. With this tax cut, wealthier households would be exempt, while their staff, even under minimum wage, would pay tax on income" ([594]).

---

590 Jacques BICHOT, "The Matthew effect revisited", in *Social Law*, nº 6, Paris, Librairie technique et économique, 2002, pp. 575-581

591 Hamid DJOUNIDI, *Tax Law*, Paris, Hachette, 2000, p. 21

592 Ibidem, p. 40

593 Cf. UMBA di NDANGI, *Op. cit.*, p. 220

594 Christian De BRIE, "Taxation in favor of the privileged", in *http://www.monde-diplomatique.fr/1995/01/DE_BRIE/1123*

In summary, we note that many irregularities recorded in the revenue collection operations constitute various forms of interference with the constitutional principle of tax equality. All fraud, tax evasion and favouritism in any form whatsoever are in breach of this principle since they save a group of taxpayers from all or part of the expenses needed to tax payment which others perform in full.

II.2. Manifestations of fiscal injustice

The professional tax on earnings is one of the taxes where recovery is relatively easy by the system of withholding tax mentioned above. Nevertheless, it suggests some tax inequities, some of which are legal and others *de facto*. As part of this process, three cases are of concern, namely the various exemptions, the abuses orchestrated by some employers (especially international NGOs) and observed with indifference by political institutions.

II.2.1. Tax exemptions

The following are tax exempt under IPR ([595]):

1) The State, Provinces, Cities, Territories, Municipalities, Districts as well as administrative offices and other public establishments by law with no other resources than from budgetary subsidies;

- Religious institutions, scientific or philanthropic created by the application of Article 1 of Decree of 28 December 1888 and meeting the requirements of the Legislative Decree of 18 September 1965;
- Private associations designed to deal with religious, scientific or philanthropic works, with personality based on the application of Article 2 of Decree of 28 December 1888 and referred to in Article 5 of Decree-Law 18 September 1965;
- Public institutions created by the decree of July 19, 1926;
- Non-profit associations whose purpose is religious, social, scientific, or philanthropic deriving their civilian personality from special decrees;

2) The majority of remuneration and benefits affected by diplomats and diplomatic agents, consuls and consular agents accredited in the DRC in their official capacity when the state they represent, this being subject to reciprocity, that is, provided that the Governments whose representatives are granted the same immunity to diplomats and consular officials of the DRC.

It should also be noted that under the Cotonou Agreement signed in 2000 between ACP and the European Union, premiums paid to nationals in connection with the implementation of projects financed from funds of the European Union shall be IPR exempt. ([596]).

From the foregoing, we notice that the preferential tax treatment is not inherently bad, but it must be shielded by the supervisory mechanisms to prevent abuse. Although exemptions would include ingredients for possible tax evasion, breeding animosity of the majority of honest taxpayers and even denying substantial revenue to tax administration.

---

[595] Art. 94 of the ordinance-law n° 69/009 of 10 February 1969 as amended and supplemented to date.

[596] Cfr. Letter n° 042/COFED/FINANCES/2005 of 4 May 2005 of Minister of Finance and the NAO European Development Fund letter cited by MBOKO DJANDIMA, *Op. cit.*, p. 117

As an example, tax law exempts diplomatic missions and international agencies, including agencies of the UN system, from the obligation to declare the salaries paid to their employees. Note that though the problem does not arise for "tax immunity" beneficiaries, a concern remains for local staff despite the breach opened by Law No. 06/003 of 27 February 2006 amending and supplementing certain provisions of Law No. 004/2003 of 13 March 2003 on tax reform procedures.

To recap, the above Act obliges local staff employed by diplomatic missions and international organisations to personally take the remuneration statement allocated them and pay the corresponding tax.

All things considered, this solution in our view remains a «utopia», given that the tax culture is still not deeply rooted in the minds of the Congolese. Ernest Midagu Bahati states, «in a world largely turned to materialism, a world where the pursuit of money and wealth have become a cult, men seek to make more money and, once they get their end, they manifest a propensity to spend less and most importantly, pay less taxes»([597]).

In the same vein, Kola Gonze writes:

> "the smell of holiness or perfection is not the kind of prerogative for common mortals. In fact, no one can feel it, save at least for those who call themselves believers, as they approach the divine creator or his angels. The imperfection that characterizes the human being since his creation has been manifested when the latter, made in the image of his creator, violated the principles of good governance and loyalty established during his first sphere of earthly existence" ([598]).

Economic and financial crime in general and fraud in particular, have been in existence since time immemorial. As noted by Andre Bossard, a former secretary general of Interpol, „the characteristics of serious crime are reminiscent of modern society, namely the constant search for profit, control instruments and the use of technology as well as mobility" ([599]).

As a result, the freedom given to locals employed by international organisations can only strengthened these *imaginary treasures* geared towards tax evasion. One just needs to consult the Directorate General of Taxes archives to understand the statistics of those who perform this legal duty. Yet, compared with employees of local businesses, those from international agencies are relatively better paid.

II.2.2. Reluctance among members of political institutions towards the IPR

It should be noted that wages and benefits granted to any person related to the state by pact or by mandate are taxable by the IPR. These include wages, salaries, fees, benefits accorded to members of public institutions (Government, Parliament Courts and Tribunals), officials, public servants, etc. ([600]).

Unfortunately, the general lack of a tax culture among the Congolese and the influence peddling has become a cult in Congo rendering these legal provisions ineffective. Taxation

---

[597] MIDAGU BAHATI, E., *"Fraud and tax evasion: problems and struggles"*, in *Congo Fiscalité*, n° 001-2008, pp. 12-15.

[598] KOLA GONZE, "The fight against predation and economic and financial transgressions as part of criminal policy. Case of tax and customs fraud, in AKELE ADAU, *Réforme du Code pénal congolais,* tome II *: A la recherche des options fondamentales du Code pénal congolais*, Kinshasa, Editions du Cepas, 2008, p. 274

[599] André BOSSARD, cité par KOLA GONZE, *"The fight against predation and economic and financial transgressions as part of criminal policy. The case of tax and customs fraud"*, *Op. cit.*

[600] Ref. above

remains theoretical for salaries, wages and other benefits accorded to members of political institutions and members of their cabinets.

A. From the members of parliament

The Congolese Government opted for withholding tax of 30% on the salary of all politicians to increase state revenue. The Budget Minister had explained that, during his tenure, the transaction did not involve the national MPs only, but the entire political body in the Republic.

However, only a few months later, the Congolese MPs in their usual antisocial behaviour paid their tax. Okapi.net, members went ahead to receive the emoluments they had shunned in March 2009 ([601]); Certainly, the funds were available to the lower chamber, but the people's elected representatives had refused to touch it to protest against the government's withholding tax on their income.

> *"Our money should have been in our possession already, but there was an inadvertent error in the calculation of our pay. We have since returned the money to the bank for the error to be corrected. We asked the auditor's office of the National Assembly to correct the error"*, explained MLC MP Boongo Nkoy told UN radio Okapi.

When asked to explain what the error was, the same member alluded to the parliamentarians' withholding tax on emoluments.

Modeste Bahati, then a quaestor of the National Assembly confirmed the displeasure of his colleagues, stating that members, unanimously refused to collect their salaries. They considered that the government had violated the law by deducting their salary at source, since the Congolese tax system is declarative (sic).

This series proves the ignorance of the law by the legislators. The declaration system does not involve all taxes. In this case, professional tax on earnings is still held by the one who attributes such remuneration, except for international organisations that are exempt from this obligation vis-à-vis the remuneration paid to their local commitment.

This point proves ignorance of the law by the legislators.

This attitude displayed by parliamentarians whose enviable emoluments can potentially disturb social peace. For example, civil servants threatened to boycott their "AIDS" ([602]) on the grounds that they are expected to sacrifice too much, yet the politicians are having it easy! If times are tough for the parliamentarians who are deducted 30%, then what can be said of those employees who currently earn $ 30? Even with that tax deduction at source, no parliamentarian can earn less than $ 3,000, reports "Le Palmarès" ([603]).

However, the Congolese are not alone. Paulin Manwelo cites among the cases presented by Mabika Kalanda, whose work he analyses, the corrupt and greedy politicians and

---

601 Lire Okapi/MCN, "MPs refuse to collect their salaries in protest against withholding taxes at source", in *http://www.mediacongo.net/show.asp?doc=12371*, 15 April 2009.

602 Refers, not to the traditional *"Acquired Immunodeficiency Syndrome"*, but rather to *"Insufficient Salary Acquired through great difficulties"*

603 Le Palmarès n° of 16 April 2009

quotes the words of the author, «once elected our parliamentarians and ministers discuss compensation (...). At their first meeting, they discuss their allowances ranging from 100,000 to 500,000 francs per year»([604]).

It should be noted that this evil is not a feature of the „spoiled children" ([605]) of "the Hemicycle of Lingwala". Professor Roger Kola Gonze ruefully puts it, "many political and military activities evade tax payment. Some politicians and military grease themselves from exemptions at will. [But] this misuse of the concept of authority and public force creates a negative impact on tax collection. Indeed, it does not measure the actual effects of such exemptions on the country's development "([606]), hence the need to properly implement the zero tolerance policy by criminalising influence peddling.

B. Criminalization of the trading of favours

To counter the influence on peddling, which is the stumbling block in the taxation of "white collar Kulun" revenues ([607]), the criminal provisions criminalising this kind of mentality should be applied.

In France, this behaviour is criminalised specifically the opposition to tax assessment or collection. ([608]). French legislature represses the actions of any person who, by his conduct, obstructs the establishment of tax, organises collective refusal, incites the public to refuse or delay tax payment, or more generally opposes the fulfilment of duties of agents responsible for applying the tax law ([609]).

CGI Article 1741 applies to any person who embezzles or wilfully attempts to evade the assessment or partial payment of tax. Two elements are used to characterize the crime of tax evasion:

- The material element: the existence of facts to enable the taxpayer to evade tax;
- The intentional element: being animated by an intention to defraud.

Thus anyone who, by assault, threats or concerted effort , organises or attempts to organise collective tax refusal will be liable to the penalties provided for in Article 1 of the Act of August 18, 1936 repressing the damages on the Nation's credit ([610]).

---

604 Paulin MANWELO, "The trial of Congolese mentality in the work of Mabika Kalanda" in *Congo-Afrique*, n° 441, janvier 2010, pp. 41-54

605 Expression by TSHITENGE LUBABU M. K., "Parliamentarians, the Republic's 'spoilt children'", in *Jeune Afrique,* n° of 24 February 2010

606 KOLA GONZE, "Analysis of the people's economy and its formalization in the DRC", in BAKANDEJA wa MPUNGU and Bernard REMICHE, in "From a people's economy to a taxable economy. Proceedings of the *INEADEC* International Symposium (19 September 2008), Bruxelles, Larcier, 2010, pp. 143-190

607 The "Kuluna" is a phenomenon that has assumed alarming proportions in Kinshasa where groups composed of gangs and armed with machetes, knives and even firearms terrorize the populations of some areas of the Congolese capital. And "white collar Kuluna" is used to describe white-collar criminals, who unfortunately find themselves among the elite and even within public institutions. Find details in the following articles: Le Phare, "*Hunting down white collar ''Kuluna (thieves)'' resolutely revived by the Head of State as part of the government's ''zero tolerance!''*", in http://www.digitalcongo.net/article/68742, 26 July 2010; La République, *"Zero Tolerance is on. "White Collar Kuluna" under siege*, in http://www.7sur7.cd/index.php?, 30 July 2010 ; LP/MCN, *"Zero Tolerance: Luzolo Bambi attacks the untouchables",* in *mediacongo.net*, 30 August 2010.

608 Art. 1737 et 1746, *General Tax Code* (CGI)

609 Gérard LEGRAND, *Fiscal responsibility for corporate leaders*, Paris, Editions du Juris-Classeur, 2003, p. 221

610 Art. 1747 *General Tax Code*.

In summary, it should be remembered that mobilising e collective tax refusal requires the implementation of assault, threats or concerted manoeuvres that can be directed against the tax agents or against the taxpayers. On the other hand, the implementation of these should target refusal tax payment by a group of persons or class of taxpayers.

We can, together with Jacques BRURON, conclude that members of the Congolese political institutions were agitating against taxes or were collectively opposed to the establishment of the tax base. ([611]).

II.2.3. Parable of „the poor man who had one little ewe lamb" ([612])

Infatuated with Bathsheba, the wife of Uriah the Hittite, King David committed adultery with her and killed her husband at the battlefront. Prophet Nathan announced Yahweh's wrath in the following parable:

> *There were two men in a city, one was rich, and the other was poor. The rich man had many small and large livestock while the poor had only one sheep that he had purchased. He fed her, she grew up beside him with her sons, and she ate her bread and drank of his cup and slept in his bosom: she was to him like a daughter. One day the rich man received a visitor. As he did not want to take from his livestock to prepare a meal for the traveller, he stole the poor man's sheep and prepared it for his visitor.*

This parable applies to abuses by some employers in relation to their employees. In effect, research conducted among employees of some companies and NGOs, especially international, showed repeated violations of the tax and social provisions applicable in the DRC.

This refers specifically to withdrawals done in defiance of the rules governing IPR basis of assessment. Admittedly, our field investigations reveal that some employers are abusing the term „gross salary" used by the tax legislator to determine the tax base at IPR. Moreover, the applied rate is sometimes very high.

A. Taxable incomes

Some employers collect tax not only on the taxable income as mentioned in Article 47 of Legislative Ordinance No. 69/009 of 10 February 1969 on taxable incomes as amended and supplemented specifically by law No. 73/003 of January 5, 1973, by Law No. 77/016 of July 25, 1977, by Ordinance-Law No. 84-022 of 30 March 1984 and by Decree-Law No. 109/2000 of July 19, 2000, but also on un-taxable income under Article 48 of the text.

In this regard however, the Departmental circular No. 4133 of 23 December 1988 on the interpretation of Article 48-3° of the Ordinance-Law No. 69/009 of 10 February 1969 is clear: it refers to "gross salary" or "gross pay" as the total amount paid in cash as compensation, ***thereby excluding the value of benefits in kind and the sums in form of compensation or benefits (housing, transportation, medical expenses, statutory family allowances, etc..)*** and without deduction of social security contributions or union ([613]).

---

[611] Jacques BRURON, *Criminal tax law,* Paris, LGDJ, 1993, pp. 73-74
[612] Cf. 2 Samuel 11 and 12.
[613] Ref.MBOKO N'DANDIMA, *Op. cit*. p. 115

Similarly, much of the doctrine ([614]) that addresses this issue indicates that for the calculation of the IPR, payrolls or tax base is analysed by instalment and as and when, the rate increasing by instalment. The sum is deducted from the cost of accommodation (to a maximum of 30% of salary), transportation and family allowances for dependent children, leaving a net pay as the base for taxation.

In reality, tax on professional earnings as scheduled on revenue targets any notion of enrichment for the recipient of such income. However, transportation, to name just one case, is considered income earned by the employee, but rather as a reimbursement of professional expenses incurred by the worker. As for housing and medical care, these are social benefits expressly exempt from the IPR base by the legislature.

B. The application of the tax rate

It has been stated farther on that the IPR tax rate is progressive and changes according to the consistency of income. This progression is either overall-based, or on block- based or level- based.

Unfortunately, the rate applied by some companies does not in any way reflect current tax provisions, implying that employers consider not only the overall income of their employees, but they apply very high rates.

For example, Ms. Mimie-Aimee M., agent of an international humanitarian NGO working in Kinshasa told us she was earning a basic salary of 271,116 FC, but the tax was more than 101.086FC ([615]). In fact, this tax is based on the gross pay which includes, apart from the 271.116FC basic salary, housing allowance (100.584FC) and transport allowance (31.896FC).

To suppress this behaviour by employers, it is important to invoke Article 321 of the Labour Code which imposes a fine not exceeding 20.000FC.,According to certain provisions of Article 112, which is of interested to this discussion, though allowing certain deductions, renders null and void any provision giving by the employer the right to impose pay cuts on damages.

Although these deductions are allowed, they can only be carried in accordance with the statutory and regulatory provisions. This means that any employer who arbitrarily applies them, without complying with the rules required for their deduction, will be answerable for his actions before the law under section 321 mentioned above.

Unfortunately, the penalty to be incurred is not likely to deter employers from resorting to corrupt practices, *contra legem*.

In effect, there is an ingenious legal response to the ineffectiveness of traditional means of punishment for offenses committed at the workplace. Certainly, when the expected gain for the commission is greater than the fine to which the perpetrator may condemned, the general tendency is for the perpetrator, for economic rationality, to transgress the law. It is easier, for example, for a manufacturer or merchant to accept losing on the legal ground when he is satisfied to have won economically ([616]).

---

[614] Ref. mainly JAGENEAU, GH., *Op. cit.*, pp. 68-69 ; Jean-Pierre CASIMIR and Martial CHADEFAUX, *Droit fiscal. Manuel et applications*, 2nd éd., Paris, Nathan, 2008, p. 301 ; Jean-Jacques BIENVENU and Thierry LAMBERT, *Droit fiscal*, 3rd éd., Paris, PUF, 2003. p. 104 ; Emmanuel DISLE and Jacques SARAF, *Droit fiscal*, Paris, Dunod, 2004, p. 435

[615] Interview done in Kinshasa, le 03 December 2009

[616] MANZANZA LUMINGU, "The awarding of punitive damages: a new dimension in the suppression of counterfeiting of intellectual works," in *Paroles de Justice*, 2010.

CONCLUSION

In this paper, we have looked at remuneration in the Democratic Republic of Congo and uncovered some difficulties experienced by employees on taxes.

We analysed the remuneration and tax regime employment regulation while explaining its concept and circumscribing its constituent components before determining the modalities for its payment.

We then introduced the IPR as a taxation method by placing it in the general context of scheduler taxes on earnings. We noted that the IPR is now targeting diverse remunerations, even including the salaries of members of political institutions.

In all cases, we deplored the abuses caused by the employers tax deduction.. In determining the tax base, some employers even include revenues that should be tax exempt. Therefore it is necessary for labor inspectors and tax officials to protect employees who are victims of such abuse.

In addition, the apparent reluctance observed among the majority of the members of political institutions breaks the principle of equality of all citizens in taxation. Thus effective mechanisms should provide and allow the tax authorities to collect the tax in the hands of those who have a lot of wealth through state revenue, but refuse to contribute to the exchequer.

Certainly, as we know, the Congolese tax system is declarative. This means that it is based on the taxpayer's good faith when called upon to declare their taxable property whose assessment shall be finally confirmed by the tax officer. It is at this level that economic and financial predation plays out constituted by tax evasion ([617]).

It is at this point that tax crime law should be applied. It has been observed in comparative law that „even when reduced to an adjuvant, tax crime law is a rich discipline: rich in indictments, in procedural specifics and peculiarities relating to sanctions"([618]), which is not the case in Congolese law where the practice of fraud seems to be tolerated (…) ([619]).

---

[617] BAKANDEJA wa MPUNGU, *"Criminal involvement by the police in the fight against economic and financial corruption"* in *Réforme du Code pénal congolais,* vol. II*: A la recherche des options fondamentales du Code pénal congolais*, Kinshasa, Editions du Cepas, 2008. pp. 255-271

[618] Ref.Jean Didier WILFRID, *Droit pénal des affaires*, 6th éd., Paris, Dalloz, 2005.

[619] BAKANDEJA wa MPUNGU, *"Criminal involvement by the police in the fight against economic and financial corruption"*, in *Op.cit.*

REFERENCES

BAKANDEJA wa MPUNGU, G., *Les finances publiques. Pour une meilleure gouvernance économique et financière en République Démocratique du Congo*, Bruxelles, Larcier, Kinshasa, Afrique Editions, 2006.

BAKANDEJA wa MPUNGU, « L'amélioration de la gouvernance économique et financière : une conditionnalité de la relance en DRC », in TAMBWE KITENGE et MAKOSSO A.C. (dir.), *RD Congo, les élections et après ? Intellectuels et politiques posent les enjeux de l'après-transition*, Paris, L'Harmattan, 2006.

BENABENT, A., *Droit civilian. Les obligations*, 4ème éd., Paris, Montchrestien, 1994.

BICHOT, J., « L'effet Matthieu revisité », in *Droit social*, nº 6, Paris, Librairie technique et économique, 2002, pp. 575-581

BIENVENU, J.J. et LAMBERT, T., *Droit fiscal*, 3ème éd., Paris, PUF, 2003.

B.I.T., *Rapport mondial sur les salaires*, Genève, 2009.

BOUVIER, M., *Introduction au droit fiscal général et à la théorie de l'impôt*, Paris, LGDJ, 2004.

BRURON, J., *Droit pénal fiscal*, Paris, LGDJ, 1993

CASIMIR, J.P. et CHADEFAUX, M., *Droit fiscal. Manuel et applications*, 2ème éd., Paris, Nathan, 2008.

COLE, J. et COLE, S., *Social Stratification in Science*, University of Chicago Press, 1973.

DISLE, E. et SARAF, J., *Droit fiscal*, Paris, Dunod, 2004.

DJOUNIDI, H., *Droit fiscal,* Paris, Hachette, 2000.

DUQUESNE, F., *Droit du travail*, 2ème éd., Paris, Gualino éditeur, 2003.

GUERY, G., *Pratique du droit du travail*, 11ème éd., Paris, Gualino éditeur, 2003.

HESS-FALLON, B. et SIMON, A.-M., *Droit du travail*, 16ème éd., Paris, Dalloz, 2004.

JAGENEAU, GH., *Bref aperçu de droit congolais du travail*, Editions Shalamo, Likasi, 2001.

KALONGO MBIKAYI et AKELE ADAU, *Réforme du Code pénal congolais,* tome I : *Etat des lieux et inventaire des problèmes du droit pénal congolais*, Kinshasa, Editions du Cepas, 2008.

KOLA GONZE, « Analyse de l'économie populaire et de sa formalisation en DRC », in BAKANDEJA wa MPUNGU et Bernard REMICHE, *D'une économie populaire à une économie fiscalisée. Actes du Colloque international de l'INEADEC* (19 septembre 2008), Bruxelles, Larcier, 2010, pp. 143-190

KOLA GONZE, *Cours de Droit fiscal*, Université de Kinshasa, Faculté de Droit, 1ère Licence, 2009-2010.

KOLA GONZE, « La lutte contre les prédations et prévarications économiques et financières comme élément de politique criminelle. Cas de fraude fiscale et douanière », in AKELE ADAU, *Réforme du Code pénal congolais,* tome II : *A la recherche des options fondamentales du Code pénal congolais*, Kinshasa, Editions du Cepas, 2008, pp. 274

KUMBU ki Ngimbi, *Droit du travail. Manuel d'enseignement*, Kinshasa, Galimage, 2010.

LANGLOIS, P., *Droit du travail,* 6ème éd., Paris, Sirey, 1987.

LEGIER, G., *Droit civilian. Les obligations*, 14ème éd., Paris, Dalloz, 1993.

LEGRAND, G., *La responsabilité fiscale des dirigeants d'entreprise*, Paris, Editions du Juris-Classeur, 2003.

LUWENYEMA LULE, *Précis de droit du travail zaïrois*, Kinshasa, Editions Lule, 1989.

MALAURIE, P. et AYNES, L., *Cours de Droit civilian*. Tome VI, *Les obligations*, 6ème éd., Paris, Cujas, 1995.

MALHERBE, J. et THILMANY, J., *Cours de droit fiscal. Impôts sur les revenus*, UCL, 1992-1993.

MANWELO, P., « Le procès de la mentalité congolaise dans l'œuvre de Mabika Kalanda », in *Congo-Afrique*, n° 441, janvier 2010, pp. 41-54

MANZANZA LUMINGU, « La condamnation aux dommages-intérêts punitifs : une nouvelle dimension dans la répression de la contrefaçon des œuvres de l'esprit », in *Paroles de Justice*, 2010.

MANZANZA LUMINGU et ENAGOGO AGADUSAMESO, « Le critère de la territorialité réelle en droit fiscal congolais : esquisse d'une réforme », in *Mouvements et Enjeux Sociaux*, n° 61, juillet – août 2010.

MBOKO DJ'ANDIMA, *Code général des impôts*, 2ème éd., Kinshasa, PUC, 2009.

MERTON Robert K. « The Matthew Effet », *Science*, vol. 159, nº 3810, 1968, p. 56-63

MUKENZA, D., « Congo-Kinshasa: les députés crient famine », in *http://fr.allafrica.com/stories/200902040776.html*, 4 février 2009

NOEL, C., *Droit fiscal*, Paris, Gualino éditeur, 2009, p. 336

NZANGI BATUTU, « L'institution du salaire », in NDOMELO KISUSA Kaïmba et KIENGE-KIENGE Intudi (dir.), *Droits et obligations du travailleur en droit congolais. Apparence ou réalité d'un conflit d'intérêts*, Louvain-la-Neuve, Academia Bruylant, Kinshasa, Editions Kazi, 2003, pp. 113-126

PANSIER, F.J., *Droit du travail. Relations individuelles et collectives*, 3ème éd., Paris, Editions du Juris-Classeur, 2003.

Okapi/MCN, « Les députés refusent de percevoir leurs émoluments pour protester contre la retenue à la source de l'impôt », in *http://www.mediacongo.net/show.asp?doc=12371*, 15 avril 2009.

TABALO Maakabi-Kyela et BOBELE Boponde, « Statut juridique, financier et sécurité sociale des députés provinciaux », in PNUD, *Mandats, rôles et fonctions des pouvoirs constitués dans le nouveau système politique de la République Démocratique du Congo*, Kinshasa, PNUD, 2007, pp. 120-130

TSHITENGE LUBABU M. K., « Les députés, ces „enfants gâtés" de la République », in *Jeune Afrique,* n° du 24 février 2010

UMBA di NDANGI, R., *Finances publiques. Commentaires de principes, procédures, pratiques des origines à nos jours en République Démocratique du Congo*, Kinshasa, B.E.C.I.F., 2006.

WALBERG Herbert J. et SIOW-LING Tsai, « Matthew Effects in Education », *American Educational Research Journal*, vol. 20, nº 3, 1983, p. 359-373.

WILFRID, J. D., *Droit pénal des affaires*, 6ème éd., Paris, Dalloz, 2005. with many cases during this period.[620]

[620] *Idem,* pp.161-162.