

DR Congo as a State of Law – Constitution and Reality

By *Hartmut Hamann*, Stuttgart*

The report does not provide a complete overview. It was written following a working visit to the *Université Catholique de Bukavu* in the spring of 2009 and addresses current aspects of constitutional reality.¹

I. The Constitution

1. *Origins of the Constitution*

The *Constitution de la République démocratique du Congo* has been in force since 18 February 2006 when it was accepted in a referendum. It had been preceded by a transitional constitution on the basis of an *Accord Global et Inclusive* of 17 December 2002, an agreement with the warring parties in the Congo, each supported by various neighbouring countries, who had agreed to joint reorganisation and government of the country.

The preamble explores the idea of the state of law²:

Nous, Peuple congolais,

Uni par le destin et par l'histoire autour de nobles idéaux de liberté, de fraternité, de solidarité, de justice, de paix et de travail;

Animé par notre volonté commune de bâtir, au cœur de l'Afrique, un Etat de droit et une Nation puissante et prospère, fondée sur une véritable démocratie politique, économique, sociale et culturelle;

Considérant que l'injustice avec ses corollaires, l'impunité, le népotisme, le régionalisme, le tribalisme, le clanisme et le clientélisme, par leurs multiples vicissitudes, sont à l'origine de l'inversion générale des valeurs et de la ruine du pays; [...]"

Article 1 of the current Constitution emphasises that DR Congo is a democratic state of law. Its bodies are: the president, the parliament, the government, the courts, Article 68.

A transparent separation of the powers and the independence of the judicial body are integral aspects of a state based on the rule of law.

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¹ This report is based on a lecture given at the annual conference of the *Arbeitskreis für Überseeische Verfassungsvergleichung* in Kassel on 27 June 2009. For this publication it has been slightly revised, updated and supplemented with a few footnotes.

² The text of the Constitution can be downloaded at www.leganet.cd.

2. *Legislative*

The parliament has two chambers: the assembly of representatives and the senate. It adopts the laws and controls the government, Article 100. The representatives are elected by the people and the senators are elected by the provincial parliaments, each for a five-year term, Articles 101, 103 and 105.

3. *Executive*

The president is elected directly by the people for a period of 5 years, Article 70. He appoints the prime minister, Article 78. The ministers are appointed by the president after having been nominated by the prime minister. The prime minister is responsible for the execution of the laws, Articles 19, 92. The administration supports the government. The president supervises compliance with the Constitution, Article 69.

4. *Judiciary*

The courts are independent of the legislative and the executive, Article 149. The *Conseil Supérieur de la Magistrature* decides about the appointment and revocation of judges, Article 152.

5. *Horizontal separation of powers*

DR Congo is a decentralised unitary state, not a federal state. The provinces have the character of a legal person, Article 3. The representatives are elected directly to the provincial parliaments for a 5-year term. The provincial governors are elected by the provincial representatives and appointed by presidential decree, Article 198. The provinces receive 40 % of the state income, Article 175.

II. **Reality**

1. *Legislative*

The parliamentary elections took place in 2006 with the financial and logistical support of the international community. On 25 March 2009, Vital Kamerhe, the elected president of the assembly of representatives, Article 111 of the Constitution, announced that he was stepping down, not on request from the assembly of representatives but at the insistence of the governing party of which the state president is a member. The reasons behind this move were as follows: In November 2008 the state president had decided not to hold meetings with representatives and senators in the palace of the state president any longer but in the office of the president of the national assembly. As the executive power installed itself in the middle of the legislative, this included a symbolic message. In December 2008 the state president signed a non-disclosed treaty with the neighbouring country of Rwanda which

Chart 1 shows the current division of DR Congo into provinces:

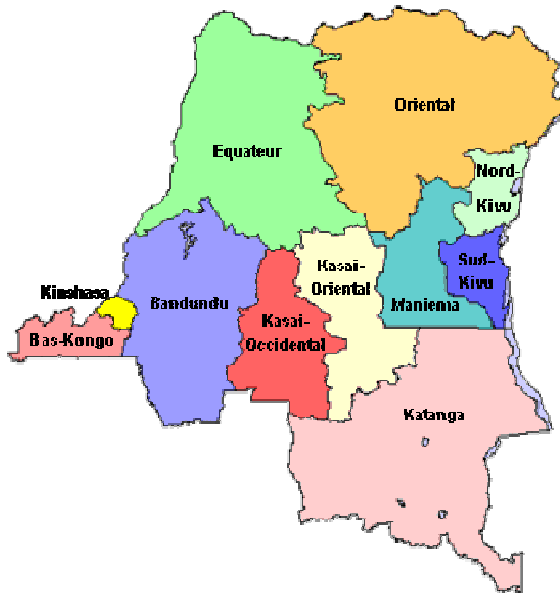


Chart 2 shows the new division provided in Article 2 of the Constitution which has not yet been implemented:



permitted the presence of the Rwandan Army in Nord-Kivu in the east of the DR Congo with the aim of fighting against rebels. When the Rwandan army moved in in January 2009 Vital Kamerhe expressed his regret in an interview with Radio France International and Radio Okapi that he and the parliament had not been informed by the government, contrary to Article 213 of the Constitution. It was then that the leadership of the governing party demanded that he resign and later also stated who was to be his successor. When this resignation was demanded parliament was in recess. Vital Kamerhe stated that if he were to resign then he would only do so in a plenary session of the parliament which could also decide about his removal from office. Such session took place in Parliament on 25 March 2009. Vital Kamerhe announced his resignation; "*Je vous prie de bien vouloir accepter ma démission sans débat ni vote*". The candidate proposed by the state president, the general secretary of the governing party, Evariste Boshag, was elected. Shortly before the election numerous other candidates declared that they would not be campaigning.³

2. Executive

State president, Joseph Kabila, was elected in November 2006. The other candidate, Jean-Pierre Bemba, had to leave the country a few months after the losing the election and after being involved in an armed dispute between the presidential guard and his private army. He fled to Portugal and now has to answer to the International Court of Justice.⁴ The correct legal form was also observed in this case: Jean-Pierre Bemba had refused to do without the militia who guarded him, as even during the election campaign there had been disputes between the presidential guard and the followers of Bemba.

3. Judiciary

Ordinary jurisdiction has the following basic structure: *Tribunal de Grande Instance, Cour d'appel, Cour de cassation*.⁵ There are also tribunals known as "*tribunaux de paix*" which will replace the traditional courts which decide in accordance with customary law which

³ Here for example: *Mantuba-Ngoma Mabiala*, Must parliamentary president Vital Kamerhe really resign?, http://www.kas.de/proj/home/pub/7/1/-/dokument_id-15844/index.html; *Mantuba-Ngoma Mabiala*, A new incumbent for the chair of the national assembly in DR Congo, http://www.kas.de/proj/home/pub/7/1/year-2009/dokument_id-16266/index.html; *Radio Okapi*, Vital Kamerhe démissionne de son poste de président de l'Assemblée nationale, <http://www.radiookapi.net/index.php?i=53&a=22724>; *Radio Okapi*, Vital Kamerhe, après sa démission: «Mon grand parti est la nation congolaise», <http://www.radiookapi.net/index.php?i=53&a=22728>; *Radio Okapi*, Assemblée nationale : Vital Kamerhe dépouillé de sa garde rapprochée, <http://www.radiookapi.net/index.php?i=53&a=22843>.

⁴ Details on the proceedings can be found on the website of the International Court of Justice: <http://www.icc-cpi.int>.

⁵ Code de l'organisation et de la compétence judiciaires (Code d'O.C.J.).

has been passed down. The act which stipulates this has existed since 1982 and is based on an act from 1968. However, traditional jurisdiction continues to play a major role. Even where it has officially been done away with because a *tribunal de paix* has been set up it frequently enjoys greater trust from the people than state jurisdiction. Example: Uvira. There the traditional court which has officially been done away with administers justice in a building right next to the *tribunal de paix*.⁶ This probably looks quite different in the capital of Kinshasa where there are eight *tribunaux de paix*.⁷

Where are the problems:

a) Officially no judges or state prosecutors have been appointed since 1997.⁸ It has been suggested for many years that young lawyers should be reappointed. A selection procedure for appointing one thousand additional judges and state prosecutors was launched in autumn 2009.⁹

b) The number of judges is not very high. For example in the province of Sud-Kivu which has approximately 4.5 million inhabitants there are 22 judges (for civil law, criminal law, employment law and administrative law). There is one *tribunal de grande instance* in Bukavu, another one in Uvira and also a *tribunal de paix* in Uvira. Finally there is the *cour d'appel* in Bukavu.¹⁰

The equipment of the courts in Sud-Kivu has principally been financed with European funds.¹¹ Access to justice outside the major towns is very difficult also because of the lack of transport infrastructure.

c) The justice system is considered to be corrupt. In the ranking of Transparency International DR Congo ranks 171st out of 180.¹² The working conditions for the courts are difficult.¹³

d) There is doubt about the independence of the judiciary. Example: On 9 February 2008 the State President, Joseph Kabila, issued several decrees subject to which numerous judges were retired and new judges were appointed. Grounds: The *Conseil supérieur de la*

⁶ Mastaki, Le droit au juge dans les milieux ruraux du Sud-Kivu, in: African Law Study Library Vol. 3 (Expected date of publication: 2010).

⁷ Manzana Lumingo, De l'organisation et du fonctionnement des tribunaux de paix à Kinshasa, in: African Law Study Library Vol. 2, p. 99 ff. (Expected date of publication: 2010).

⁸ Manzana Lumingo (Fn. 7) p. 69/80.

⁹ For details see: www.justice.gov.cd

¹⁰ Information by word-of-mouth from the judicial authorities there.

¹¹ REJUSCO programme (*Restauration de la justice à l'est de la RDC*), www.rejusco.org.

¹² http://www.transparency.de/fileadmin/pdfs/Korruptionenindizes/08-09-23-CPI2008_Rangliste_deutsch.pdf.

¹³ Mvioki Babutana describes this in a tangible way: Le système judiciaire congolais: Etat des lieux et perspectives d'avenir in Mabilia Mantuba-Ngoma/Hanf/Schlee (Ed.), La République Démocratique du Congo: Une démocratisation au bout du fusil, p. 175 ff.

Magistrature provided in the Constitution (*Article 152*) had not yet been newly constituted and therefore the president considered himself entitled to act in the interests of the country. The parties concerned were filled with consternation. Constitutional experts among other things pointed out that the *Conseil supérieur de la Magistrature* had existed before the new Constitution came into force and was not got rid of or newly constituted due to the new constitution. It was said that as long as it did not have new members it remained authorised to make decisions in its current permutation and that it was the task of the president to protect the Constitution. This criticism was made towards the relevant authorities.¹⁴ As a result, the decrees were corrected. Some judges stayed in office others more or less willingly retired. Despite all this the episode shows that the threshold of the executive is relatively low to influence the judiciary. The difficult area of conflict between the fight against corruption in the judiciary by the president and the influence of the executive on the judiciary remains topical. New decisions on appointing and dismissing judges illustrate this.¹⁵

4. *Horizontal separation of powers*

Laws on the new order of the provinces, the development of the provinces and the regional interplay were promulgated in July and October 2008: Loi n° 08/012 du 31 juillet 2008 portant principes fondamentaux relatifs à la libre administration des provinces; Loi organique n° 08/016 portant composition, organisation et fonctionnement des entités territoriales décentralisées et leurs rapports avec l'Etat et les provinces; Loi organique n° 08/015 du 7 octobre 2008 portant modalités d'organisation et de fonctionnement de la conférence des gouverneurs de province.

When the planned elections will take place on the local and regional level has not yet been decided. When they take place international support will again be provided. The Security Council has extended the UN Mission to the DR Congo by resolution 1856 (2008) from 22 December 2008 until 31 December 2009. It currently has 19,815 soldiers, 760 military observers and 1,141 policemen and also administrative employees.

Their task is¹⁶

"to support the strengthening of democratic institutions and the rule of law and, to that end, to

a) Provide advice to strengthen democratic institutions and processes at the national, provincial, regional and local levels;

[...]

¹⁴ *Manzana Lumingo*, (Fn. 7) p. 69/83.

¹⁵ Here e.g. *Radio Okapi*, Joseph Kabila met en retraite le 1^{er} président de la Cour suprême de justice, www.radiookapi.net/index.php?i=53&a=23998.

¹⁶ <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20SRES%201856.pdf>.

d) In close coordination with international partners and the United Nations Country Team, provide assistance to the Congolese authorities, including the National Independent Electoral Commission, in the organization, preparation and conduct of local elections;

e) Assist in the establishment of a secure and peaceful environment for the holding of free and transparent local elections that are expected to be held by the end of June 2009. ..."

Whether and how the planned decentralisation is implemented is currently open. The planned redivision of the provinces is one of the topics on which a commission to revise the Constitution set up by the president in the summer 2009 advises.¹⁷

The question still remains how decentralisation can function in a country which has difficulty in keeping its territory completely under control and which has a reputation for being more than averagely corrupt. In addition sheer size and diversity of the country constitutes a challenge.

One solution could be an attempt to understand the decentralisation less as the distribution of central power to regions and provinces and more as the chance to make the new organisation from the bottom up possible, that is to offer local and regional communities the framework with which they can implement a new organisation within the meaning of the subsidiarity principle. Such a new organisation could strengthen the willingness to administer at one's own responsibility and indirectly to promote the development of a state accepted by the population and therefore strong in a positive way. Such an approach could also make it possible to build on circumstances which have a strongly regional character. Those who are directly affected could contribute their ideas directly. One of the tasks of the central state would be to initiate and guarantee such a new organisation. How the structure of a state of law in the Democratic Republic of Congo can be approached from the bottom up in situ without simply assuming European or American theories will have to be developed by Congolese researchers and practitioners. Some authors talk about "tropicalisation".¹⁸ It is probably correct that a state of law should and can always be structured and developed in the historical and cultural context.¹⁹

¹⁷ *Radio Okapi*, RDC: une commission de révision de la Constitution, Kengo wa Dondo confirme, <http://www.radiookapi.net/index.php?i=53&a=24847>; *Weibezahl*, Wohin geht die Reise?, http://www.kas.de/proj/home/pub/7/1/year-2009/dokument_id-17715/index.html.

¹⁸ *Malanda Nsumbu*, La Nouvelle Constitution de la RDC: Aspects juridiques politiques économiques et socioculturels, Kinshasa 2003, p. 44.

¹⁹ Currently relating to decentralisation *Kumbu and Mantuba-Ngoma Mabiala* in *Dezentralisierung in der DR Congo, 2009*, published by Konrad-Adenauer-Stiftung; on the development of the constitution *Hamann*, *Die Übergangsverfassung der Demokratischen Republik Kongo – Föderalismus oder Zentralismus?* in *ZaöRV* 65 (2005), p. 467 ff.; *Kalala Ilunga Matthiesen*, *Eine Analyse aus staatstheoretischer, verfassungsrechtlicher und völkerrechtlicher Sicht*.

IV. Summary

The Constitution of the DR Congo offers a framework for the development of a state of law which could accurately reflect the special geographical, cultural, historical and political features of this country. Whether the elite groups in power wish this appears to be an open issue. It must also be determined categorically what influence the international community will and should have here and whether it can decide to take concerted action with the view to the development of a state of law.

In view of the author there is much to suggest that the development and structure of a state of law in the Democratic Republic of the Congo can only succeed if this starts at the bottom and works its way up by local and regional communities organising themselves and assuming responsibility. The task of the central state is to make this possible and to provide and secure a framework for this. The international community can support this. The better the coordination among European countries in so doing, the greater the prospect of success. Local elites could and would have to further develop the state of law structures. This gives rise to the question what motivation there is for such elites to create state of law structures.

and debtors against the background of the incentives generated by debt relief programs. Free-riding behavior of emerging creditor countries and disincentives of debtor countries are the results of an unhampered extension of loans by multilateral creditors. Using a simple economic model of autocratic regimes, this paper shows that there is a trade-off between granting debt relief and good governance. The trade-off suggests that granting more debt relief will worsen the institutional setting and thus strengthen the position of a dictator. These developments are not compatible with a sustainable debt position. We try to propose an institutional arrangement by creating incentives for creditors and debtors which might be able to overcome this trade-off. To avoid free-riding behavior, an international insolvency proceeding should be implemented which makes imprudent lending less attractive. Instead of granting more debt relief, debtor countries should receive a financial reward for institutional reforms allocated by a simple formula created in this paper. The underlying framework provides incentives for debtor countries to implement institutional reforms bottom-up, as well as for creditors to prevent free-riding behavior.

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