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Libera Università Internazionale Degli Studi Sociali

Traditional Chieftaincy and Decentralization in  
the Democratic Republic of Congo:  
Opportunities and Challenges

**By**

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## **ACKNOWLEDGEMENT**

If I allowed myself to sign this work in my personal name, it is mainly because I am, when all is said and done, the only one to bear its responsibility. Having said that, I have to recognize, however, that for and during its realization, I benefited from financial, academic, social and emotional support without which it could not just have been possible.

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I am quite aware of the three main pitfalls of enumeration in this particular circumstances. The two first are omission and indiscretion. And I’m afraid I am already trapped in both of them. If so, I apologize to whom it may have prejudiced. Now I have to avoid re-swamping my face with the third mistake which is that of embarking/engaging in an endless enumeration. I am so serene in doing it that the enumeration I made was just a quotation from memory –with its possible lacunae I have just confessed- without any aim at organizing into hierarchy either those who are mentioned or them and those who are left out. My only assurance - if any- is that the debts I owe to each of you can never be repaid; only gratitude and whenever possible, reciprocity can make for them.

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## **DECLARATION**

I, Paul-Robain Namegabe Rugarabura declare that this work is original. It has never been presented to any other University or institution. In the instances where the works of other writers have been used, references have been duly given. In this respect, I declare this work to be authentically mine. I hereby present this dissertation in full fulfilment of the requirements for the award of the PhD in Political Theory.

Signed.....

Date.....

Supervisor: Professor Raffaele De Mucci

Signature.....

Date.....

# 1. INTRODUCTION

## 1.1. Exposition of personal incentives in relation with the topic

This project started in 2003-2004, during my master's at the University of Antwerp's Institute of Development Policy and Management. I discussed it with Prof Dirk Beke for my master's thesis. Although he appreciated the project, he warned me that it was so complex and required deep research to be implemented in a single academic year. He recommended me to keep it possibly for my Doctorate and offered his availability to help in my researches on this topic. That was a big deal, since Dirk Beke was an expert in this field and built his research career in many African countries like Algeria, Democratic Republic of Congo, Ethiopia, Niger, etc.

But it was without reckoning with the fate! Against all expectations, he died right a month before I got the information that the Luiss University has awarded me a scholarship for this Ph.D. God rest his soul!

The topic he eventually advised me to treat under his supervision for my master's thesis was: "*Le pouvoir traditionnel au Sud-Kivu de 1998-2003: rôle et perspectives*". That thesis won the prize for Development Co-operation 2004 of the Province of Antwerp (Belgium). At the same time, the Institute of Development Policy and Management asked me to turn it into an article for publication in the yearbook of the Centre of study of the Great lakes region of Africa. In this article, I analysed how traditional authority systems were treated during the 1998-2003 armed conflict in Democratic Republic of the Congo and the strategies used by traditional leaders to remain in power. I showed how these strategies allowed some of them to recover, increase or decrease their legitimacy and proposed that these leaders should be included in the on-going post-war process of democratic change.<sup>1</sup> The question raised to me by the reading panel, to which the article was submitted before publication, was "how". They estimated that the answer provided in the preceding pages was not sufficient and that it was necessary to push further. I provided a complementary answer to this question in a footnote<sup>2</sup>, but it left me with a feeling of dissatisfaction.

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<sup>1</sup> NAMEGABE P-R, « Le pouvoir traditionnel au Sud-Kivu de 1998-2003 : Rôle et perspectives », in Marysse S. and Reyntjens F. (eds), *L'Afrique des grands lacs. Annuaire 2004-2005*, Paris, L'Harmattan, 2005, pp. 209-234.

<sup>2</sup> *Ibid.* See the note 48.

Since then, I started feeling the need to push the reflection further, so that I decided to devote my doctorate thesis to it. This is all the more relevant since it seems to me that in spite of its practical appearance, this question of "how" encompasses a theoretical dimension related to the origins and even the idea of the state in general and, more particularly, the African state as it is described and analysed by many "Africanist" authors.<sup>3</sup> They do not miss the opportunity to underline its factitious character and to spread out its poor performances and incapacities. And Congo is always the example of the "bad pupil", whether it is about state legitimacy and governance or developmental capacity and human development. Saïd Abass Ahamed summed it up as a concentrate of all evils that most of the African countries face nowadays.<sup>4</sup>

Now that the country is in the process of pacification, reconstruction and democratisation, it seems to be appropriate to develop an analysis of the institutional reforms which should preside over this process with the aim of promoting the development of the country and local democracy, increasing the institutional capacity, reducing the ditch between the state and citizens. These reforms should also encourage population to participate in the political action. They should allow the basic entities to have access to (new) economic opportunities. So they can be able to promote the development of the hinterland and avoid frustrations within rural populations.<sup>5</sup>

My position is that, considering both the size of the country (2 345 000 km<sup>2</sup>) and the extent of the task, it is necessary over and above the reforms at the centre of the state, to think about mechanisms that can permit an effective and efficient contribution of all the entities of the country in the measure of their potentialities. And this is only possible, in my view sense, if an effort of understanding the present structure is made in order to verify if and to make sure that it permits such a mobilization.

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<sup>3</sup> See among others, BADIE B., *L'Etat Importé: L'occidentalisation de l'Ordre Politique*, Paris, Fayard, 1992; BAYART, J.F., *The State in Africa: The Politics of the Belly*, London and New York, Longman, 1993; BAYART, J.F.(ed.), *La Greffe de l'Etat*, Paris, Karthala, 1996; BAYART, J.F., ELLIS, S., and HIBOU B., *The Criminalization of the State in Africa*, London, James Currey, 1999.

<sup>4</sup> «Concentré de tous les maux auxquels nombre d'Etats africains sont confrontés actuellement». ABASS AHAMED Saïd, «Démocratisation en temps de guerre : Le rôle des Nations Unies et de l'Union européenne en République démocratique du Congo», in Marysse S., Reyntjens F. and Vandeginste S., *L'Afrique des grands lacs. Annuaire 2005-2006*, Paris, L'Harmattan, 2006, p. 289.

<sup>5</sup> CHRETIEN Jean-Pierre, « Dimension historique de la question identitaire dans la région des Grands lacs. En quête d'un équilibre moderne », in *Les identités meurtries: faire face aux défis posés par nos murs psychologiques et idéologiques*, Collection "Regards croisés", n° 12, Pole Institute, Goma, 2004, p. 41

It is more concretely about reconsidering the organizational setting of the state (both vertically and horizontally) in such a way that it becomes able to address the present challenges.

## 1.2. Statement of the research problem.

One of the most striking features of the Congolese political organization, especially the territorial administrative organization, is that it still is tributary of colonial choice. Of course some little changes concerning the administrative deconcentration or decentralization of the (subordinate) territorial entities intervened over the years. They carried mainly on the number of the territorial entities, on their legal statute and, very often, on their respective denominations. But territorial structure remains almost the same: central state, provinces (formerly called regions), cities and districts, “*Territoires*” and “*Chefferies*” and “*Secteurs*” in rural areas, communes in the cities.<sup>6</sup> In the same way their sociological content has been taken into account hardly ever.<sup>7</sup>

In addition, theoretical approach (of the conception) of the state and of its territorial organization is barely tackled. It seems like the principle “*uti possidetis*” which imposed the intangibility (inviolability) of the frontiers inherited from the colonization<sup>8</sup> has been extended (or had to be extended) to the domestic arena.

This subdivision is criticized strongly by an abundant literature: it is notably reproached, on the one hand, for having been done in the total ignorance of the pre-colonial political structures and on the other hand, for having created institutions and authorities that do not correspond to the needs of local communities<sup>9</sup>; what puts the problem of their legitimacy. In addition, it has introduced the idea of territory with fixed borders<sup>10</sup> where

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<sup>6</sup> DOUTRELOUX Albert, « Tradition et modernité dans le développement », in *Revue Internationale des Sciences Administratives*, vol.62, n° 3, septembre 1996, p. 3.

<sup>7</sup> KAKYINDA LUSANGA, « La décentralisation territoriale zaïroise à l'épreuve de la théorie et des faits », *Les cahiers du CEDAF*, n°2, 1984, p.1.

<sup>8</sup> Pierre Englebert shows the limits of this principle by referring to the attempts at redefining borders and polities waged violently in many parts of the continent, as in Sudan, the Great Lakes region of Central Africa, or among Tuaregs of Mali and Niger and poses the necessity for African to create a policy environment in which the state reform can take place in a manner that minimizes the violence. ENGLEBERT Pierre, *State Legitimacy and Development in Africa*, Boulder & London, Lynner Rienner Publishers, 2000, pp. 10-11.

<sup>9</sup> One notes that some entities are enormously big while the narrowness of others hinders transactions that were previously made on a very large space.

<sup>10</sup> This is true not only for state borders but also for internal borders between different entities with the difference that the former were established by treaties while the latter were fixed by the central authority. In both cases, the consequence for the pre-colonial structures was that some of them were either enlarged or reduced. See for

people used to move through a space in which the conception of the border, where it existed, was perceived as an elastic border.<sup>11</sup> Furthermore this territorial division does not correspond with languages and/or ethnic identities<sup>12</sup> and does not encourage solidarities and synergies in that sense. Since then, the Congolese legislator, rather than correcting these imperfections, limits himself by taking them back. Yet he always justifies his different interventions in the territorial organization by the desire of setting an efficient territorial administration, for the promotion of the development in its multiple facets, economic, politics, social, cultural...<sup>13</sup>

In addition, it is necessary to note that until the independence, the Congolese administrative architecture was still ongoing. The territorial division made until then was still fitting into a certain dynamic. Let's note for instance that the aim pursued through the creation of “*Territoires*” was, in the end, to substitute them to the traditional chieftaincies. Colonizer considered that the latter were a brake to the democratisation of the countryside. The success generated by the creation of *Territoires* in the management of the colony allowed the colonizer to maintain such a dream. They contributed to opening up the country, accelerating the road planning, setting up communication means, equipping the colony, large sanitary covering ... *Territoires* became the seat of rural colonial administration. It was the echelon of intervention, in direct contact with rural communities and their chiefs and the process of resolution of different problems that colonization generated.<sup>14</sup>

But this *Territoires*' success did not tarnish the chieftaincy's picture for all that. That's why the colonial ambition of suppressing it has not been realized until the independence. And since then, these two structures, traditional and modern, have been maintained in the

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example the phrase “chefferie agrandie” used by Bosco Muchukiwa, *Pouvoirs Locaux et Contestations populaires dans le Territoire d'Uvira au Sud-Kivu de 1961 à 2004*, Ph.D. thesis, Institute of Development Policy and Management, University of Antwerp, 2004.

<sup>11</sup> DENG Francis, “These Borders Are Not Sacred”, *Washington Post*, December 20<sup>th</sup>, 1996. Naomi Chazan holds that these boundaries are still porous and that, when convenient, they are ignored by individuals and groups. See CHAZAN Naomi, “Patterns of State-Society Incorporation and Disengagement in Africa”, in D. Rothchild and Naomi Chazan(eds), *The Precarious Balance: State and Society in Africa*, Boulder, Colo: Westview Press, 1988, p.138.

<sup>12</sup> MARYSSE Stefaan, “Decentralization Issues in Post-Conflict Democratic Republic of the Congo(DRC)”, in *L'Afrique des grands lacs. Annuaire 2004-2005*, Paris, L'Harmattan, 2005, p.191.

<sup>13</sup> KAKYINDA LUSANGA, *op. cit.*, p.2.

<sup>14</sup> *Ibid.*, pp.22-23. Let's notice that these *Territoire* performances did not survive the colonization. As soon as the colonial Administrator left the country, the *Territoire* lost the efficiency it was credited with. See SAINT MOULIN Léon de, “Histoire de l'Organisation Administrative du Zaïre ”, in *Zaïre-Afrique*, n°201, January 1992, p.38 ; DAUMONT J.M., “ Prélude à la Démocratisation des Institutions Politiques Congolaises”, in *Problèmes d'Afrique Centrale*, n°39, 1<sup>er</sup> trimestre 1958, p.8.

following legislations. The scientific census made by the national institute of statistics identified, in 1984, 231 *Territoires* (zones at that time) and 746 chieftaincies.

Today one can validly wonder the relevance of the maintenance of these two structures in the Congolese territorial administrative architecture, all the more as they put to the ruled the problems of allegiance when the two types of authorities solicit them.

Beyond this allegiance problem, an other issue concerning the coexistence between the chieftaincy and the *Territoire* is at the root of many conflicts. First of all, the distribution of expertise between these two structures lets remain some domains of collision (for instance in jurisdictional matter). For example, in jurisdictional matter the *Territoire's* court is hierarchically higher than the chieftaincy's. But one, often, notes a refusal of the chieftaincy to accept its judgment be censored by the *Territoire*. Appraising to be the depository of the tradition, the chieftaincy hardly conceives that the *Territoire*, which is a modern invention, pronounces a decision contradicting its own. This explains why the former prevents numerous of its decisions reformed in appeal at the *Territoire* from being applied. As for *Territoire's* judges, insofar as they are locally recruited, they hardly give back a decision that would contradict traditional authority's. Indeed, since the *Territoire*, as a modern entity, does not have so to speak its own customary territory, these judges remain subjects of their chief even though they sit on a high level of jurisdiction.

Then, in accordance with the law of 1982<sup>15</sup> on decentralization<sup>16</sup>, all decentralized administrative entities were placed under the domestic ministry's administrative supervision. But this one delegated the administrative supervision on the chieftaincy to the *Territoire* and the one on the *Territoire* to the province. Furthermore, the article 231 of the same law stipulated that the Chieftaincy was to be under the hierarchic control of the *Commissaire de Zone* (present *Territoire's* Administrator). In practice, this administrative

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<sup>15</sup> Ordonnance-loi n°82-006 from February 25, 1982 in *Journal Officiel de la République du Zaïre*, n°3, 15 mars 1982.

<sup>16</sup> It is admitted that this law did not in fact organize decentralization, but much more a deconcentration in Zaïre/DRC. See MARYSSE Stefaan, *op. cit.*, p.196. In the first chapter, I will analyze the different understanding of these two concepts, namely the one which considers deconcentration as part of decentralization unlike the other for which the two concepts are opposed. The Congolese administration experience from the colonial period until nowadays that I develop in the second chapter explains why I adopt the second position. For now, I should only mention that the law of 1982 needs to be modified for the sake of harmony with the new constitution adopted by referendum in the late 2005 and promulgated on February 18, 2006. This constitution recognizes the legal personality only to the Provinces, the cities, the communes, the sectors and the chieftaincies. All the former districts become provinces; which increases the number of provinces from eleven to twenty plus the capital Kinshasa.

supervision/hierarchic power became problematic insofar as it was felt by the chieftaincy like a limitation of its autonomy and an interference in the customary law, which it considered to be its discretionary sphere of competence. As a result, both the traditional chief and the *Territoire* Administrator behave like two rival dignitaries.

These problems are far from being a simple matter of competences distribution, of state reinforcement and of its mechanisms of control and sanction<sup>17</sup>. It is more a question of disconnection or lack of clear articulation, which is intrinsic to the territorial flowchart and on which no study has been focussed until now concerning the specific case of Congo after the independence.<sup>18</sup> When it is about decentralization or deconcentration, the structures are supposed to already exist and it is just a question of determining what legal status and what competences are to be allocated to them. With the exception of the chieftaincy which could sometimes cover itself with the argument of having a certain homogeneity<sup>19</sup>, it is never a question of what these structures have in common and unit them (language, norms, values, culture, judicial system), what kind of rapports they have developed among themselves, and what they want (or are able) to develop together. And the few times when they are reshaped, it was more for electoral purposes, search of positions, collecting resources<sup>20</sup>, or for ethnic calculation. This research aims to explore new basis of the decentralization policy. The main purpose is to explore how to enhance state legitimacy<sup>21</sup> and capacity through the decentralization policy in which traditional entities play a key role.

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<sup>17</sup> This tendency is common among jurists(positivists). Driven by the “operationality desire”, they tend to develop more voluntarist approaches. Actors’ facts and acts are analysed and assessed in the eyes of the law. Since the affirmation of the authority of the law is, for them, enough to get the intended results, they call for the strengthening of application, control and sanction mechanisms. If they are not available or in the case of their failure, they shout about what they call “lack of political will”.

<sup>18</sup> Before the independence, a series of articles published in the journal entitled “*Problèmes d’Afrique Centrale*”, n°39, 1st Trimester 1958, were devoted to this issue.

<sup>19</sup> MARYSSE Stefaan, *op. cit.*, p. 197. All authors do not share this idea. In their studies, Mayer Fortes and Evans-Pritchard showed, for instance, that many of pre-colonial entities were an amalgam of different peoples. FORTES M. and EVANS-PRITCHARD E. E., *African Political System*, Oxford, Oxford University Press, 1940. Moreover, the problems of the so called minorities spread over many entities in the East of Congo reinforces this argument and calls for a solution which puts into question the actual territorial model.

<sup>20</sup> On should be struck by the debate on the Constitution of the third republic in the “Assemblée Nationale de la Transition” that led to the extension of the number of provinces from 11 to 25 plus the capital city Kinshasa. In front the refusal of restoring the former province of Kivu, the other provinces’ representatives decided to transform all the Districts in provinces in order to profit, among others, of the 40% of the national resources provided in the new constitution and of the representation in national institutions(senate, national assembly) on the par with former Kivu’s provinces.

<sup>21</sup> Some Congolese scholars hold that the question of legitimacy has never found satisfactory and long-standing solution since the independence. See WETSH’OKONDA M., “La commission vérité et réconciliation: une grenouille peut-elle avaler un éléphant?”, *Le Potentiel*, n°3179 of Thursday July 22, 2004 and KIKASA M.F., « Des dialogues belgo-congolais aux dialogues intercongolais, 1960-2001 : A la recherche de l’unité et de la légitimité en RDC », *Congo-Afrique*, n°358, October 2001, pp.471-481 quoted by BUCYALIMWE Mararo S., « Kinshasa et le Kivu depuis 1987 : Une histoire ambiguë », in Marysse S. & Reyntjens F.(eds.), *L’Afrique des grands lacs. Annuaire 2004-2005*, Paris, L’Harmattan, 2005, p.183.

### 1.3. Literature review.

#### 1.3.1. *Theory of dualism in African administrative organisation*

Dualism is one of the key concepts used in the literature to analyze African states. This concept expresses the fact that African countries share many aspects of the modernity while norms and practices resulting from the custom continue to prevail therein. Some authors tended to isolate these two normative orders in considering that, in virtue of a colonial legacy, customary law applied to subjects in the countryside under native authority control while (modern) law recognized rights whose benefice remains limited to the citizens living in town. Mahmood Mamdani held, for instance, that :

“Organized differently in rural areas from urban ones, that (colonial) state was Janus-faced, bifurcated. It contained a duality: two forms of power under a single hegemonic authority. Urban power spoke the language of civil society and civil rights, rural power of community and culture. Civil power claimed to protect rights, customary power pledged to enforce tradition. The former was organized on the principle of differentiation to check the concentration of power, the latter around the principle of fusion to ensure a unitary authority. To grasp the relationship between the two, civil power and customary power, and between the language each employed, -rights and custom, freedom and tradition,- we need to consider them separately while keeping in mind that each signified one face of the same bifurcated state”.<sup>22</sup>

But none of these two forms of power was democratic; both are different forms of despotism, the former functioning under “direct rule” and the latter labelled “indirect rule” or “decentralized despotism”. Mamdani sustained that, although that bifurcated state created with colonialism was deracialized after independence, it was not democratized.<sup>23</sup> In other words, it appears that in post-colonial Africa, the rights that were the monopoly of whites and, with some reservations, of civilized natives, have been extended to all citizens living in towns while the practice of closeting “free peasant in separate ethnic containers, each with a

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<sup>22</sup> MAHMOOD Mamdani, *Citizen and Subject. Contemporary Africa and the Legacy of Late Colonialism*, Princeton, Princeton University Press, 1996, p.18.

<sup>23</sup> *Ibid.*, pp.8, 26.

customary shell guarded over by a Native Authority”<sup>24</sup> is still prevailing where this forms of authority has been kept.

In reality this distinction is very questionable. It is not unusual that people in the cities invoke in their relations some customary norms to which they adhere or belong. Moreover, most of the time, people belonging to different ethnic groups apply in their relationships, principles which are no more than a sort of “diffuse overlapping consensus” of customary laws in force in the region (regulation of the right to speak in the meeting according to the age, the social position, the intellectual level, gender...). One notes even the emergence and the generalization of some practices which let someone think that cities have created their own customary laws. Is not this the case when we see how drivers on potholed streets negotiate or give mutually the right of way, or how businessmen/businesswomen associations share the tours of travelling, fix and impose to their members the prices of their articles, in violation of commercial law forbidding illegal arrangements? This leads us to sustain that, should one estimate respectively the share of both the customary and the modern law in the cities, he will easily realize how the countryside has invaded the cities or how the cities are “ruralized”. If any difference were thus to be made, it would be that of the lack of an official or formal native authority in charge of enforcing those town’s customary laws. In the countryside, instead, certain changes, obviously totally out of the customary scheme, are, sometimes, received and enforced under the fiction that there were locally formulated and traditional chiefs enforce them.

Beside that, authors do not have the same opinion concerning the part of these customary and modern norms and practices should occupy in the state-building process. Many radical modernist (evolutionist) theories propose just the banishment of traditional structures and institutions. They argue that they are contrary to the ideal of modern state, and put a brake on its establishment. From this point of view, the custom and the institutions that it has given birth to have to be removed from the state’s political and administrative field. At best they should be merely restricted to the cultural or private domain. Otherwise they are fought in their very existence.<sup>25</sup>

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<sup>24</sup> *Ibidem*, p.61.

<sup>25</sup> MARION Levy, « Patterns of Modernisation in Political Development », in *Annals of the American Academy of Political and Social Sciences*, March 1966, pp. 29-40, quoted by VAUGHAN Olufeni, *Nigerian Chiefs: Traditional Power in Modern Politics 1890s-1990s*, New York, University of Rochester Press, 2000, p.3. Concerning the official discourse in Benin in the seventies against traditional institutions, see also PERROT C-H. et FAUVELLE-AYMAR F-X. (Sous la dir.), *Le retour des rois : Les autorités traditionnelles et l’Etat en Afrique contemporaine*, Paris, Karthala, p. 114.

Less radical modernists on their side see this removal of “traditional or primordial culture” as an unavoidable consequence of modernisation. According to them, “advances toward certain levels of modernity within African political, economic, and social system are invariably accompanied by an equal decline in that system's traditional and primordial culture”<sup>26</sup>

Other authors have developed more conciliatory and even realistic approaches. For them, Africa follows a paradoxical logic in comparison with that of the nation-state at its beginnings. According to them, nation-state took advantage of a context of insecurity to monopolize the legitimate use of violence. The latter became a collective right of the societies in exchange for their security. Mwayila Tshiyembe claims that this success was due to a double postulate:

1. the one of individualism which requires from individuals to refer to the political entity instead of the community to which he belongs.
2. The one of nation-state's own credibility, i.e. its capacity to actually protect the citizen and to have enough resources to this end.

Paradoxically, notes this author, the main characteristic of post-colonial African state is the decay of the central power because of nepotism, precariousness, lack of any civic and political virtue, predation and bribery. Far from being confronted by the crisis that western feudal lords faced, African pre-colonial nations and the traditional authorities that symbolize them have got resources all the more powerful since they represent the traditional legitimacy in opposition to the legitimacy of importation that covers the official political scene.<sup>27</sup>

African state is thus, in the present day, necessarily a multinational state. Traditional institutions are still keeping a very important room into the collective imaginary and many Africans are still attached to them. These institutions have some positive values (the idea that the power is derived from the people for whom is held in trust, search for consensus when dealing with some controversial issues, existence of checks and balances<sup>28</sup>, cohesion of the group, identity building), which can contribute to the edification of a more embedded state. It follows from that that, by rejecting these institutions, one runs the risk of leading to either a

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<sup>26</sup> SCHRAEDER Peter J., *African Politics and Society: A Mosaic in Transformation*, 2ed., Ed. Belmont, CA: Thomson/Wodsworth, 2004, quoted by BRADLEY TODD M., «The Other»: Precursory African Conception of Democracy», in *International Studies Review*, 7, 2005, p.418.

<sup>27</sup> MWAYILA TSHIYEMBE, *Etat multinational et démocratie en Afrique : Sociologie de la renaissance politique*, Paris, L'Harmattan, 2001, p. 121.

<sup>28</sup> OLADIPO Olusegun, “Tradition and the Quest for Democracy in Africa”, 2000, Available at [www.polylog.org](http://www.polylog.org)

total dislocation of African societies or a rejection of the graft of what should be seen as a totally foreign state. The tendency is thus to propose a sort of articulation of tradition and modernity. Trutz Von Trotha has proposed the idea of turning the (administrative) chieftaincy of present days into “civil chieftaincy”. This would be more just, responsive and responsible just as the new type of central government would be.<sup>29</sup> Mwayila Thiyembe speaks of “*républicanisation du pouvoir traditionnel*” (turning traditional power into republic). It is about a sort of “marriage of heart and convenience” of these two fields of politics. Its viability requires that tradition get into the republic and the republic into the tradition. In concrete terms, African institutions should be associated with the state project. This process implies, among others, at the micro-local level, the recognition of the traditional power and the rehabilitation of its institutions so that there are chieftaincy’s government and assembly. It should be endowed with a legal status and the consequent administrative structure. It will become the place where people will be introduced to and will familiarize with democracy.<sup>30</sup>

Let’s notice that Congo is still stumbling on these two opposite tendencies. Since the royal decree issued on October 6, 1891 traditional chieftaincies have been recognized and inserted in the administration of the so called Independent State of Congo<sup>31</sup>. But, as it will be demonstrated in details in the third chapter of this study, the subsequent legislative interventions pretend to recognize the autonomy of the traditional entities and, at the same time or immediately after, one notices the will to submit them and to substitute a new legal and political hierarchy for the existing orders. This imprecision throws quite a few people into confusion about whether the existence of traditional institutions is a transitory situation or not. For example, in 1973, a law on the land has transferred the monopoly on the land and its management to the state. Dealing with the rural lands, this law says that its regulation will be fixed by the president of the Republic. It has never been the case until now. Is it a lack of political will? To be honest, this is one of the matters which constitutes the core of the

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<sup>29</sup> See Trutz Von Trotha contribution in Donal I. RAY and E.A.B. Van ROUVEROY Van NIEUWAAL (Dir.), “The new relevance of traditional authorities in Africa’s future”, in *Journal of legal pluralism and unofficial law*, n°37-38/1996, special double issue, Foundation for the journal of legal pluralism, Netherland, 1996, p.8.

<sup>30</sup> MWAYILA TSHIYEMBE, *op.cit.*

<sup>31</sup> This appellation was just a diplomatic way of hiding what was in reality a private property of the King of Belgians. Englebert notes for instance that “Congo was created by Leopold II, king of Belgians, as a private commercial venture. Henry Stanley had been commissioned to explore the bassin of the Congo River, and the resulting Congo Free State was created in 1885 as a personal property of the king”. Quoting Winsome Leslie, he notes that “the focus was on extraction of resources, the unification of territory through military conquest, and the economic destruction of pre-existing kingdoms”. ENGLEBERT Pierre, *op. cit.* 107. To stress this patrimonial behaviour, if it were still necessary to demonstrate it, one should remember that Leopold II has bequeathed Congo to Belgium.

traditional political system so that any non-level-headed intervention of the state will certainly lead the state to an open war with “its” chieftaincies! In any case, this situation is likely not to promote any strategy of consolidation.

The new constitution adopted by referendum in December 2005, recognized clearly legal status to traditional entities. But it is up to the law to establish its organization and functioning. This option, made at the high level (constitution), corresponds to a largely shared opinion that the building of modern state on the debris of the old requires the adjustment of tradition to modernity, rather than the substitution of one for the other.<sup>32</sup> In this regard, the literature review is extremely important as it helps to bring out what is already known and, by doing so, to clear the ground for the contribution to both debate and decision-making. We shall particularly focus, in the following point, on the literature which sees in the historical trajectory of African states and the “marginal” status or the role that the traditional entities have occupied in most of them as the main explanatory factors of their failure. The main hypothesis is therefore that the restructuration of these countries (Congo in particular) in such a way that these local institutions have a key role will be the guarantee for acquiring both legitimacy and developmental capacity.

### ***1.3.2. State legitimacy and developmental capacity***

Political scientists and political sociologists have recently developed very stimulating approaches to understand African states, to explain most of its failures and to indicate the way in which reforms should be led. They have focussed their analyses on the articulation between state and society. On this particular issue it becomes common among them to speak of the illegitimacy of African state. This phrase expresses the fact that African state is not (ex ante) locally appropriate or rooted. It is a product of transplantation instead of being a creation of local history.<sup>33</sup> Pierre Englebert, using Kalevi Holsti’s terminology<sup>34</sup>, has distinguished two sorts of legitimacy: the *vertical legitimacy* and the *horizontal legitimacy*. Vertical

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<sup>32</sup> LEMARCHAND René, “Political Clientelism and Ethnicity in Tropical Africa: Competing Solidarities in Nation-Building”, in *The American Political Science Review*, Vol.66, n°1, March 1972, p.87.

<sup>33</sup> ENGLEBERT Pierre, *op. cit.*, pp. 4-5. See also HYDEN Goran, “Problems and Prospects of State Coherence”, in D. Rothchild and V.A. Olorunsola, *State versus Ethnic Claims: African Policy Dilemmas*, Boulder, Colo.: Westview Press, 1983, pp. 67-84; BADIE Bertrand, *L’Etat importé: L’occidentalisation de l’ordre politique*, Paris, Fayard, 1992; DAVIDSON Basil, *The Black Man’s Burden. Africa and the Curse of the Nation-State*, New York, Times Books, 1992; MAMADOU Dia, *Africa’s Management in the 1990s and Beyond: Reconciling Indigenous and Transplanted Institutions*, Washington, D.C.: The World Bank, 1996.

<sup>34</sup> HOLSTI Kalevi J., *The State, War, and the State of War*, Cambridge: Cambridge University Press, 1996; quoted by ENGLEBERT Pierre, *op.cit.*, pp. 7-8.

legitimacy corresponds to the quality of the relation between society and political institutions or in other words the presence of a consensus on the content of the social contract. The exogenous process of state creation had as consequence that “*the leadership or the ruling class inherited the state rather than shaping it as an instrument of its existing and developing hegemony. As a result, African states were born lacking legitimacy, meaning simply that they were not endogenous to their societies, they were not historically embedded into domestic relations of power and domination, and they therefore suffered from dichotomization between power and statehood*”<sup>35</sup>. Vertical legitimacy captures the degree to which contemporary state institutions evolved endogenously to society or were imported and, in the later case, the extent to which such imported institutions clash with pre-existing relations of authority.

Horizontal legitimacy refers to the degree of continuity between pre- and postcolonial borders and is measured by the percentage of a country’s populations that belong to ethnic groups not partitioned by borders. Although the arbitrariness of borders is not particular to Africa, the characteristic of African borders is that they were drawn according to colonial interest without any regard to the social and political realities on the ground. Even if ethnicity is itself a fluid concept and unreliable source of identity or institutional affiliation, as Englebert puts it, the fact that an ethnic group exists on both sides of contemporary border, no matter how intense the ethnic identity, means that the border cuts across a pre-existing area of common political culture<sup>36</sup>. Therefore it becomes difficult for an imposing state to get the allegiance of a partitioned group.

The conclusion of this study demonstrates that the African countries that have a high degree of legitimacy, both vertically and horizontally, (Botswana, Lesotho, Swaziland, Seychelles, Cape Verde, Mauritius, São Tomé, and Príncipe) also have great developmental capacity. Freed from the immediate imperative of coercing support for building hegemony, they are more willing to invest in infrastructures, education, and health. Thus, their existing legitimacy is enhanced by the efficiency of their policies. As for their lower degrees of legitimacy, their resources are either spent on activities for rulers to establish control over society (strong bureaucracies and unnecessarily large armed forces), redistributed to competing groups (cooption) to maintain tolerance of their rule, or in current spending (salaries and wages). They resort to neo-patrimonial policies in order to substitute instrumental legitimacy for the

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<sup>35</sup> ENGLEBERT Pierre, *op.cit*, p.76.

<sup>36</sup> *Ibid.*, p.8.

lack of moral foundations of their power.<sup>37</sup> It appears from this point of view that neo-patrimonialism is not an irrational practice politically speaking, but a political choice/necessity, which in turn depends on the degree of state legitimacy. Bad governance becomes not a mere problem of political elites, but a structural problem linked to the state itself.

In my view, it is possible to speak of state illegitimacy without referring to the cultural argument, which implies the necessity of cultural embeddedness of institutions. From this point of view, state illegitimacy may express (ex post) the rejection of, or the disinterestedness towards, the state because of its poor performances and its misdeeds (predation, corruption, administrative decay, carelessness of social problems...). This illegitimacy deprives the state from any real meaning in the collective imaginary with, as one of the consequences, the lack for the state of the capacity of mobilization (army, for instance, in Congo).

Although there may be a sort of continuity between these two understandings of state illegitimacy insofar as the rejection of the transplant because of its poor performances can be logically associated with his “*exogeneity*”<sup>38</sup>, there is a clear difference in their implications. The fact that Europeans have exported the state to Africa is a simple matter of fact, which can lead -not without mistake- to sustain that it is impossible to achieve the legitimacy of state in Africa since the birth and the development of the modern state occurred out of Africa. One can derive from this point of view that, given the fact that history cannot be changed, the state imported in Africa will never become legitimate unless we proceed by organizing Berlin II as it was proposed by the former President of Rwanda, Pasteur Bizimungu. This idea seems to have seduced Pierre Englebert<sup>39</sup>, following in that Francis Deng<sup>40</sup>. Since the first steps towards this conference are not taken and supposing that it never occurs, the legitimacy (and with it, the developmental capacity) should suffer the same fate. I shall call this conception a “static or fatalist conception of legitimacy”.

The second understanding of the state legitimacy is more focused on the organization and the performances of the state which generate the interest and the (affective and material) support of the citizens, make members of the same state feel more responsible one for

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<sup>37</sup> *Ibid.*, pp.71-149.

<sup>38</sup> The book of Pierre Englebert above quoted sustains this thesis. It shows how state legitimacy affects policy choices and the quality of governance and condition the developmental capacity.

<sup>39</sup> ENGLEBERT Pierre, *op. cit.*, pp. 186 and al.

<sup>40</sup> DENG Francis, “These Borders Are Not Sacred”, *Washington Post*, 20, December 1996.

another... From this point of view, we can distinguish for instance for the same state through a certain period of time, the period of strong or weak legitimacy (despotic/democratic state, authoritarian/liberal state, welfare state) even in the context where the state was born. I shall call this conception the “dynamic conception of legitimacy”. Understood in this way, illegitimacy can strike both state and traditional entities and it is quite evident that when one speaks of legitimacy crisis in Africa, none of these two entities is spared. An abundant literature attests the fact that they are intimately linked and dependant one on the other. Fortified by their political, judicial, land, sacred, and ceremonial power, traditional authorities are called upon for acting as go-between between population and state, mobilizing population and conferring legitimacy to the state and its rulers. As for traditional authorities, they need the state to recognize their legitimacy and to get some political and economic advantages for themselves and for their entities.<sup>41</sup> Thus the idea of “*elite consensus*” system put forward by Donald Rothchild and Michael W. Foley<sup>42</sup> among others and on which we are going to dwell a little bit. It is about showing how this system worked – and God knows whether it has ever ceased to be so- and how it affected both state and chieftaincy legitimacy for better or for worse.

### ***1.3.3. The setback resulting from the elite consensus system***

A striking similarity characterizes of almost all African regimes: their adoption of the “ethnic arithmetic” strategy consisting in the co-option of the leading class and ethnic representative into the ruling elite as a way of managing the plurality of their societies. Through this logic of inclusion, the spokespeople of all the major interests or the ethnic strongmen were integrated in the key decision-making institutions.<sup>43</sup>

Some scholars have credited this “grand coalition”, to use Arend Lijphart’s phrase<sup>44</sup>, with having played an instrumental role in reducing the scale and the intensity of their

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<sup>41</sup> Read, among others, RAY Donal I. and ROUVEROY Van NIEUWAAL E.A.B.(Dir.), “The new relevance of traditional authorities in Africa’s future”, in *Journal of legal pluralism and unofficial law*, n°37-38/1996, special double issue, Foundation for the journal of legal pluralism, Netherland, 1996, pp. 4, 24-25, 42, 43; PERROT C.-H. et FAUVELLE-AYMAR F.-X.(dir.), *op. cit.*, pp.20 & 119; KAMTO Maurice, « Les rapports Etat-société civile en Afrique », in *Revue juridique et politique*, 1994, p. 290.

<sup>42</sup> ROTHCHILD Donald and FOLEY Michael W., “African States and the Politics of Inclusive Coalitions”, in Donald Rothchild and Naomi Chazan, *The Precarious Balance: State and Society in Africa*, Boulder and London, Westview Press, 1988, pp. 233-264.

<sup>43</sup> See, for instance, the concept of “fusion and reciprocal assimilation of elites” used by BAYART, J.F., *op. cit.*

<sup>44</sup> Lijphart describes it as “not so much any particular arrangement as the participation by the leaders of all significant segments in governing a plural society”. LIJPHART Arend, *Democracy in Plural Society*, New Haven, Yale University Press, 1977, p. 31 quoted by ROTHCHILD Donald and FOLEY Michael W., *op. cit.*, p. 238.

demands, in maintaining the political system, in enhancing state influence and even in strengthening legitimacy.<sup>45</sup> Lemarchand shows how in the case of Ivory Coast under Houphouet Boigny, clientelism has realized distributive effect. According to him, “ except for the Agni of Sanwi, and, to lesser extent, the Bete (two of the least favoured groups), resources, whether in the form of jobs, material payoffs, sinecures of one kind or another, or social overhead capital, are fairly evenly distributed among the representatives of the various ethnic segments. This is not to deny the existence of gross disparities of income the Ivorian bureaucratic-planters oligarchy on the one hand and ordinary peasants on the other; the only point here is that the oligarchy represents a fairly wide cross-section of the ethnic interests at stake”.<sup>46</sup>

Whether the stability of these regimes is (or was) due to their genial use of clientelism, or to their repressive capacity and to the foreign support (with the former metropolis at the top of the list) is settled. The least I can say is that the uncertainty that persisted (and still persists) on the continuation of this supposed stability after the collapse or the rule of the so-called “fathers of the nation” is -if necessary- the proof that it was built on the sand. The only advantage of this system is that it has permitted the accumulation of the political and economic capital at the centre. The doubt remains, however, whether this accumulation has been accompanied by a greater potential for initiating social and economic changes notably the modernization of the ethnic systems, with the possibility of sapping the strength of traditional networks. There is nowadays no hesitation to admit the failure of this system to realize a political development in Coleman’s sense, which is “the acquisition by a political system of a consciously-sought, and qualitatively new and enhanced political capacity as manifested in the successful institutionalisation of (1) new patterns of integration and (2) new patterns of participation and resources distribution”<sup>47</sup>

Beside that, it is quite unanimously admitted that the advantages of this policy are on an altogether different scale with its inconvenient. Resorting to the “caricatural” concepts of political decay, weak or soft states, has been the dominant tendency in designating African states since more than two decades. The so-called stable states either they fell in political crisis (in its large sense) during or immediately after the rule of the “fathers of the nation” or run the risk of sinking into it in a predictable future.

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<sup>45</sup> ROTHCHILD D. and Naomi Chazan, *op. cit.*

<sup>46</sup> LEMARCHAND R., *op.cit.*, pp.85-86.

<sup>47</sup> COLEMAN James S., “Introduction”, in James S.Coleman(Ed.), *Education and Political Development*, Princeton, Princeton University Press, 1965, p.15 ; quoted by LEMARCHAND R., *op. cit.*, p. 88.

In the fields which interests us, that is to say concerning the articulation between the central and traditional institutions, and between all of them and the people, one can note that:

(1) This strategy has pushed to the extreme the social distance between the elite and the ruled, and has transformed the latter in the ‘kitchen garden’<sup>48</sup> of the former. [“criminalization” of the state].

(2) As for the ruling class and their allies, they have affranchised themselves from any formal check and sanction from the ruled. Scott is right in noting that the elimination of the electoral process has deprived the machine<sup>49</sup> of the incentives it needs to hold its clientele. Thus the expectation of payoffs was bound to decline.<sup>50</sup>

As political regime has released itself from any constitutional constraint (myth of the African constitutionalism), many traditional authorities did the same vis-à-vis the tradition or customary law. In the environment where the breach to national security is the most, if not the only, effective provision of the criminal law, the elementary caution advises to avoid making enemies with people who participate in the political power. The so-called “*chasse aux sorcières*” phenomenon (or witch-hunt) is well known in many African countries. Even if the democratic change is credited with bringing civic and political liberties, the very little eagerness shown by almost all African countries to adopt it, for obvious reasons, indicates that it will take a long time to penetrate the intelligence services and more time again for the population to free themselves from the fear of many decades of tyranny and arbitrariness.

(3) One is surprised to see how the countryside has become under-administered. Even if the authority is geographically close, he is distant in terms of regulation. That is the situation that Timothy M. Shaw calls not without cynicism “real *laissez faire*” and describes it as follows: “the local community survives within its [states] boundaries with minimal national regulation and growing autonomy usually related to free-wheeling informal sectors –black markets and smuggling- which are real *laissez faire*, not World Bank, prescriptions. While the OAU establishment may resist any recognition of such prevalent social relations, the reality of Africa in crisis is quite different. Peoples and communities survive by seizing self-reliance –

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<sup>48</sup> Did not Mobutu soldiers use to say : “*civil aza bilonga ya soda*”(the civilian is the kitchen garden of the soldier)? Which gave to the soldier the ‘right’ to pick from the civilian as much as he wants or can! To look at how civilian are treated by anyone who holds any bit of authority, be it soldier or not, one can think that that claim of Mobutu soldiers is indeed an “act of faith” for all the state agents.

<sup>49</sup> LEMARCHAND René, *op. cit.*

<sup>50</sup> SCOTT, “Corruption, Machine politics and Political Change”, *American Political Science Review*, 63, 4, 1969, p. 1157; quoted by LEMARCHAND R., *op. cit.*, p. 85

not the national or regional kinds described by the Lagos Plan, but effective self-control and self-determination”.<sup>51</sup>

(4) A double phenomenon of “disengagement”<sup>52</sup> is occurring, not only the one of the rural population from both the state and the traditional power, but also of the traditional authorities from the local power (the leaderless phenomenon). If the first is easily understandable the second requires some explanation.

The redistribution of the prebends by central elites has produced the effect of reducing all the local structures to the rank of dependents. It has also prevented the political development both at the local and the national levels in the above mentioned Coleman’s sense. The enormity of state resources and opportunities coupled with the access to state means of violence created the idea of the derision of local resources. This does not mean that these resources are left to serve for local interest. On the contrary, their worth is just minimized by state agents; this allows them to appropriate these resources without the least hint of embarrassment.<sup>53</sup> And the ‘logic of gift’ instituted by the government whose all the actions, even those emerging on the national budget, are disguised as gift has come to spread over the so called ‘civil society’ in their functioning on basis of projects financed from the outside. Thus local authorities expect the financing from the state; the state for its part expects the financing from abroad; and the civil society, which should teach people to take care of themselves, is itself extrovert. So everybody has become a broker or courtier<sup>54</sup> of external financing. Paradoxically, when it is obtained, nobody (to begin with the church) who has an access to external financing publishes his budget! This shows how the discourse about change is full of hypocrisy.

As Gérard Conac put it, the traditional authorities bear signs of their environment. They cannot be dissociated from the dislocated society in which they are intended to work.<sup>55</sup> And since the interplay between state and traditional authorities has been established, one cannot therefore be treated independently from the other whether it is about criticism or therapy.

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<sup>51</sup> SHAW Timothy M., “State of Crisis : International Constraints, Contradictions, and Capitalisms?”, in Donald Rothchild and Naomi Chazan, (1988), *op. cit.*, p. 310.

<sup>52</sup> ROTHCHILD Donald and CHAZAN Naomi, *op. cit.*

<sup>53</sup> BAYART J.F., *op. cit.*

<sup>54</sup> FREUD C, BIERSCHEK, T., CHAUVEAU, J-P. And OLIVIER DE SARDAN, J-P., *Courtiers en développement. Les villages africains en quête de projets*, Paris, Karthala ; Mayence, APAD, 2000, 318 pages, bibl. (« Hommes et Sociétés »), *Cahier d’études africaines*, 167, 2002. <http://etudesafriques.revues.org/document1496.html>.

<sup>55</sup> CONAC Gérard, « Le développement administratif des Etats d’Afrique noire », in CONAC Gérard (dir.), *Les institutions administratives des Etats francophones d’Afrique noire*, Paris, Economica, 1979, p. VII.

#### ***1.3.4. Revisiting the concept of institution and its Congolese reverse: the notion of institution-hostage. Plea in favour of institution liberation.***

By underlying these two conceptions of state legitimacy (the historical or static one and the outcome-based or the dynamic one), we did not aim at opposing them or to establish the prevalence of one over the other. On the contrary, the aim was twofold:

To insist on their complementarities and to underlay the danger of incompleteness run by “isolationist” explications. The institution embeddedness teaches us that the popular perception of an institution can influence positively its performances. When it is got from the beginning, it exempts the institution from the hard task of having constantly to explain its moral or social foundation and allows it to freely devote to the mission it was created or established for. But it is not in itself a guarantee of performance, nor is it a key for perpetual legitimacy. They are both the result of the organisation of the institution (structure); the quality of the leadership, the presence or not of regularized channels of communication with social groups, the adaptability to its internal and external environment... The poor performances, the weakness or the collapse of the state are a shared responsibility of both modern and traditional entities. The question is the one of degree in terms of responsibility and not that of virginity for one and guilt for the other. And even where some traditional leaders can justify not having taken a great part in the state apparatus, *strictu sensu*, they have rarely -if ever- developed, individually and collectively, any strategy, which can impose them as an alternative to the state.

To underlay the failure of the clientelism or neo-patrimonialism, to serve as an instrument for assessing developmental strategies. Naomi Chazan is right when she concludes the collective book by saying that the combination of the costly and parasitic overbloated administrative apparatus, the patrimonial quality of state institutions, the centralization, and social inequality has “severely hampered the effectiveness of the state machinery in many part of the continent. Certain tasks associated with public institutions (most notably the promotion of internal security, autonomy on the international front and the formulation of binding norms of behaviour) have been fulfilled with lesser regularity in recent years. But most significantly, central government organs have failed in many of their economic roles (...). Inefficiency, it

appears from these chapters, has generated not only real problems of legitimation but also, somewhat ironically, a constriction of central government hegemony”.<sup>56</sup>

#### **1.4. Overview of the chapters**

A part from this introduction, which is the first chapter, this thesis is divided into four chapters. The second chapter gives some conceptual clarifications about decentralization in general and in Africa in particular. I insist on the correlation between decentralization and democracy and claim that decentralization without democracy is likely to be decentralized despotism or a decentralized centralism.

The third chapter is an overview on the history of decentralization in Congo. It questions the decentralization rhetoric in the Congolese political leaders’ discourse, in light of the legislation that has been actually applied from the colonial period until now. It shows the parallel or the continuation between colonial and post-colonial territorial administration and emphasize the absence of a real will to decentralize. It shows however that, although the period after Mobutu regime was still characterized by the continuation of the logic of centralization, noticeable signs of decentralization have been carried out recently, particularly in the new constitution of 2006 and laws. Those changes still need, of course, to mature both in their design and their implementation.

The fourth chapter analyses the ongoing decentralization dynamic in Congo and the rural decentralization issue. I show the role that a decentralization policy based on traditional entities can play in state legitimacy building. The idea is that giving a central role to the traditional entities is: first, a prudential attitude (given the role that these entities and the identities constructed around them play in political arena); second, a sign of respect for local entities and identities; and, ultimately, a condition for the acceptance of the state by its population. I defend the idea that associating traditional entities in the decentralization policy should not just come down, by a top-down process, to recognizing the legal status and conferring some attributions to them. Instead, it propose a process that should operate at a triple level: at the central level where should be established the responsibilities reserved for itself and those which are transferable. Then, recognizing that traditional entities are autonomous and that this autonomy is mainly derived from the custom and -but not forcibly-

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<sup>56</sup> CHAZAN Naomi, “State and Society in Africa: Images and Challenges”, in Donald Rothchild and Michael W. Foley, *op. cit.*, p. 327.

from the official law of the state, they should each engage in discussion in order to define the responsibilities that they can actually take on. Finally, traditional entities should get a progressive transfer of responsibilities on the basis of their plan of action and of the performances realized. In short, it is the thesis of the decentralization by stages or progressive decentralization that I sustain in this part.

This chapter examines also the domains in which traditional authority forms complementary logics with decentralization like chieftaincy's effectiveness, the experience of autonomy it got from the pre-colonial period and the capacity of adaptation which allowed it to survive over the colonial period and the dictator regime of the postcolonial era. I also point out some difficulties that traditional authority system have to adjust to the democracy and to decentralization. I end the chapter with a discussion on how traditional chieftaincy should be turned into a civil chieftaincy in order to become more open, accountable. I support, in this chapter, the opinion that customary law should continue to be applied in the chieftaincies, but a space should be created for and the opportunity given to those who live under its rule to have a say on it and its functioning, to question some of its imperfections and to explore new perspectives for its improvement.

The fifth chapter, I examine the possibility of completing the limits of the territory-based decentralization with the community-based decentralization, particularly in the east of Congo. The hypothesis is that this could provide a solution for some trans-territorial communities which claim not being accepted or not feeling secure in their entities or are not inserted in local traditional relations of power because of their non-autochthonous origins. The territory-based decentralization encourages them to search for their own ethnic territory. This opposes them with other local communities which claim the same rights on this territory and strengthen their claim with the anteriority if not the autochthony argument; hence the perpetuation of the conflict. The Arend Lijphart's consociative approach will be also discussed. As it appears clearly, this work (and especially its two latter parts) goes against the current uniformity strategy in the decentralization policy adopted in Congo.

### **1.5. Methodological approach.**

The second chapter, which is essentially conceptual, will bring out four dimensions (the political, economic, administrative and financial) of decentralization that I will use, in the third chapter, to analyse the Congolese Case from the colonial period until now. My attention will be focused on the different legal texts that have been issued and have affected the status of local entities, including traditional chieftaincies. I will insert them in the context in which they emerged and assess them in the light of the above-mentioned dimensions of decentralization. The fourth and the fifth chapters are, on their part, prescriptive. They encompass a series of conditionality for traditional authority-based decentralization to be more effective.

## 2. RELEVANCE AND CHALLENGES OF DECENTRALIZATION IN AFRICAN WEAK STATES.

### 2.1. Preliminary clarifications

This chapter deals with decentralization in (African) weak states. Their main characteristics are: first, the failure of the hegemonic project initiated during the colonial period and pursued in the postcolonial era. Here, state's authority comes up against fierce competition from some internal forces, groups or local units/powers. But unlike failed states, those force do not threaten the state in its very existence. Their only claim is that their belonging to the state cannot occur under whatever condition. In that way, they challenge the state's attempts at underestimating, disregarding, suppressing them or state's attempts at preventing them from deploying their own existence and power. Joel Migdal's book "Strong Societies, Weak states" gives an excellent account of that reality<sup>57</sup>. The second characteristic of those states is their weak institutional development or capacity. This weakness makes them unable to deploy both their authority and action over the whole national territory and to generate/raise the required financial resources to carry its projects/activities/missions out. They are thus characterized by poor social services delivery and even the incapacity to secure their borders.

In such an environment, both centralization and recently designed decentralization policies produced poor and somehow negatively surprising results since they either overestimated state's capacity or translated a weak state's self-understanding. On the one side, the lack of consideration for local forces engendered a resistance to the state that the institutional weakness failed to overcome<sup>58</sup>. But that institutional weakness was and is actually in itself the cause of the inefficiency and ineffectiveness of state's actions. In one case or/and (in) another, centralization engendered state's dispersion and weakened -instead if strengthening- state's legitimacy.

On the other side, decentralization discourse in Africa is/was inappropriate since it is based on wrong premises. It consists in relaying the theory of decentralization applied to highly centralized states, while in African weak sates, the societies are poorly integrated into those

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<sup>57</sup> MIGDAL S. Joel, *Strong Societies and Weak States : State-Society Relations and State Capabilities in the Third World*, Princeton, N.J., Princeton University Press, 1988.

<sup>58</sup> NANDY Ashis, *The Romance of the State and the Fate of Dissent in the Tropics*, New Delhi, Oxford University Press, 2003, pp. 1-2.

states. My claim here is that, more than elsewhere, decentralization designing and implementation should imply serious bargaining between the state and the (most significant forces of the) society.

This chapter does not deny the existence of effectively centralized states or their possible efficiency. As we have just mentioned, it is even in reference to those centralized countries that the prevailing theory on decentralization was elaborated. Speaking of decentralization using that understanding would first imply achieving successfully the hegemonic project. In theory, such result can be reached either by coercion or on a voluntary basis of the social forces included within state's borders.

Coercion is not a new phenomenon in the African political experience and one should not forget not only its failure to bring about state's hegemony but also the social cost that such an enterprise would (continue to) impose. Another thing to keep in mind is that such an enterprise does not benefit anymore from the same advantages or opportunities (such as the popularity or the tolerance) as before. In most of the cases -if not in all-, state's hegemony and the consecutive (successful) centralization "were forged with iron and blood", at the expense of individuals' and groups' political, cultural, ethnic, religious, linguistic rights.<sup>59</sup> The President of Ivory Coast, Laurent Gbagbo, used the right words to express this constraint when he said that Africa has to make its 1789 revolution in the presence of Amnesty International.<sup>60</sup>

As for the voluntary recognition of state's hegemony, the first thing to mention is the origin of current African states. All those countries resulted from a forced gathering/rally of different social categories, ethnic groups and nations by the colonial powers regardless the pre-existing political systems. That's why there is no Act that founded the state and which was recognized as such by the different communities. Would that Act have existed, I am skeptical whether African societies would have accepted to voluntarily scarify their vey existence (cultural values, social and political institutions, economic system) in the name of a foreign hegemon.

One can oppose this argument arguing the different treaties signed by the explorers working for the future colonial powers and then the administrations of those powers during the colonial period. But an abundant literature has shown the use of deception that characterized those treaties (use of writing for illiterate people, language of the negotiation and of the document, non revelation of what was really at stake) so that their interpretation

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<sup>59</sup> NANDY Ashis, *op. cit.*

<sup>60</sup> SMITH Stephen, *Négrologie : Pourquoi l'Afrique meurt*, Calmann-Lévy, 2003, p. 194.

turned out to be problematic<sup>61</sup>. I will come back largely to this dimension when examining, in the next chapter, the origins of the current Democratic Republic of the Congo. Before that, let's only note what happened in the eastern part of the Congo where the indigenous thought they were negotiating with short-stay merchants as they used to do barter on the coasts, while the emissaries of the King of the Belgians were convinced that the scraps of paper they signed with local chiefs were conferring them the full sovereignty over the territories under consideration<sup>62</sup>. The fight they continued to engage or the collaboration they offered for their survival is to be interpreted as a proof of that refusal of dissolution/dilution/homogenisation under the (iron) rule of the of the hegemonic state.

This does not imply that those societies did not undergo deep mutations. On the contrary. Populations' displacement, splitting of strong political system, creation of hierarchical systems where they were unknown, superposition of colonial law to the customary or attempts at substitution of the former to the latter,... were the common colonial policies. And many post-colonial governments pursued similar policies. The point is that the response to those colonial and post-colonial ups and downs produced a society which was as diversified as the original situation and whose organization, functioning and practices bear the heritage of these different influences.

The argument I will be making for decentralization in this chapter capitalizes all those successes and failures, the constraints of the current time, and the reality of post-colonial African countries, taking the DRC as a case study. It pleads in favour of going beyond the rhetoric and/or the flood of constitutions and adopting measures expressly conceived to officially express and to enforce that will of being and living together in respect of diversities<sup>63</sup> that seems for me to be nowadays the only viable alternative.

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<sup>61</sup> WISSELING Henri, *Le partage de l'Afrique 1880-1914*, Editions Denoël, 1996 ; MUGANGU Séverin, *op. cit.*, pp. 35 and following, ELIKIA M'Bokolo, «Afrique centrale : Le temps des massacres», in FERRO Marc(ed.), *Le livre noir du colonialisme*, Ed. Robert Laffont, Paris, 2003, pp. 433-451.

<sup>62</sup> ELIKIA M'Bokolo, *op. cit.*, p. 444.

<sup>63</sup> WAMBA dia WAMBA E., "Le refondation de l'Etat comme fondement de sa légitimation, in *Actes du Colloque sur la Décentralisation: Obstacles à l'organisation du pouvoir local et de l'administration locale dans la R.D. Congo post-conflit*, organized from December 14-16, 2004 by the ISDD(Institut des Stratégies pour le Développement Durable) Kinshasa, September 2005, p. 7.

## 2.2. Understanding of the concept of decentralization.

### 2.2.1. *Decentralization: definition, rhetoric and practice.*

Decentralization is not a new concept. Yet it is one of the most puzzling concepts. Especially in many developing countries where governments, under international pressure to decentralize, apply this concept to a semblance of reform that has little or nothing to do with decentralization in order to continue to receive external support. Scientists, in their attempt at clarifying this concept, do not facilitate the task at all. That is the case when some of them, like D. A. Rondinelli, J. R. Nellis, and G. Shabbir Cheema, among the most famous authors in the topic, include in this concept some notions (such as deconcentration, delegation)<sup>64</sup> that the dominant literature considers as its antipodes<sup>65</sup>. In its conventional formulation, decentralization designates a “movement away from a monocentric to polycentric structure of political power”<sup>66</sup>. It implies that the center, usually by law, hands over some authority, responsibilities and resources to the lower levels and recognizes to the latter both legal status and the autonomy to carry those responsibilities out. Decentralization aims at empowering people and local institutions in giving to the latter more power, getting them closer to the citizens and promoting participation.

Apparently clear in its definition and objectives, decentralization raises nevertheless some confusions<sup>67</sup> in the way many systems approached the concept and tried to implement it: first, some systems labeled “decentralization” reforms whose content was totally different from it. In other cases, the reforms had the formal content of decentralization while centralizing practices remained in force. In both cases we could see, for instance, even where it was formally forbidden, the central government continuing to appoint local authorities or to interfere in the attributions of local government, or sometimes, in a more subtle way, to transfer responsibilities without transferring the required means, just to keep local entities

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<sup>64</sup> RONDINELLI Dennis A., NELLIS John R. and CHEEMA G. Shabbir, *Decentralization in Developing Countries: A Review of Recent Experience*, World Bank Staff Working Papers n°581, Management and Development Series n°8, 1984, pp. 9-19.

<sup>65</sup> See the following point of this chapter.

<sup>66</sup> OLOWU Dele, «Decentralization in Africa: Appraising the Local Government Revitalization Strategy in Nigeria», in NZONGOLA-NTALAJA Georges & LEE Margaret C.(eds.), *State and Democracy in Africa*, Harare, African Association of Political Science(AAPS), 1997, p. 165.

<sup>67</sup> Richard Bird has even said that "decentralization is a slippery term". See BIRD Richard, *Financing Local Services: Patterns, Problems and Possibilities*, Report No.31, Toronto, Centre for Urban and Community Studies, University of Toronto, 1995; quoted by OLOWU Dele, *op.cit.*

dependent<sup>68</sup>, etc. Depending on the case, those “local” authorities kept loyalty to the central government to whom they owed their posts and who was the ultimate judge of the conformity of their acts. To take the case of the Mobutu's Zaire where the single party was above state's institutions, all the officials, whether in public services, public enterprises or in political institutions, were not only appointed by the President of the republic but at the same time local presidents of the party. Thus no one could reasonably think of making those officials accountable before local assemblies (themselves constituted, as they were, in a travesty of election).

Moreover, the implementation of local decisions came to be dependent on the will of central government to provide the required means. As most of the time those means were insufficiently or even not provided, local authorities began systematically reproducing the same plans in the successive budgets. The expected accountability came also to be affected in this case. Unpaid, local assemblies were unable to hold local executives accountable. In any case, the very idea of local institutions lost its very meaning.

All these confusions came from the fact that many governments, more cynically than naively, developed decentralization discourse without taking into account its strong correlation with democratization. In eluding or impeding democratization, chances for decentralization were to suffer the same fate. I argue in this thesis that the very idea which relates decentralization and democratization is that the former aims actually at realizing participatory democracy without which none of them can be fully realized.

### ***2.2.2. Decentralization as a way of achieving participatory democracy.***

I acknowledge first that decentralization can be and is actually only one dimension of democracy. In that way, democracy appears to be broader/more general in the sense that it applies, for instance, to the whole socio-political system(including the associative and social life) and accounts for both local and central political institutions. Moreover democracy is not incompatible with a relatively centralized system in which human rights are nevertheless recognized. However, even if in such a system people were allowed to designate in free and competitive elections those who exercise state's authority or the right to petition to influence the decision-making process in the country, participation could remain limited for many reasons. First the physical and social distance between the centre of decision and the

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<sup>68</sup> RONDINELLI Dennis A., NELLIS John R. and CHEEMA G. Shabbir, *op.cit.*, 1984, p.3.

population and the multiplicity of intermediaries. For large countries, their size adds some more difficulties to this task. At the same time, people, lacking sufficient power, will be forced to wait even for tasks they can locally take in charge for their own necessities(well-being).

Second, the fact that the least demand has to be assessed in regard of the many others from the whole country. So, whatever the emotional charge it is endowed with(e.g. restoration of a tomb) or its preventive character(the cracks in a wall), local demand will either have to wait or even be rejected from the outset for lack of priority and/or (general) interest. Frustration, sentiment of having been had are common in that situation of rejection or when the intervention occurs later on, when the damage has possibly become higher and more costly. Better consideration for people's preferences and prompt responsiveness to local needs, allocative efficiency, checks and balances to restrain central government's power are thus the classical advantages of decentralization<sup>69</sup> on which I would like to add some more.

For plural society, decentralization is a way for each component of the country's population to develop its potential, the genius of its members, the richness of its cultural heritage, to show what it is pride of, its particular share in the common effort. In that way, decentralization becomes a personal and collective effort school. It's also a school where people can learn to appreciate the effort of others. From the human, financial, and intellectual effort, the time, the meetings, contacts it takes for local government to realize a infrastructure, people start to learn both how to solve their own problems and beside the cost -that can be mentioned somewhere on the wall- to appreciate the value of a public work.

Emotionally, we can also mention the affective proximity vis-à-vis some works which have been realized locally and which are as such a result of a direct local effort. This argument is derived from a personal experience in Democratic Republic of Congo(DRC) where from the eighties the state has disengaged itself from all the social services, school and health care. Soon the infrastructures become not only dilapidated/crumbling but also overcrowded. So the parents, already overwhelmed with the school fees (including the functioning fees and the salaries for the teachers), were called upon to support the restoration of schools and to build new classes. One could easily see in many villages how the society become so attentive in controlling the school area, especially for kids not to play in the ground to avoid that they come to break the remaining glasses or any other installation and thus constraining the families to support the same effort once again. Although manifestly Congo

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<sup>69</sup> MARYSSE S., *op. cit.*, 2005, p.189.

does not fill in the case of a democratic country and that *de facto* decentralization was a resourcefulness (the so-called “*débrouillardise*”) in substitution for an inefficient state, it shows how the direct joint effort to maintain or to build some infrastructures helps to understand their very worth.

Decentralization can also be a way of allowing peoples to give a genuine answer to the question of why to keep the country united. It is another form of dictatorship or cheating to keep the peaces of a country united under the mere threat of weapons or in preventing peoples, groups or communities to enjoy that part of freedom which consists in taking locally some of their affairs in charge themselves in the fear that it allow them later on to secede. This fear pushed many governments to pursue an endless and unsuccessful enterprise of making people happy against their better judgment in a highly centralized system. In many countries where some regions or groups have strong desire for autonomy, it ended in transforming every action of the central government, even the most well intentioned, to be felt like a threat, a provocation, an umpteenth attempt to display its authority. And yet, XX recognized that many tensions are not likely to find solution within existing state’s borders since few rebellions or dissident movements put unquestionable demands for secession against the state they are challenging. Most of the time, it is the ignorance of/insensitivity to their claims or intolerance and the repression of some governments in the name of a mythical and fetishistic idea of nation that exacerbate the situation. In any case, if peoples want to secede, it’s not the constitution which will prevent them to proceed. If there is any real universal constitutional norm one can find, the integrity of all existing countries, including the few which resulted from secession. The only exception available now is the Constitution of Ethiopia which clearly recognizes the right to secession, certainly inspired from the secession of Eritrea that it was unable to prevent.

For instance the great amount and complexity of a state's tasks will certainly make the central government, inasmuch as it would be, unable to carry out or to control all of them<sup>70</sup>. . . Lack of decentralization, in a society comes also to lack an important characteristic of a real democracy, in the essence, the responsiveness to peoples needs, expectations and concerns. It may be argued that this argument is weak since it plays only in the context of weak states whereas some centralized states can, to the good extent, carry out their tasks. But this objection although serious takes only the technical/material dimension. It does not consider the “*appropriation valorielle*”(value appropriation) of the task which has been locally

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<sup>70</sup> RONDINELLI Dennis A., NELLIS John R. and CHEEMA G. Shabbir, *op. cit.*, p.3.

accomplished and the pride of what someone has achieved personally is different from the attitude in front what is achieved by the central government and which is considered as a compliance with its duties. The fact that one does not make any effort or is not in position/unable to accomplish something on his own makes him to lose the capacity to appreciate the effort accomplished by other. School of personal effort and appreciation of somebody else's. In bringing state's institutions close to the citizens and opening them up to participation, decentralization reinforces democracy and makes it to become more effective. It allows democracy to penetrate in the daily life through the "proximity institutions". Thus political institutions become approachable. Schematically, the more centralized a society is, the more institutions are both physically and socially distant, the less likely participation will be, the less institution will be responsive to people's concerns, the less democratic society is. Decentralization is thus a way of achieving participatory democracy rather than merely a representative democracy. In Joseph Ayee's terms:

“Decentralization is conducive to local democracy, which is the real and tangible form of democracy in contrast to the theoretical and quasi-mythical democracy of electoral campaigns, conferences and speeches. Local democracy is in the harmony with the needs day-to-day living. The citizens of the country are at least given the opportunity to alter the course of the events by participating in decisions relating to issues which affect them. This encourages the development of political activity at a local level which is beneficial to the general well-being of the nation. Furthermore, this level of political activity will encourage competent men and women to take an interest in politics at the level of local decision-making and thus encourage the emergence of a new political class. Similarly, at the economic and social level, economic decentralization is now considered to be a sine qua non for development and democratization. In this respect, there can be no doubt as to the value of proper local and regional development plans which are qualitatively different from the local and regional components of national plans and which, within the context of effective decentralization, mobilize valuable energies and resources around integrated projects”<sup>71</sup>.

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<sup>71</sup> AYEE, Joseph R.A., «Participation, Poverty and Social Exclusion», Development Policy Management Forum(DPMF) Publications: DPMF Workshop and Conference Proceedings, <http://www.dpmf.org/participation-joseph.html>

### ***2.2.3. Decentralization calls for participation in both central and local government.***

Democracy concerns only central institutions is limited and needs to be extended to the whole state system or apparatus, the same holds when attempts at decentralization are limited to democratization or participation only within local institutions. Mahmood Mamdani has argued in that sense when he told that "a reform in the character of local authority must remain partial and unstable so long as it is not reinforced by a corresponding reform in the central state. Otherwise, its significance will be limited and temporary. Such reform runs the risk of being incorporated into existing forms of state administration, and as such, becoming custodians of the very order they aim at changing"<sup>72</sup>.

Uganda is one of the examples of states who went far in the reforms concerning the local government level while the democratization of the central level is still low. According to Matthew Todd Bradley<sup>73</sup>, Uganda has adopted a non-party democracy officially to avoid or at least to minimize the regional, ethnic, and religious affiliations engendered by former multi-party experience and which was unlikely to reinforce nation- and state-building. The non-party system, also called movement democracy or movement system, was initiated by Yoweri Kaguta Museveni during his guerrilla movement and pursued when he came to power in 1986. It "is based on the framework of mass participatory democracy in which all Ugandans citizens (regardless of affiliation) are members of the national movement and thus, are eligible to vote and actively participate in local and national politics".

This system is credited with having fostered local participation through the establishment of an administrative structure consisting in a series of councils named Local committees made of representatives directly elected by citizens of the various villages. "Additionally, each sequential, upper-level council including the parish, county, and district is composed of representatives elected by the previous level of governance. This arrangement is important because it creates fluidity, stability and transparency in the process"<sup>74</sup>.

Although this non-party system is supported by Ugandans who, during the 2001 referendum, voted at 88 percent in favor of its continuation, some authors point out its limitation to the lower level and does not extend to the upper one, namely the central

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<sup>72</sup> MAMDANI Mahmood, *op.cit.*, p.210.

<sup>73</sup> BRADLEY TODD M., «The Other»: Precursory African Conception of Democracy», in *International Studies Review*, 7, 2005, pp.411-412.

<sup>74</sup> BRADLEY TODD M., *op.cit.*, referring to KASFIR Nelson, «No-Party democracy in Uganda», *Journal of Democracy*, 1998, 9(2), pp.49-63.

government.<sup>75</sup> The respective electoral scores of 75 and 69 percent that Museveni got respectively in 1996 and 2001 are interpreted as peoples' sustain to his policy, but nothing excludes that they be a mark of a system totally controlled by him, making Todd Bradley to rightly wonder whether the current system's relative stability mentioned by Jeff Haynes<sup>76</sup> will survive its initiator.

In any case, this decentralization's exigency for democracy was and is somehow the cause that pushed some people to favor centralization.

#### **2.2.4. *Opponents of decentralization***

Although nowadays strongly criticized, centralization has some defenders. In the cold war context, strong regimes, when controlled, offered to their allies or supporters guarantees of stability. Dictators preferred a more open system whose main weakness was that of bringing about unknown and/or uncontrolled rulers and allowing free discussions about allies. This openness was thus deliberately discouraged, if not fought. The saying “they may be sons of bitches, but at least they are our own sons of bitches” used by a former American president was so explicit on that point. As long as they were still “commandeering” behind their masters in the bloc game and providing the needed natural resources, dictators were good friends<sup>77</sup>. Strong and stable regimes allowed also a free and secure/permanent access to natural resources. If one may consider that this satellite role has disappeared in the post cold war era, that of natural resource thank cannot be excluded in the explanation of why some superpowers are still operating with their “authoritarian but nevertheless traditional allies”.

In the domestic arena, some theories were developed to support centralization in developing countries in general and in post-colonial African states in particular. Given the illegitimate constitution of these states, the very reason of their existence, their necessity and their vitality were challenged from within and/or from outside<sup>78</sup>. To deal with such a hostile political environment, a strong centralized government was needed to keep the country's unity, to formulate and to implement developmental policies. Since development was defined

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<sup>75</sup> SCHRAEDER Peter, *African Politics and Society. A Mosaic in Transformation*, Boston and New York, Bedford and St. Martin's, 2000, pp. 237, 272-273.

<sup>76</sup> HAYNES Jeff, «Limited» Democracy in Ghana and Uganda: What is Most Important to International Actors-Stability or Political Freedom?» *Journal of Contemporary African Studies*, 19(2), 183-204, mentioned by BRADLEY TODD M., *op. cit.*, p.412.

<sup>77</sup> BRADLEY TODD M., *op. cit.*, p.414.

<sup>78</sup> SAWADOGO Raogo Antoine, *L'Etat africain face à la décentralisation*, Paris, Karthala, 2001, p. 205

as capital intensive and growth oriented and the administration was perceived as a hierarchical top-down structure, this was intended to produce a gain both in time and in means since it could avoid endless bargaining between opposing groups on the one side, and allow a better allocation and control of scarce resources.<sup>79</sup> What have been called “development administration's deadlock” can be understood in that sense: According to it, “a country might enjoy instrumentality, predictability and equality before the law, but must therefore suffer authority, narrow discretion and compartmentalized, hierarchical decision-making. Or it might enjoy change, creativity and flexibility, and discretion – and suffer goal-substitution. One cannot have the advantages of discretion and bright-line rules simultaneously”<sup>80</sup>. The use of governmental power was thus presented as the guarantee to change institutions in favor of the masses<sup>81</sup>. Convinced that democracy was harmful to economic growth, some authors proposed: “political development must be held down, at least temporarily, in order to promote economic development”<sup>82</sup> This conception lost its supporters when it appeared that the centralized regimes were not taking developmental issues so seriously. Instead, that system allowed corruption, secrecy, patrimonialism, clientelism, etc. In Many African countries, it ended up into wars and ethnic violence(Somalia, Liberia, Sierra Leone, Ethiopia, Rwanda, Burundi, Angola, and Nigeria), or party or military autocracy, and its corollaries: inappropriate allocation of resources to arms instead of health welfare; economic mismanagement; state corruption; human rights abuses; and money laundering”<sup>83</sup>. In the lack of any institutional mean to constrain those regimes to change their attitude, desperation became the master-word. And when any change was to be brought about, it was by military means. But the latter option turned in reproducing the same attitude than changing it. State authority continued shrinking and/was rejected, and the society was dispersed in a sort of *laissez-faire* way.

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<sup>79</sup> BYRANT C. and WHITE L.G., *Managing Development in the Third World*, Boulder, Co, Westview, 1982, quoted by AYEE, Joseph R.A., *op. cit.*

<sup>80</sup> SCHAFFER, 1969 quoted by SEIDMAN Ann and SEIDMAN Robert B., *op. cit.*

<sup>81</sup> SEIDMAN Ann and SEIDMAN Robert B., *op. cit.*, p. 161.

<sup>82</sup> HUNTINGTON, Samuel P. and NELSON, Joan M., *No Easy Choice: Political Participation in Developing Countries*, Cambridge, MA: Harvard University Press, 1976, quoted by SCHMITZ Hans Peter, «Domestic and Transnational Perspectives on Democratization», *International Studies Review* 6(3), 2004, p.413.

<sup>83</sup> OLOWU Dele, *op. cit.*, p.164. This situation confirms Vernon Bogdanor in his doubt about the proposition that "centralisation makes for national unity". For him, this proposition "is a case that needs to be argued, not simply asserted. An alternative answer is possible -that a society may be held together through what Gladstone once called, in a speech given at Swansea in 1887, a 'recognition of the distinctive qualities of the separate parts of great countries". He concludes from that that devolution may strengthen the country(the United Kingdom, in his case), not weaken it. See BOGDANOR Vernon, "Devolution: Decentralisation or disintegration?", *The Political Quarterly Publishing*, Backwell Publishers, Oxford & Malden, 1999, p.194.

### **2.2.5. *No centralization, no decentralization paradox.***

Undemocratic, African states are not truly decentralized. Neither are they, in fact, really that centralized as such despite the extreme and often-criticized theoretical centralization attributed to them. That is what Dele Olowu refers to in saying that “African states are centralized, at least formally, whereas their societies are relatively decentralized, and in many cases, dispersed”<sup>84</sup>. From that point of view, it is wrong to think of these states whose decentralization is about here as entities which have both competences in all fields and (effectively or at least potentially) enough resources to carry them out, so that what is required to get more efficient public service/action is only a harmonious and sound share of attributions and resources<sup>85</sup>. In fact, the state is so weak that, in many countries, it became more and more absent in terms of regulation, public services. And the center(government) itself, enable to display its authority and action on the entire territory, withdrew itself to become isolated, limited in the capital city and in some towns and some other “useful spaces” within national boundaries. It is not strange to see some authors speaking of useful and useless spaces within state's territory. This disengagement, the existence of free-spaces or no-state-spaces within national boundaries is presented as altogether a cause of centralized practices from the beginning<sup>86</sup> and as their consequence insofar as the state embraced large sectors and faced with shrinking means for many reasons: mismanagement, that fact that the international financing institutions turned the tap off either because of the change in the international politics/interests or the continuing debt crisis.

### **2.2.6. *For a new understanding of decentralization in Africa.***

The above mentioned society dispersion calls for a new understanding of decentralization in the African context. It is not only as a matter of transferring responsibilities and means from the upper to the lower level as its definition/common understanding makes us believe. It is also a question of how to make more effective what is decentralization in name only, to make more official(formal) the *de facto* decentralization, or how to gather the currently dispersed powers or groups in a more harmonious and coordinated structure/procedure/way. Thus, decentralization is altogether a way for the state to take (back) the authority, power,

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<sup>84</sup> OLOWU Dele, *op. cit.*

<sup>85</sup> SAWADOGO Raogo Antoine, *op. cit.*, p.205.

<sup>86</sup> See the arguments presented in favour of centralization in this chapter.

responsibility it has never effectively got, exercised or that it has *de facto* lost. It is a way of creating the center or allowing it to better or effectively exist.

Of course these objectives/tasks seem to add some more to what is already said - somehow rightly- excessive expectations from decentralization<sup>87</sup>. To be sure, the literature gives a long list of reasons why countries decentralize: resource mobilization and allocation, and ultimately macroeconomic stability, service delivery, and equity; need to improve delivery of local services to large population, the challenge of ethnic and geographic diversity, ethnic or religious tensions<sup>88</sup>; belief that decentralization can help stimulate economic growth or reduce rural poverty, goals that central government interventions have failed to achieve; way of strengthening civil society and deepening democracy; a way to off-load expensive responsibilities on to lower level government<sup>89</sup>; democratizing where democracy does not exist or improving it where it is limited to the central institutions; developing the country and reducing poverty; reforming the administration and promoting good governance<sup>90</sup>; etc. Some of them look even contradictory like the idea that decentralization or federalism were conceived to tame the dragons of ethnic politics<sup>91</sup>, while in other cases it (federalism) is seen as having infused new vigour to ethnic conflicts.<sup>92</sup> Having a regard to all that, Sawadogo warns us against the fetishist conception of decentralization which presents it as a miracle solution to make more effective what, for decades, many strategies and programs failed to do, a sort of shortcut to catch up with Western countries<sup>93</sup>.

Although relevant, this Sawadogo's point is not itself beyond criticism. In our view, the question should not be dealt with in an “all or nothing” way, meaning that if decentralization does not provide everything which is required or expected from it *hic et nunc*, then it is useless. First of all, this criticism fails to demonstrate that decentralization does not have the potential to produce these results. As we mentioned before, most of the time, decentralization's poor performances have more to do with both the chaotic situation it is required to provide the solution to and the ways in which the process has been led than to the decentralization itself. This is the case when, while a real center does not exist or while its

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<sup>87</sup> SAWADOGO Raogo Antoine, *op. cit.*, p.206.

<sup>88</sup> AHMED Junaid, BIRD Richard, & LITVACK Jennie, *Rethinking Decentralization in Developing Countries*, Discussion paper, World Bank, October 1998, 42 pages.

<sup>89</sup> MANOR James, *The Promise and Limitations of Decentralization: Summary*, Technical Consultation on Decentralization, FAO, December 1997. <http://www.fao.org/sd/rodirect/ROfo0023.htm>

<sup>90</sup> SAWADOGO Raogo Antoine, *op.cit.*

<sup>91</sup> RONDINELLI Dennis A., NELLIS John R. and CHEEMA G. Shabbir, *op.cit.*, p.20.

<sup>92</sup> SEIDMAN Ann and SEIDMAN Robert B., *State and Law in the Development Process. Problem-Solving and Institutional Change in the Third World*, London & New York, Macmillan Press Ltd and St. Martin's Press, 1994, p.158.

<sup>93</sup> SAWADOGO Raogo Antoine, *op.cit.*

authority is disputable if not disputed, state's organs behave nevertheless like “decentralization-licensor”, thus failing to adopt a slow, open attitude, where the formal state is a partner among others and not the allocative power/authority. In most of the cases, it will get more than it will give. A state's (center's?) role should thus be that of coordinating, facilitating, than that of allocating, directing, controlling, sanctioning.

Second, some reforms require time to improve and to produce the results, especially having a regard to the catastrophic context in which they have to take place. The problem is that the burning issues decentralization is asked to find solution to are at the same time the main obstacles to true decentralization's implementation<sup>94</sup>. For instance, centralized habits and practices "institute" their own dignitaries who are ready to hinder any attempt to change<sup>95</sup>. And a sort of administrative solidarity makes more tough such a change since the officials tend to hide some compromising information and to protect mutually.

Finally, one should not forget that decentralization is not the only solution to all state's problems. Some of them, like security, immigration and trade, to name a few problems, require solutions which goes beyond national boundaries and have to be dealt with at the regional and international levels.

### ***2.2.7. Does centralization have to lose any relevance today then?***

The move in favor of decentralization does not mean that centralization loses all relevance. Some matters/sectors(national defense, monetary policy) need to be carried out at the central level while some others can be transferred to the lower level or kept under central control depending on the level where they are likely to be better, effectively performed(that is one of the understanding of the subsidiarity principle).

In the context of weak state, pleading in favour of decentralization is not necessarily operating against the center but for a better center. Not only the decentralized entities have to develop the capacity to carry out their attributions, but also the centre has to do the same for its own, including its capacity to coordinate, to assist and -even when necessary and within the limits to be established by the partners to the process- to stand in temporarily or in

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<sup>94</sup> RONDINELLI Dennis A., NELLIS John R. and CHEEMA G. Shabbir, *op.cit.*, pp.4 and 72.

<sup>95</sup> The Human Development Report 1993 holds the same position when it says that vested interests that currently enjoy power in different sectors concerned by democratic reforms are not ready to abandon them at any cost. By the contrary, they are determined to defend their position by using all possible means at their disposal (well-financed lobbies, close-knits associations and even violence). See UNDP, *Human Development Report 1993*, [http://hdr.undp.org/reports/global/1993/en/pdf/hdr\\_1993](http://hdr.undp.org/reports/global/1993/en/pdf/hdr_1993) See also RONDINELLI Dennis A., "The Dilemma of Development Administration: Complexity and Uncertainty in Control-Oriented Bureaucracies", *World Politics*, vol.35, n°1, October 1982, p.67.

permanence for local entities in the name of their own interest or the general interest. That should be the case when, because of the lower level of technical and administrative capacity of local entities, local elites would come to capture for their own the benefits of decentralization calling the central government to intervene to ensure macroeconomic governance and fiscal discipline<sup>96</sup>. It should also be the case in the Congolese case, as rightly pointed out by Marie Mazalto<sup>97</sup>, concerning the “*traçabilité*”, the redistribution and the control of the funds allocated to local entities in the new 2002 mining law. In fact, this law establishes a fiscal system that promotes the sharing of benefits between the central government (60% of the revenues) and local communities (25% for the province where the project is located and 15% for the city or the territory where the exploitation is carried out). Since in most of the mining zones, the public authority is if not lacking at least weak, the intervention of a legitimate and more equipped central authority may be useful to enforce and to promote local capacity to draw the maximum of benefice from that financial opportunity.

Two remarks follow from what precedes:

- Decentralization is not a operation which has to be accomplished once and for all. Neither is it a one-way mechanism. Given the weakness of some institutions and their little experience, decentralization should be a progressive process that avoids the situation where a certain responsibility is transferred to a level that is actually unable to carry it out. This is the main problem of some decisions taken at the central level, and which are inspired by the necessity of generality and uniformity and are supposed to be easily "manageable". In running the risk of ending up in creating impotent institutions, decentralization inspired with these considerations would be just useless(since it does not solve any problem and probably it will create more problems than it solves). Our claim is that, at anytime, it should be possible, when some objective reasons plea in favor of that, for some responsibilities to be transferred, at least temporarily, either to the upper or to the lower level<sup>98</sup>.

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<sup>96</sup> MARYSSE S., *op. cit.*, p. 190.

<sup>97</sup> MAZALTO M., «La réforme des législations minières en Afrique et le rôle des institutions financières internationales : La République démocratique du Congo», in MARYSSE S. & REYNTJENS F.(Eds), *L'Afrique des grands lacs. Annuaire 2004-2005*, Paris, L'Harmattan, 2005, p. 276-277.

<sup>98</sup> In that, our position is, somehow, similar to that of World Bank officials when they were making a performance audit of 70 projects in 1975 and came to the conclusion that it was a "fairly common experience for projects to change in the course of implementation". World Bank, *Annual Review of Project Performance Audit Result*, Washington, DC., World Bank, 1978, p.3. Quoted by RONDINELLI Dennis A., "The Dilemma of Development Administration: Complexity and Uncertainty in Control-Oriented Bureaucracies", *op.cit.*, p.47. Since, like any project, the original design of decentralization may be proven to be technically unworkable if not faulty, or its workability may subsequently encounter some unforeseen difficulties, there is no necessity to be

- Keeping some responsibility under central government's control does not mean its discretion in the decision-making and the decision-implementation but its openness to public deliberation, bargaining and critics. In that sense, decentralization means participation not only in local affairs, but also in the central government's attributions.

### **2.3. Decentralization and closely related concepts.**

The 1993 UNDP Human Development Report<sup>99</sup> makes a distinction between three concepts, deconcentration, delegation and devolution, but only the third corresponds to the actual meaning of decentralization. On their part, Dennis Rondinelli, John R. Nellis and G. Shabbir Cheema<sup>100</sup> added to these three concepts a fourth one, that of privatization but, unlike the UNDP, they describe all of them as types of decentralization. After having presented these four notions, I will provide reasons why I share UNDP's position and then give Dele Olowu's excellent contribution to the understanding of decentralization.

Deconcentration is used when the central government limits itself in passing down administrative discretion, responsibility or authority to lower levels or local offices of central government ministries and agencies. It is a shift of the workload from centrally located officials to staff or offices outside of the national capital. Deconcentration, when it is more than mere reorganization, gives more discretion to field agents to plan and implement programs and projects, or to adjust central directives to local conditions, but always within guidelines set by central ministry or agency headquarters. Both sources agree that, although deconcentration does result in some dispersal of power from central government to lower levels of administration, these different levels remain within the central government structure and few decisions can be taken without reference to the centre.

Delegation involves passing some authority and decision-making powers over to local officials or to organizations that are outside the regular bureaucratic structure and that are only indirectly controlled by the central government. But the central government keeps the ultimate responsibility and the right to overturn their decisions and can, at any time, take these powers back. According to Rondinelli, Nellis and Cheema, delegation is looked upon as a way of removing important functions from inefficient bureaucracies or as way for government to provide goods and services for which user or unit charges can be made, but which are not

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stubborn over these changes which, after all, may threaten, wholly or partially, the success of the decentralization process.

<sup>99</sup> UNDP, *Human Development Report 1993*, [http://hdr.undp.org/reports/global/1993/en/pdf/hdr\\_1993\\_ch4.pdf](http://hdr.undp.org/reports/global/1993/en/pdf/hdr_1993_ch4.pdf)

<sup>100</sup> RONDINELLI Dennis A., NELLIS John R. and CHEEMA G. Shabbir, *op.cit.*

effectively provided by the civil service. Delegation is also a strategy of maintaining public control over highly profitable or valuable activities while adopting, at the same time a more “business-like” organizational structure that makes use of managerial and accounting techniques normally associated with private enterprise. Delegation is finally a means of promoting high priority development objectives that seemingly could not be achieved by either the private sector or the national bureaucracy<sup>101</sup>. Many activities can be subject to delegation: highways, railroads, dams, minerals, petroleum, transportation systems, hydroelectric facilities, airlines, television stations, telephone services, health, education, social security. Depending on the case, these activities can be carried out by state-owned or mixed corporations or by some organizations under the commercial law (especially for those dealing with business-like issues) or administrative law (particularly for those providing social services).

Devolution implies granting decision-making powers to local authorities and allowing them to take full responsibility without reference back to central government. This includes financial powers (encompassing the right to raise revenues and make expenditures) as well as the authority to design and execute local development projects and programmes. The sub-national units of government that devolution creates have a legal status which makes them separate or distinct from central government. The latter frequently exercises only indirect, supervisory control over them. Normally this sub-national units of government have clear and legally recognized geographical boundaries within which they exercise an exclusive authority to perform explicitly granted or reserved functions.

Privatization appears in situations where private sectors firms or voluntary organizations begin offering goods and services that government provides poorly, or not at all, or only in some parts of the country. That shift of responsibility may come from voluntary or deliberate efforts by government to divest itself of public functions in favour of the private. In others cases, privatization comes from a mere substitution of private initiative to state’s failure in performing its traditional missions (education, healthcare, even security) or to state's reluctance toward certain kind of policy (family planning)<sup>102</sup>.

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<sup>101</sup> RONDINELLI Dennis A., NELLIS John R. and CHEEMA G. Shabbir, *op.cit.*, pp.15 and 18.

<sup>102</sup> *Ibidem*, pp.10, 23-26.

Dele Olowu has provided a very interesting analytical tool of the concept and policies relating to decentralization<sup>103</sup>. He made a fourfold typology of decentralization dimensions and expected outcomes: political, economic, administrative and financial decentralization.

*Political decentralization* refers to the opening up of the political space to accommodate civil and political liberties, the existence of genuine institutional pluralism, and political competition through fair and free elections. It entails a movement away from a monocentric to a polycentric structure of political power. It incorporates the creation and/or strengthening of institutions for enhancing vertical and horizontal decentralization, or in fact, non-centralization. Horizontal decentralization would include institutions for promoting the separation of powers and accountability of the executive for its actions and inactions to other public bodies, such legislatures and the courts. Vertical decentralization is realized through the empowerment of local government structures. The objectives of political decentralization are greater citizen participation and higher levels of accountability of the political system to citizens, leading to positive governance norms such as institutional responsiveness and reduction in governmental corruption and waste.

*Economic decentralization*, on the other hand refers to reduction of state dominance in the economic domain, the stimulation of economic pluralism through such initiatives as deregulations, privatization, support to private sector and informal sector growth. The objectives of economic decentralization are higher rates of production, competitiveness, fiscal solvency, and economic diversification.

*Administrative decentralization* refers to the strengthening of field administrative units of the civil service operating in a country. It may also include efforts at capacity building at national and local levels.

Finally, *financial decentralization* refers, among other things, to the transfer of financial resources from central government to autonomous local agencies. These resources may be transferred directly or through tax powers to enable the decentralized agencies to undertake responsibilities already transferred to them. This may also involve efforts at financial deregulation and deconcentration of financial institutions away from the major capitals, and the efforts at mobilizing credit from the informal sector, such as the *tontines* of Cameroon, or the Community Banks in Nigeria.

Using these four major decentralization dimensions, Dele Olowu constructed his argument as follows:

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<sup>103</sup> OLOWU Dele, *op. cit.*, pp.165-168.

$$D_s = P_d + E_d + A_d + F_d$$

$$D_s = P_d + E_d$$

$$D_s = E_d + F_d$$

$$D_s \neq P_d + A_d$$

$$D_s \neq P_{da}$$

$$D_s = P_{db}$$

$$D_s \neq P_d, E_d, A_d, F_d$$

Where:

$D_s$  = State decentralization

$P_d$  = Political decentralization

$E_d$  = Economic decentralization

$A_d$  = Administrative decentralization

$F_d$  = Fiscal decentralization

$P_{da}$  = Political decentralization from above

$P_{db}$  = Political decentralization from below

= Positive value;  $\neq$  Negative value.

According to Dele Olowu, ideally, a genuine process of decentralization is the one which combines all four dimensions, particularly the political and the economic ones. For him, decentralization along political and economic dimensions will ultimately produce substantive decentralization as the political and economic forces, once liberated, force through institutional and fiscal decentralization, or neutralize centralization in those areas. E.g.: France and Netherlands and Botswana.

Where only economic and financial decentralization have taken place, it is possible to have effective state decentralization, even where there is no political and full administrative decentralization. The experience of most of the Asian tigers (Singapore, Korea, Taiwan, Hong Kong, Thailand, Indonesia, Malaysia) and Japan is of this variety. Their political systems, until recently, remained centralized, but they enjoy relatively high levels of economic and financial decentralization.

It is, however, difficult to have a situation in which financial and administrative decentralization occur without putting political and economic decentralization in place.  $A_d$ ,  $F_d$  are the product of  $P_d$ ,  $E_d$ . Even if it was possible to have financial and administrative

decentralization, there would be little or no state decentralization because it is difficult, if not impossible, for administrative and financial decentralization to bring about political and economic decentralization. For that reason, Dele Olowu attests that most of the effort at local government reform in African countries is of this variety.

In the same manner, decentralization along only one of the dimensions cannot bring about real local autonomy. Perhaps the single exception is political decentralization, when it is galvanized by pressure from below rather than a concession from above. If political decentralization is initiated from above by those who wield executive power, and without any substantial inputs from civil society, the impact on state decentralization, or any of its dimensions (economic, administrative or financial), is likely to be minimal. That has been the case in most African states where political decentralization was a concession from above, usually to satisfy donors or particular segments of the society (e.g. The military constituency of military rules, elements of the ruling party, or traditional authorities). Here the ruling authorities decided the nature, pace, and dimensions of political decentralization with the result that this process could not bring about any other form of decentralization, whether economic, institutional, or financial. For Dele Olowu, that explains why the practice of multiparty politics and/or elections in several African countries has not led to institutional pluralism and strong local governments. But the reverse is likely to be the case if pressure for political decentralization is from below, and if civil society takes an active part in defining the elements of the reform.

Dele Olowu's approach accounts for the paradox we found in what have been wrongly qualified decentralization in many African countries. Having failed to encounter the four dimensions analysed by this author, the reforms undertaken under the decentralization label were no more than deconcentration or delegation policies. That's what we will demonstrate in the second chapter concerning the Congolese case, both in colonial and in the post-colonial period. Historically illegitimate, Congo failed to improve its legitimacy by adopting sound decentralization policies. Instead, it constantly pursued reforms from above with the only aim of controlling the society and giving a semblance of legitimacy for external consumption, particularly. Thus these reforms failed to contribute to state's legitimation.

## **2.4. Different structural aspects of decentralization.**

Here, we want to pay attention not on the content/object of devolution, but on the structural aspect of decentralization. It is more an answer to the question of “to whom” and “how” powers are transferred/distributed than in which domains powers are transferred. Of course these two questions are interrelated and the reply to the latter encompasses some aspects related to the former.

### **2.4.1. Vertical versus horizontal decentralization.**

The first distinction to mention is the one between *horizontal and vertical decentralization*, the same one we met in Dele Olowu's approach when developing the implications of political decentralization and which is also mentioned in the 1993 Human Development Report.

*Vertical decentralization* allows the central government to hand some of its powers to lower tiers of authority – to states in federal countries or to regions, and then further down to local governments, or even to village level. But this process has to be accompanied by *horizontal decentralization*, meaning a dispersion of power among institutions at the same level (each same level). Indeed, it happens sometimes that an institution concentrates the whole range of powers in its hands<sup>104</sup>. That is the case of the executive of many dictator regimes, but also some 'democratizing countries', when the most important affairs of the state are taken away from the cabinet to be dealt with by close presidential advisers. The governmental framework is kept just to look like other modern states while in reality there is an institutional duality in which the body of advisers is the real executive and the cabinet has a mere token role to find jobs for political clients or for the opponents of the regime.

President Mobutu used, for instance, to enact laws without informing either the National Assembly or even the ministers officially in charge of the attributions the new laws were about.<sup>105</sup> The strategy was simple. A provision of the constitution said that "the

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<sup>104</sup> UNDP, *Human Development Report 1993*, [http://hdr.undp.org/reports/global/1993/en/pdf/hdr\\_1993\\_ch4.pdf](http://hdr.undp.org/reports/global/1993/en/pdf/hdr_1993_ch4.pdf)

<sup>105</sup> One of Mobutu's former ministers, Me Thomas Lwango, said that, sometimes, Mobutu asked separately two or three ministers and advisers to prepare his speech and at the end he read none of their texts but an other version resulting from a combination of ideas drawn from the different texts. The last version was made by somebody else, different from the authors of the first texts. Thus none of them could pride himself on having

legislative power is exercised by the President of the Republic "*with the help*" of the legislative council". Thus the president was the legislator and the legislative body was a mere adviser, a councilor. Later on, under certain pressures, that constitutional provision was removed and the legislative power came to be shared between the President of the Republic "*and*" the legislative Council and was to be exercised respectively by Ordonnance-loi and by law. The Ordonnance-loi was intended to be a legislative act taken by the president of the Republic in a particular moment: when the parliament is on vacation or in the emergency case. In reality, the exception became the rule. The Ordonnance-lois came to be the common way of legislating, for the President used to take them while the parliament was in ordinary session or he expected the moment when the parliament was on vacation to enact a great amount of them. In any case, since, in terms of hierarchy, the unique party's institutions had the primacy over state's ones and Mobutu was the President of the Party, no other institution was entitled to put into question his acts.

Horizontal decentralization is also found to be absent, as we'll see later on, within traditional forms of authority where the three powers (executive, legislative and judicial) are concentrated in the chief.

#### ***2.4.2. Territorial versus technical and community-based decentralization.***

*Territorial decentralization* is also used to differentiate it with *technical decentralization* and with *community-based decentralization*. The idea is that in order to decentralize, state territory is usually divided into many political entities to which responsibilities are recognized. This usual mode allows the state to adopt a uniform structure of local government. This advantage of uniformity does not go without dangers. Among them, is the one mentioned by Dele Olowu in Nigeria where the local reforms launched in 1976 brought the total of local government units to 549 "on a uniform criteria of 150,000-800,000 throughout the country, and with a uniform political/administrative structure(the councilor model)". Its main danger was, however, that it "failed to make necessary concessions for cultural and economic diversity (e.g. between the urban and rural areas and between areas of strong non-governmental activity and those without)<sup>106</sup>". The problem posed by the Vidcos in Zimbabwe are of the same kind. Here, the state created new entities on the basis of an

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made the speech, neither the one whose few or none ideas are picked up nor the last writer who transcribes ideas which are not his own.

<sup>106</sup> OLOWU Dele, *op. cit.*, pp.169-170.

arbitrary unit of 100 households, “a unit which did not necessarily comprise a community with shared resources, interests, or a common identity. Vidcos were nonetheless mandated to produce land use plans(of which more later), a goal which again did not reflect local demands and which proved well nigh impossible to carry out without the modification of boundaries and membership”<sup>107</sup>.

That's the reason why people propose, at a lower level at least, to design these entities in such a way that their limits correspond to those of the pre-colonial (traditional) political institutions. I argue in this thesis that this is a wise solution if African modern states want to gain some legitimacy. I also show how this solution has some limits, namely the risk of provoking what M. Mamdani called "decentralized despotism".

*The community-based decentralization* is a mechanism found to solve the problem appearing when a group that has to constitute the political basis (unit) for decentralization or a group which makes political claims is not concentrated on one particular territory but is scattered around two or more territories. This mechanism applies also to nomadic groups, without any permanent establishment on a particular territory. In both cases, the territorial decentralization model fails as it would imply, in the former case, bringing together peoples belonging to the group into question and, in the latter, forcing the groups into question to change their status to become sedentary. Which proves unworkable, as many cases have shown it. In Sudan, for instance, an irrigation program concerning nomads found difficulties to work. Its social acceptance become a problem because nomads were expected to be available for scheduled work in the fields at the time periods which apparently clashed with their livestock herding interests. The nomads opposed the managers of the project even if the pasture conditions in the area were technically suitable to make the program a success<sup>108</sup>.

This form of decentralization has been adopted in the Belgian case. Dirk Beke proposed it for the Tuareg case in Niger. I argue, in the fifth chapter, that it can be the case for Banyamulenge in D.R.C..

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<sup>107</sup> ALEXADER Jocelyn, “State, Peasantry & Resettlement in Zimbabwe”, in MOHAN Giles & TUNDE ZACK-WILLIAMS(Eds), *The Politics of Transition in Africa. State, Democracy & Economic Development*, Sheffield, Revue of African Political Economy (ROAPE), 2004, p.198.

<sup>108</sup> RONDINELLI Denis, "The Dilemma of Development Administration: Complexity and Uncertainty in Control-Oriented Bureaucracies", *op. cit.*, p.58.

The idea is then that of building decentralization on both the community of interests and the "moral link" which unite these peoples and, thus, recognizing some particular rights to them on that basis.

*Technical/functional decentralization (décentralisation par service)*: it implies recognition of legal status and financial autonomy to some public services under the management of more or less autonomous organs.

Unlike territorial or community-based decentralization which is multi-sectoral and creates or recognizes local entities in the aim of establishing a sort of equilibrium of powers all over the country, technical decentralization is mono-sectoral and concerns government-owned firms or public corporations or offices. That's the reason why the speciality principle applies to the latter while local entities benefit from a share of/in state's sovereignty. Although both local entities and public corporations or offices are recognized a legal status, the authority which created public corporations can suppress them very easily than the state can do for local entities for mere political reasons. Beside their autonomy, local corporations remains closely under the control of central or local government (depending of which level of authority they depends on).

## **2.5. Justification of the key position of decentralization policy both in the literature and this study concerning the particular case of D.R.C.**

### ***2.5.1. Reappraisal of decentralization's position in legal and political science's literature.***

In consulting the legal and political science literature about decentralization, one is struck by the positions from which that issue is debated. Almost all the authors deal with that issue in part devoted to the form of the state and particularly in the unitary state. A bit like in the evolutionary theory, decentralization is presented as the most "civilized" or "enlightened" stage of the administration of the unitary state in relation to centralization (with deconcentration or delegation as its variants) which is less differentiated (in terms of separation of powers), participatory and democratic. This is true if we take into account the characteristics and advantages of a genuine decentralization we have presented before. Federalism -which is another form of the state opposed to the unitary state- is described as a form of state in which decentralization has been pushed too far by constitutional recognition

of constituent states' autonomy.<sup>109</sup> If a scale were to be drawn, assuming that genuine decentralization implies democracy, federalism should be thought –not without mistake–to be more democratic than a decentralized, unitary state.

This scientific distortion has engendered two diametrically opposite (and somehow conflicting) currents of thought in the Congolese political debate. Here, the debate about a genuine decentralization of the state get always lost in the confrontation between federalists and unitarists. The fact that the latter (so-called centripetal) accuse the former (called centrifugal) of having or cautioning secessionist ideas, adds more spice to the debate! The compromise is usually found in an evasive constitutional formula about the form of the state. Once that compromise is found, political leaders seem to consider that the essential is done, the problem is settled, the work is over, and evacuate the rest of the question to an “as soon as possible” time. This was, true for the Constitution of June 18, 1960 and for that of August 4<sup>th</sup>, 1964. It was also, recently, the attitude of the parliamentarians of the 2003-2006 transitional period who, in their three years legislature, adopted a constitution while the adoption of the law about decentralization was postponed to the next legislature. As a consequence, the electoral calendar was modified since, in the lack of the law on decentralization, the electoral process which should begin with local elections could no more be respected. The electoral commission is blocked now since it has achieved the presidential, legislative and provincial elections but cannot go further in organizing local elections because the newly elected parliament has not adopted the law on decentralization seventeen months after its inauguration. This situation calls for some remarks:

First of all, there is an overlap between characteristics of unitary decentralized state and federalism so that, in terms of decentralization -not in terms of the constitutionally proclaimed form of the state- the difference between these two forms of state is more that of degree. Its is not surprising that some unitary states are more or less decentralized than federal states and vice versa. Rothchild notes on that respect that, some states (like the former USSR and the Union of South Africa) have established systems that are federal in design but unitary in practice because regional governments were denied sufficient measure of independence<sup>110</sup>. Dele Olowu's criticisms of federalism in Nigeria goes in the same sense<sup>111</sup>. Charles Durand's

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<sup>109</sup> BEKE Dirk, «La décentralisation dans les pays en voie de développement et la prévention des conflits internes», Paper presented at the conference organized by the International Institute of Administrative Science, Brussels (Belgium), February 27, 2004.

<sup>110</sup> ROTHCHILD Donald S., *Toward Unity in Africa : A Study of Federalism in British Africa*, Washington, D.C., Public Affairs Press, 1960, pp. 3-4.

<sup>111</sup> OLOWU Dele, *op. cit.*

old but still relevant contribution is more complete about the weakness of the use of the legal criterion to distinguish between federal state and an unitary but decentralized state<sup>112</sup>.

Second, it is wrong to enclose the debate about decentralization within the framework of unitary state. Even within the federal state, the constituent states are not, indeed, the least administrative tiers. To the contrary, they contain territorial/administrative subdivisions whose relationships with the state to which they belong and, possibly, with the central state have to be clearly defined. It does not change fundamentally anything in the political development of the country whether the centralization be exercised by the central state or the constituent state. The last may be even worse. Since it is difficult for government, especially in large and weak countries, to control all the different portions of its territory (which allows a sort of “laissez-faire”), federalism without decentralization may give the constituent state the opportunity to achieve what the central state could not do. Harry Goulbourne noted for example that in authoritarian, highly centralized, overbearing and restrictive post-colonial African state whose tendency is to concentrate state power in one or two institutions and to employ the most draconian and sometimes petty means available to curtail and restrict social life of citizens, their “inefficiency is often the saving factor with respect to the lives and freedom of citizens. In other words, if the interventionist state in African countries were able to execute efficiently most of what leaders and regimes desire, then many of these states would have to be regarded as being fascist states. Paradoxically, therefore, it is sheer inefficiency which sometimes acts as protection against arbitrary treatment by one or other state's institutions and leaders”.<sup>113</sup>

Third, concerning the traditional authority issue, discussing its status remains important even in a hypothetical case where federalism would imply “making constituent states to measure” of traditional entities. Congolese legislation is constantly terse concerning these traditional entities in comparison to the provisions devoted to others territorial/administrative institutions (provinces, district, *Territoires*). When it is about the former, in most of the time, it refers to the customary law. Referring merely to customary law

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<sup>112</sup> DURAND Charles, «De l'Etat fédéral à l'Etat unitaire décentralisé», in *L'Evolution du droit public : Etude en l'honneur d'Achille Mestre*, Paris, Sirey, 1956, pp.193-210.

<sup>113</sup> GOULBOURNE Harry, The State, “Development, and the Need for Participatory Democracy in Africa”, in ANYANG' NYONG'O Peter(ed.), *Popular Struggles for Democracy in Africa*, London & New Jersey, Zed Books Ltd & The United Nations University, 1987, p. 29.

without paying attention to its content and its current functioning may result in backing what Mahmood Mamdani calls “decentralized despotism”.<sup>114</sup>

Thus decentralization remains a key issue whatever the form of the state, whether it be federal or unitary.

### **2.5.2. *Decentralization, an aspiration of Congolese people?***

Recent history of the DRC<sup>115</sup> has prevented any possibility of thinking of Congo in terms of united country in the short, medium, or long-term. The plausible scenario was that the country was splitting. The time the division lasted (from August 1998 to June 2003 and even later since some regions under rebellion movements remained uncontrolled by the transitional government) and the attitude of military protagonists reinforced such an idea. One should not forget that goods crossing the “borders” from the territory under the RCD-Goma control to that under an other rebel movement (RCD/ML, MLC,...) and vice-versa had to pay “customs” duty! The so called “Experts of Congo” bet that the situation of the DRC. was the proof of the borders reconfiguration in front of the dying Congo. The question was then that of the relevance of decentralization in the situation in which some domestic, regional and international actors were working for the implosion of the country. But Congo seems to have defied them. Two main reasons justify this relevance. The first is grounded on a recent study carried out by Herbert F. Weiss and Tatiana Carayannis entitled “The Enduring Idea of the Congo”<sup>116</sup> whose aim was the examination of public attitudes toward the Kinshasa government and rebel authorities in the DRC during the period of war in order to understand the construction of Congolese national and state identities. But this study was limited to five cities (Kinshasa, Kikwit, Lubumbashi, Mbuji-Mayi and Gemena) where the researchers have been authorized to carry out their survey. The RCD, a rebel movement backed by Rwanda, refused to give his authorization on the territory that they were controlling and which corresponded to about a third of Congolese national territory. The motive of such a refusal is to be found for the RCD in the awareness of its unpopularity as it has been demonstrated in the 2005-2006 plural elections. We are going to present separately these two aspects.

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<sup>114</sup> MAMDANI Mahmood, *op. cit.*, p. 18.

<sup>115</sup> A decade of violent conflicts involving the official army, a series of rebel movements and militias but also foreign armies from Rwanda, Uganda, Burundi, Angola, Zimbabwe, Namibia and Chad.

<sup>116</sup> WEISS Herbert F. & CARAYANNIS Tatiana, “The Enduring Idea of the Congo”, in LAREMONT Ricardo René(ed.), *Borders, Nationalism, and the African State*, Boulder & London, Lynne Rienner Publishers, 2005, pp.135-177.

2.5.2.1. *Herbert F. Weiss and Tatiana Carayannis' conclusions on national identity in the DR Congo.*

Herbert F. Weiss and Tatiana Carayannis have concluded that “the identification of the Congolese with the Congolese nation over the last forty years has become stronger, despite predatory leaders, years of war and political fragmentation, devastating poverty, ethnic and linguistic diversity, and the virtual collapse of state services.”<sup>117</sup> They note two particular moments when Congolese state structure was weaker than ever so that secession would have been possible had anyone chosen to lead one: the first is the period corresponding to the late Mobutu regime and the early LD Kabila’s takeover in 1997. As much as Mobutu army was so weakened that foreign armies were able to march across the country and to overturn his regime in a matter of seven months with little resistance, LD Kabila military force was so weak since it relied on young *kadogos* (most of them children) that he recruited during the war and foreign (Rwandan, Ugandan) military. One among the latter, James Kabarebe, was the Chief of staff of the FAC (Forces armées congolaises) before going to occupy the same position in his home country Rwanda. The second starts in mid-1998 (June and July) when, under internal pressure, LD Kabila decided to release himself from his former foreign allies. That decision leads the latter to sustain other rebellions against Kinshasa government from August 2, 1998 until mid 2003, provoking a real regional war with no less than seven foreign countries involved.<sup>118</sup> This situation engendered a *de facto* division of the Congo since the political and military establishments “created what became recognized borders between the Kinshasa and the rebel-controlled zones. At a later stage, these borders were even monitored by MONUC, the UN observer mission in the Congo. Yet, despite the deep antagonisms that existed between the leaders of the different movements, not a single one postulated a breakup of the Congo”.<sup>119</sup> The question is why?

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<sup>117</sup> *Ibidem*, p.135.

<sup>118</sup> Rwanda, Uganda and Burundi were supporting a rebel movement called RCD (*Rassemblement congolais pour la démocratie*), and then, when a quarrel of leadership between Rwanda and Uganda ended in the split of RCD, one wing called RCD-Goma continued receiving Rwandan and, to a lesser extent, Burundian support while a second wing, RCD/ML, was under Ugandan influence. Later on, Uganda helped to create another anti-Kinshasa movement, the MLC (*Mouvement de Libération du Congo*) which dominated the northern part of the Congo. As for Kinshasa government, its life was spared thanks to the military support of Angola, Zimbabwe, Namibia and Chad. Internally, it tried to seek support wherever it could find it. Thus it made alliance with many Mai Mai (local guerrillas) in eastern Congo and mobilized the Interahamwe/ex-FAR and other Rwandan Hutu, and the Burundian insurgency movement called *Forces de défense de la démocratie (FDD)*, who were established in the Democratic Republic of Congo.

<sup>119</sup> WEISS Herbert F. & CARAYANNIS Tatiana, *op. cit.*, pp. 149-153.

The answer provided by some authors like Claphan, Reno and Pierre Englebert according to which the lack of sub-national ambitions of African guerrilla movements and warlords may be due to the uncertainty of obtaining international recognition and consequently the risk of not accessing to the international aid and patronage<sup>120</sup> is not enough to explain the luck of such initiatives in Congolese case. Its weakness is that it favors leaders' will or interests without taking into account the position of the population under their rule. It is only by incorporating that aspect that the Congolese situation becomes clearer. The Congo of 1960 seems to have experienced some change. The early independence period was characterized by a strong secession current particularly in three regions: Katanga, South Kasai and Lower Kongo. The two former did actually secede and they received military support of Belgian troops in their attempt to keep controlling these two economic lungs of the Congo. But the international community, strongly opposed to the secessionist movement, stopped it by sending a UN force to restore the borders inherited from the colonial period.<sup>121</sup> Katanga attempted to secede again in 1977 and in 1978 but the movement was stopped thanks of foreign help (France, Belgium, Morocco, with USA logistical support).

Some author noted that this secession tendency diminished. A series of public opinion surveys conducted in Herbert F. Weiss and Tatiana Carayannis' study in five cities(Kinshasa, Kikwit, Lubumbashi, Mbuji-Mayi and Gemena) throughout the DRC in January and June 2002 showed that 78% of people asked whether the Congo must remain unified said that yes and advocated the use of force, if necessary, to do so. It is worthy to note that two of these cities, Lubumbashi and Mbuji-Mayi, belong to formerly secessionist regions. In the former 69% people gave that answer to 84% in the latter.<sup>122</sup> Two other questions asked in this survey are worthy of note. The first concerns whether unity of the Congo is the more important than the interests of any particular group or ethnicity. To this question the average of affirmative replies in the five cities was 88.4%. The second is about the type of state the respondents would prefer in the future of the Congo. The authors note that there has been a gradual shift in Congolese preferences in systems of government since the start of the war. In BERCI (Bureau d'Etudes, de Recherche et de Consulting International) surveys through 1998, among the three choices given -federal state (authority decentralized and constitutionally given), unitary state (authority highly centralized), and decentralized unitary state (authority decentralized

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<sup>120</sup> CLAPHAM Christopher, *Africa and The International System: The Politics of State Survival*, Cambridge: Cambridge University Press, 1996; RENO William S.K., *Warlord Politics and African States*, Boulder, Colo: Lynne Rienner Publishers, quoted by ENGLEBERT Pierre, *op.cit.*, p.183.

<sup>121</sup> WEISS Herbert F. & CARAYANNIS Tatiana, *op. cit.*, p.159.

<sup>122</sup> *Ibidem*, p.163.

and conferred by the state)- a federal system of government was preferred by most respondents. Later on, from when, because of the war, the country was divided into four politico-military zones, federalism came to be seen as code for partition. People's tendency therefore moved away from decentralized government because of fears that that decision possibly would lead to the permanent partition of the state.

In this survey(...), "70 percent of respondents in Kinshasa favored some form of unitary state system. Only 23 percent of Kinshasa respondents favored federalism, compared to 41 percent in 1998. 64 percent of respondents in Kikwit and 82 percent in Gemena favored some form of unitary state system. In Mbuji-Mayi, 46 percent of respondents favored some form of unitary state system, and 39 percent favored federalism. Although this was the highest response in favor of federalism of the five cities, when compared to earlier polls it is a dramatic drop; in a 1998 poll, for example, 73 percent of respondents in Mbuji-Mayi favored federalism. In Lubumbashi, 39 percent favored some form of unitary state, and only 23 percent favored federalism-a change from four years earlier when 53 percent favored federalism"<sup>123</sup>.

Even if, as we said before, this survey was limited to the part under the control of Kinshasa government except Gemena which was controlled by the MLC, we can assume, from the Constitutional referendum and the results of the 2005-2006 first plural elections from forty years, that the result would have been even higher in the East part of Congo formerly under the control of rebels.

#### 2.5.2.2. *National identity? Yes! And then?*

The increasing of national identity and the commitment to national unity and territorial integrity have the merit of having allowed the avoidance of borders' implosion in the context of weak state. This makes the question of state's external border restructuring less appropriate issue in the current situation. WEISS Herbert F. & CARAYANNIS Tatiana, righteously, warn us that "while it is evident that the Congolese people will resist any effort –external or internal- to undermine the national unity and territorial integrity of the state, they will fight equally hard for spoils contained within it. A strong national consciousness does not, therefore, preclude crippling internal divisions over power and resources"<sup>124</sup>.

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<sup>123</sup> *Ibid.*, pp. 164-165.

<sup>124</sup> WEISS Herbert F. & CARAYANNIS Tatiana, *op.cit.*, p. 174.

In my view, a great attention should, therefore, be drawn to another kind of borders which are no more external but internal. These borders are, in my view, both horizontal and vertical.

On the horizontal level: The acceptance of the Congolese state by its citizens is surprising for the literature and for the common sense, with regard to the history of its birth, the way in which it has been administrated until now, the recent turbulences and violence it has endured. The fact that its citizens are fully disposed to share its destiny exempts the Congo from one of the hard tasks it should normally find an answer to, which is that of its moral foundation. If in other contexts it is the precondition for state legitimacy, Congolese state seems, according to our precedent developments, to benefit from it a priori and even gratuitously(for free)! Will it continuously be so and at any price? We pointed out the dispersion of African societies in general and of Congo in particular. The recent violence experience of almost a decade furthered that dispersion and added to it psychological barriers between peoples. On that, the newly elected institutions should work if they want to avoid having the ongoing recovery become a mere ceasefire.

On the vertical level, Congo still needs to work out its structural apparatus to include in a more coherent and harmonious way all the different political and social forces. This plea in favor of institutional strengthening policy requires the abandonment of the centralist logics and adoption of political formula allowing the share of powers and resources with the lower levels of the state so that population basic needs be solved at the lowest level they can be (as it is required by the subsidiarity principle).

### 3. AN OVERVIEW OF CONGOLESE (DE)CENTRALIZATION LEGISLATION.

The aim of this chapter is to question the decentralization rhetoric in the Congolese political leaders' discourse, in light of the legislation that has been actually applied from the colonial period until now. I will show the parallel or the continuation between colonial and post-colonial territorial administration and emphasize the absence of a real will to decentralize. Finally, this chapter shows how logic of a centralization that was inspired and/or initiated in 1885 has proceeded, independently of changes in the sovereignty of the Congo.

It is worth recalling that the Democratic Republic of Congo (DRC), as many African countries, comes from an arbitrary colonial creation. Its borders were established without any reference to the assemblage of ethnic groups, religious groups, and peoples already residing within the space circumscribed by those borders. Before colonization, political power was held by traditional or customary authorities with the help of their dignitaries. The political units varied from large, highly structured, and centralized units (called empires or kingdoms) to small, decentralized units based on either kinship or common but short-term interests (such as hunting or agriculture). The concept of "segmentary societies" is used to designate this latter form of political organization<sup>125</sup>. The traditional authority was sovereign within whatever limits of jurisdiction, be it territorial or personal, that he could establish. The jurisdiction of those pre-colonial political entities was not taken into account when the current borders of the country were delimited.

The colonial power worked to undermine the sovereignty of these institutions. It attempted, at times in vain, to suppress traditional powers, considering them to be backward for a modern or modernizing administration. It eventually kept them, -"temporarily", although this temporary allowance never come to an end,- (although there was some transformation of the pre-colonial institutions). Among the motives of keeping them were the double constraints of having to maintain a minimum of respect for local customs and institutions in order to avoid a full rejection of colonial authority and the necessity of having intermediaries endowed with effective power in order to communicate colonial orders to the indigenous people. The traditional authority became then -of course, only when it was necessary- the canal for the soft penetration of colonial power. At the same time, for the sake of its hegemonic project, the

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<sup>125</sup> See FORTES Meyer and EVANS-PRITCHARD E. E., *African political systems*, London, Oxford University Press, 1940 ; EVANS PRITCHARD E. E., *Les Nuer. Description des modes de vie et des institutions politiques d'un peuple nilotique*, 1939.

colonial power kept reinforcing the fact that traditional authority existed only by permission the colonizer, and that traditional authority was merely an instrument of colonial authority. Thus, colonial authority repeatedly intimated that traditional authority had no power of its own<sup>126</sup>.

This situation was clearly equivocal. On the one hand, it expressed colonial power's hesitation to alter or disband the traditional African political institutions. At the same time, the colonial power reduced the legal status of those institutions to that of its 'instrument' whose existence and power was only an extension of the colonial power's will.

In any case, the above considerations appear to have influenced the colonial power's consecration of the chieftaincy at the lowest administrative tier, made with the decree of October 6, 1891.<sup>127</sup> This decree was the first one to recognize and integrate traditional authorities in the administration of the so-called "*Etat indépendant du Congo*" (Congo Free State). Before that, a prescription by the Administrator General on May 14, 1886 recognized only authorities' judicial power in when it was opposed to indigenous interests. The customary essence upon which the traditional African institution's authority rests has been constantly reasserted in all the legal acts since then. The power granted to those authorities, as we will see in examining the texts related to this issue, strengthened and weakened according to circumstances.

### **3.1. The first steps towards a territorial reform during the colonial period.**

#### **3.1.1. *The Origins of the current DRC***

Almost every African country was given to the European colonial powers (States) who were party to the Conference of Berlin (from November 15, 1884 to February 26, 1885). The current DRC, unlike the other African states, began as the private property of King Leopold II, then King of Belgium. King sent several exploratory missions in the Congo before the conference (the most important being that of Sir Henry Morton Stanley), which revealed its rich natural resources and strategic position.

Some years before the Berlin conference, King had organized a geography conference in Brussels (September 12-14, 1876). The conference purported to have a humanitarian aim of exploring and civilizing central Africa, the sole part of the world where civilization had not

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<sup>126</sup> COQUERY-VIDROVITCH Catherine, "A propos des racines historiques du pouvoir: "Chefferie" et "tribalisme", in *Les pouvoirs Africains*, n°25, PUF, Paris, 1983, p.54.

<sup>127</sup> ISANGO Idi Wanzila, "La présence des chef coutumiers dans l'administration territoriale du Zaïre : quelle opportunité ?", in *Zaire-Afrique*, n°258, mars 1992, p.151.

penetrated yet.<sup>128</sup> This theme was chosen to touch the hearts of the conference's participants: the superpowers of that time, namely Russia, Austria, Italy, Germany, France and England. For that purpose, the conference decided to create the African International Association(AIA) and it appointed King Leopold II as its president. National committees were to be created in each country, but they never functioned properly because patriotism and inter-state rivalry prevailed over the idea of international association. The English were not enthusiastic about King's humanitarian project, because they wanted to be the first nation to abolish slavery. In addition, their Royal Geographical Society refused to be subordinated to the Society of Brussels. For that reason, the English created their own association: The African Exploration Association. As for the French and the Germans who seemed to collaborate, they put up their own flags instead of the Association's at the different stations they installed in Africa, although the French received even some financial support from King Leopold II<sup>129</sup>.

However, the alleged humanitarian aims of the conference were merely to avoid arousing the suspicions of the other participants. In November 1878, Leopold II turned the international philanthropic association into a commercial company called Committee for Studies of the Upper Congo (1878-1879). The committee took the form of a joint venture with a capital of one million Belgian francs, in which King's share was of 260,000 and his two Dutch associates Kerdiijk and Pincoffs owned 130,000 through their company Afrikaansche Handels-Vereeniging(AHV). The remaining portion of capital came from private European investors. But this attempt did not go far. In May 1879, before the expedition in charge of establishing stations and charting the Congo River could finish its first mission, the AHV went bankrupt.<sup>130</sup>

Instead of discouraging Leopold II, this misfortune allowed him to embark on his political goal of getting a colony through the International Association of the Congo he had created in 1882 and of which he had complete control. The name of International Association of the Congo was chosen to create confusion between that organisation and its predecessors, especially the AIA. The International Association of the Congo(IAC) even took the AIA's flag (a blue flag with a gold star in the centre). The Americans were the first victims of that confusion when they formally recognized the International Association of the Congo. Unlike the Portuguese, the English and the French, they had no interest in Africa and the guarantee of a free trade they received from Leopold II was enough to reassure them of its legitimacy. But

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<sup>128</sup> WISSELING Henri, *op. cit.*, pp. 164-165.

<sup>129</sup> *Ibid.*, pp. 166-167.

<sup>130</sup> *Ibid.*, pp. 170-178.

they were deliberately mistaken since they were reported that the International Association of the Congo was the successor to the former institutions and that it would temporarily administer new states that were created or would be created in Congo until they were capable of becoming autonomous. The IAC adopted similar strategy that the *Société de Colonisation américaine* used to create Liberia. Thus, the Americans had the illusion that they were contributing to the creation of a new Liberia.<sup>131</sup>

The common characteristic of all these different associations is their ambiguous mission: besides the use of the concessions they acquired by treaties signed with local chiefs, they eventually came to need to interfere in natives' affairs and adopt sovereignty rights over the territories in question. The status of the IAC was particularly ambiguous when substituted itself for its predecessor organisations. In its struggle for international recognition, it presented itself as an administrator of free states (in a treaty with the United Kingdom, the Netherlands and Spain), as a government of free states (in a treaty with Italy), as a state without any reference to other entities (in a treaty with Germany, Russia, Norway and Denmark) while in an agreement with Belgium it was about the creation of a free and independent state.<sup>132</sup>

In any case, the result of those missions and the recognition of the International Association of the Congo by the main powers before and during the Berlin conference<sup>133</sup> put King Leopold II in a better position than the other parties to negotiate his share in Africa. But a serious obstacle hindered his capacity to negotiate: the Belgian Parliament was opposed to any involvement in colonialism for several reasons. First, the country was influenced by liberal ideas promoting free trade against monopolistic practices. From that point of view, it was unnecessarily costly to obtain a colony since those good and services would circulate more effectively in a competitive environment. Second, Belgium did not have a navy that could secure any colonial possessions. Third, the country was deemed a neutral one, and under the protection of the European superpowers, the irrational involvement in the colonial adventure could jeopardize the very existence of Belgium. Fourth, the failure to establish Guatemala in 1845 was still fresh in Belgium's memory.<sup>134</sup>

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<sup>131</sup> *Ibid.*, pp. pp. 233-234.

<sup>132</sup> MUGANGU Séverin, *La gestion foncière rurale au Zaïre : Réformes juridiques et pratiques foncières locales. Cas du Bushi*, Academia-Bruylant & L'Harmattan, Louvain-la-Neuve & Paris, 1997, pp.38-41.

<sup>133</sup> He got the recognition by the USA on the 10<sup>th</sup> April 1884, Germany on the 8<sup>th</sup> November 1884, England on the 16<sup>th</sup> December 1884, France on the 5<sup>th</sup> February 1885 and Portugal on the 15<sup>th</sup> February 1885. See WISSELING Henri, *op. cit.*, pp. 229, 233 and 237.

<sup>134</sup> *Ibid.*, p. 147.

Obstinate to get his favourite share in the African cake, Leopold II managed to overcome this obstacle thanks to his diplomatic skills. First of all, he offered free trade to all. In doing so, he had an advantage over challengers who were known or suspected to be protectionists (namely the Portuguese and the French). The Portuguese took him at his word in publishing the treaties that Leopold's organizations signed with local chiefs in virtue of which the organizations were recognized and transferred exclusive rights. King replied that he claimed exclusive rights precisely to restore them to the whole humanity.<sup>135</sup>

Second, he capitalized on tensions among the European superpowers (France, Germany, England and Portugal). The Portuguese and French threats were the most serious in the region. The Portuguese had the oldest claim over the mouth of the Congo river, as it was "discovered" in 1482 by Diego Cao. But, being known for their protectionism and corruption, Portugal claims were not well taken by other countries. In particular, Portugal's protector, England, was hesitant to accept Portuguese claims. Besides the Portuguese, France invoked its treaty with Makoko and claimed the left bank of the Stanley-pool (between Leopoldville and Matadi). To avert the French threat, Strauch, the negotiator for King Leopold II, wrote a message to Jules Ferry, President of the French council, in which he stated that the AIC was not willing to give up the territory France was claiming. He did concede, however, that, if the IAC had to sell its possessions for any reason, preference would be given to France to acquire them.<sup>136</sup>

The French, while satisfied with such an unexpected offer, preferred to delay the recognition of the IAC in order to observe England's attitude and make sure that the IAC could not be transferred to them. In the meanwhile, Leopold II approached the Germans who had themselves just converted to colonialism. Because of their late conversion, they had no sphere of influence on the Western African coast. They recognized the IAC on November 8, 1884 in the hopes of eventually acquiring colonial rights on the east African coast.

The German recognition had a double effect: it supported the French actions and inspired fear in the English of a possible German-French coalition. The English chose to avoid making a useless trial of influence with their rival, and recognized the IAC on December 16, 1884. France followed suit on February 5, 1885. Following this, the Portuguese had no alternative than to moderate their claims. The Berlin conference was going on forever and the parties were tired with the Portuguese claims. The other parties forced the Portuguese to give up their

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<sup>135</sup> STENGERS J, «Léopold II et la rivalité franco-anglaise en Afrique, 1882-1884», *Revue belge de philosophie et d'histoire*, 47, 1969, p. 462, quoted by WISSELING Henri, *op. cit.*, p.199.

<sup>136</sup> MUGANGU Séverin, *op. cit.*, p. 42.

claim to the right bank of the Congo River and make do with the left one and the enclave of Kabinda (in the north of the Congo embouchure). On the February 15<sup>th</sup>, Portugal finally recognized the IAC and worked hard to keep it from failing and thus falling into French hands. As for Leopold II, he could continue extending the Congo's territory as he wished, and France did not complain because Leopold's expansion increased its "inheritance"<sup>137</sup>.

The Berlin conference ended on February 26, 1885 and the AIC, which, on February 23<sup>rd</sup> was recognized as a sovereign state, was admitted to sign the General Act of the conference with its fourteen peers. Three months later, on May 29<sup>th</sup>, Leopold II transformed the AIC into the so-called "*Etat Indépendant du Congo*" (Congo Free State). The creation of the Congo Free State engendered dissolution of the AIC and the transfer of its structures to the new "state".<sup>138</sup>

### **3.1.2. Constraints from the General Act of Berlin**

Once the question of King's rights to Congo was settled, a second obstacle appeared (afterward): On February 26, 1885, the General Act of Berlin effectively compelled King and his IAC to occupy the country in order to guarantee free trade all over the conventional basin of the Congo, to maintain the public order, to put an end to the slave trade and to promote the economic and social development.<sup>139</sup> Those tasks required human and financial resources. Free trade had the effect of depriving Leopold II of customs duties and Belgium refused to involve limited human and financial resources. The only alternatives to Leopold II were either to invest his own resources and eventually borrow from public or private institutions or to generate money from the colony by exploiting it directly or through private companies. In the end, he adopted a mix of all of these strategies.<sup>140</sup>

The Congo Free State was established as business-state whose guide-line was that of profitability. Its main instrument was the land. After having declared state-ownership over all the territory of the Congo Free State, indigenous peoples were granted the use of the land they actually occupied and that in the immediate vicinity. The rest was declared *res nullius* and, as such, was property of the State. As the state's appetite for more resources (minerals, rubber, ivory) extended, however, the indigenous peoples' land was gradually taken over. Chartered

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<sup>137</sup> For more details and bibliographical references, see MUGANGU Séverin, *op. cit.*, pp.38-41 and WISSELING Henri, *op. cit.*, pp. 137-255.

<sup>138</sup> ELIKIA M'Bokolo, *op. cit.*, p. 434.

<sup>139</sup> DURIEUX André, *Institutions politiques, administrative et judiciaires du Congo-Belge et du Ruanda-Urundi*, Editions Bieleveld, Bruxelles, 1955, pp.14-16.

<sup>140</sup> MUGANGU Séverin, *op. cit.*, pp.43-67.

trading corporations were given public power-like attributions on state property: Besides pursuing wealth, these corporations were also assigned the task of maintaining public order and establishing administrative and military services. At the politico-administrative level, this evolution involved the redefinition of the status of local chiefdoms and relations of authority. At the top was King Leopold II represented in the Congo Free State by the Administrator General of the Congo with an executive body made of Administrators general of different departments. The territory was divided into 12 districts headed by district commissioners whose dimensions corresponded exactly to those of the land circumscriptions in charges of the issue about private properties subject to the land legislation.<sup>141</sup>

As mentioned above, the first text that modified the power of traditional authorities was the decree the October 6, 1891. This decree recognized and integrated the traditional authorities in the administration through official enthronement. It transformed their sovereign power into subordinate power, since they were placed under the direction and control of the district Commissioners or their representatives. At the same time, the decree granted the Governor General the capacity to fix the relationship between chiefs and their subjects.

Isango Idi Wanzila mentioned two reasons why Leopold's administration decided to incorporate traditional chiefs. The first is insufficiency of agents: it was difficult for King Leopold II (and later on, when the Congo became a Belgian colony, for Belgium) to bring civil agents from Belgium into the Congo. Moreover, there was a difficulty facing the Belgians in terms of sheer size of Congo (being 80 times the size of Belgium), which made administration more difficult and to which they were not accustomed. The second one was the avoidance of the "civilization's barrier" that was making difficult the relationship between the new foreign authorities and the populations under their control.<sup>142</sup>

Intimate contact with the population was best established through traditional chiefs whose role was to obtain the compliance with demands for forced labour, compulsory cultivation, labour recruitment and other colonial regulations. "By fulfilling their colonial functions faithfully and by attempting to enrich themselves in the process through extra-legal means, the chiefs eventually alienated themselves from most of their subjects."<sup>143</sup> The work they were doing were essentially that of lower-level officials of the colonial administration.<sup>144</sup>

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<sup>141</sup> MUGANGU S., *op. cit.*, p.52.

<sup>142</sup> ISANGO Idi Wanzila, *op. cit.*, p.151.

<sup>143</sup> NZONGOLA NTALAJA, "The Second Independence Movement in Congo-Kinshasa", in Peter ANYANG' NYONG'O(ed.), *Popular Struggle for Democracy in Africa*, London & New Jersey, Zed Books Ltd & The United Nations University, 1987, p. 117.

<sup>144</sup> *Idem.*

It's worth mentioning that traditional authorities' intermediary role was not always evident since they were not everywhere compliant. The main problem for many of them was how to admit their essentially absolute power was subordinate to a higher authority and that they had to become the mere executants of this higher will<sup>145</sup>. Some chiefs were even inciting their subjects to hide, oppose and even revolt against the occupants.

To convince them, Leopold II's administration used a strategy combining both courtesy and brutality: on the one side, it concluded treaties with local chiefs which committed them to respect the authority of the Congo Free State, which placed them under its protection.

The effective occupation of those areas was difficult because of misinterpretations of those treaties. Indeed, while the indigenous peoples thought they were negotiating with short-stay merchants, such as those who bartered on the coasts, the emissaries of King were convinced that those scraps of paper conferred full sovereignty over the territories under consideration to Leopold II<sup>146</sup>. While some chiefs accepted the arrangement, other had to be constrained through the use of force.<sup>147</sup> Particularly resistant chiefs were replaced by more ambitious people, most of the time those in conflict with traditional chiefs or even by neighbouring scheming chiefs<sup>148</sup>.

In any case, the will of King Leopold II was clearly to extend his control over traditional authorities and, through them, over their territories in order to occupy and exploit the area.<sup>149</sup> Leopold II held appointment ceremonies to finalize their contract. During the ceremony, they were given a medal with "loyalty and devotion" inscribed on it.<sup>150</sup> The medal and a copy of the report of the ceremony became the new symbols of power instead of the traditional symbols.

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<sup>145</sup> WILLAME J.C., «Les provinces du Congo: Structures et fonctionnement. Lomami & Kivu Central», *Cahiers économiques et Sociaux*, Collection D'Etudes Politiques, IRES(Institut de Recherches Economiques et Sociales), n° 4, Léopoldville, 1964, p. 6.

<sup>146</sup> ELIKIA M'Bokolo, *op. cit.*, p. 444.

<sup>147</sup> In one of his reports, Paul Constermans, then Commissary of the government in Uvira in the administrative zone of Ruzizi-Kivu, mentioned to have led some operations against King of NGWESHE. During the last one of 1902, he proudly attested that 80 peoples were killed, 100 women made prisoners, 130 cows and 200 sheep taken from the inhabitants of the region. In that time, King of Ngweshe did capitulate. A year after, in 1903, the same Constermans reported an other operation against King Kabare during which he states the killing of 400 indigenous peoples, the seizure of 600 cows and 1200 goats and sheep. He mentioned that given that King went to find refuge in Ngweshe and refused to capitulate, he would continue to organize frequent incursions against him. See MARCHAL J., *E. D. Morel contre Léopold II : L'histoire du Congo 1890-1910*, volume I, Paris, L'Harmattan, 1996, pp. 44-47 and 54.

<sup>148</sup> XX, «L'évolution politique du Congo-belge et des autorités indigènes», in *Problèmes d'Afrique centrale*, n° 43, 1<sup>er</sup> semestre, 1959, Bruxelles, p. 27.

<sup>149</sup> LESLIE Winsome J., *Zaire: Continuity and Political Change in an Oppressive State*, Boulder, Colo., Westview, 1993, pp. 8-9.

<sup>150</sup> A decree of the November 4, 1892 instituting that medal states that that medal of 50mm of diameter made in bronze will bear on the one side the effigy of the Sovereign King, and on the other the weapons of the Free state of Congo topped by the words: loyalty and devotion.

Mugangu is right in that the official investiture of traditional authorities did not aim at confirming their traditional attributions to obtain their collaboration (as Vunduwawe Te Pemako holds). Instead, the intention was to have to have control over indigenous populations through the traditional authority.<sup>151</sup>

This process of disintegrating indigenous societies was pursued by the decree of June 3, 1906. It attests that all indigenous peoples should belong to a chieftaincy. The latter is made of one or many villages under the control of a unique superior chief. This chief is confirmed by the Governor General. And where there is no chief or if the chief appears to be unable or without authority, the Governor General is entitled to appoint another who is able to get the respect of the inhabitants.

Séverin Mugangu mentions that, beside the pyramidal structure it evenly imposed on all chieftaincies, there were other significant consequences:

- some chiefs' territory was extended beyond the space they controlled already;
- some formerly large and strong kingdoms were split into different autonomous chieftaincies controlled by formerly petty-chiefs (former subordinates) who became chiefs themselves, because the territorial restructuring;
- some chieftaincies kept their former borders but had illegitimate chiefs imposed upon them, because the legitimate chiefs were considered incapable to lead, without authority or averse to collaborating with the occupying power.

In sum, the decree denatured the relationship between chiefs and their subordinates since it transformed the role of the traditional authority into a mere intermediary of state authority and the indigenous people. In addition, a chief's official capacity was reduced to the exercise of the legal powers determined in the law. In other words, the traditional authorities lost the political and ideological justification of their power since the traditional order came to be disqualified in the definition of peoples' respective position in the local socio-political structure.<sup>152</sup>

Ironically, the distortion and erosion of traditional power was accompanied by the conditioning of traditional authority: those chiefs who were inaugurated were ensured remuneration (that they were authorized to cumulate with the tribute from their subordinates<sup>153</sup>) and special protection in their relationships with their subordinates and their

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<sup>151</sup> MUGANGU S., *op. cit.*, p. 58.

<sup>152</sup> *Ibid.*, pp. 58-59.

<sup>153</sup> COQUERY-VIDROVITCH Catherine, *op. cit.*, p. 55.

neighbouring chiefs. In the same ironical vein, traditional authorities were said to be exercising their power according to the customary law as far as it was in keeping with public order and good moral standards.

The decree of June 3, 1906 created tensions between amputated and extended entities and ousted and the new chiefs, and it opened the door for unavoidable clashes between customary law (and its institutions) and the state's law (and its so-called modern institutions). And within the customary system, it tended to radicalize the position of chiefs, increasing the social distance between them and their subordinates and eroding traditional mechanisms of checks and balances. Moreover, as Mahmood Mamdani noted, "the custom came to be defined and enforced by customary Native authorities, backed by the armed might of the central state. Even when force came to be ruled out, it was for European officials supervising Native authorities in the local state. But the latter were tolerated to use it in their relations with their subjects. It was regarded as customary and served to get from the subject the compliance with some development measures".<sup>154</sup> That opened the door for what the author called "decentralized despotism".<sup>155</sup>

And yet, before those changes, as Mahmood Mamdani rightly pointed out, even where centralization went far, the organized power of clans continued to function as popular check on King and its administration.<sup>156</sup>

### ***3.1.3. The tragedy of Leopold's system and the taking over by Belgium.***

Leopold's repressive system ended in a tragedy that cost millions of human lives. In 1892, forced labour legalised for building roads, cutting down the trees, and portorage<sup>157</sup>. Women and children were arrested or even taken hostage to force males to comply with labour demands. In the region called *Cuvette centrale*, the situation was even worse. Rich in ivory and rubber, that region corresponded to a quarter of the whole colony and was distributed in 1892 among three strongly interrelated companies: *Société anversoise du commerce au Congo* called Anversoise, the ABIR (Anglo-Belgian India Rubber and Exploration Company) and the Crown's estate. Those companies developed inhuman methods that became the main topic of conversation: in the case of insufficient delivery of rubber, the rule was to kill the people who were guilty and then cut off their right hands to prove that resistant peoples were punished

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<sup>154</sup> MAMDANI M., *op. cit.*, pp. 42-43 and 286-287.

<sup>155</sup> *Idem.*

<sup>156</sup> *Ibid.*, p. 42.

<sup>157</sup> ELIKIA M'Bokolo, *op. cit.*, p. 442.

effectively. Sometimes, insufficient labour was treated “leniently”: labourers were whipped 50 to 100 times a day (at 6am and 2pm) after which they were exposed naked to the sun for the rest of the day<sup>158</sup>.

The widespread denunciation of such abuses thanks both to the British publicist Edmund D. Morel through his Congo Reform Association and the protestant missionaries forced King to cede his property to Belgium in 1908. Belgium, now aware of the richness of the Congo, did not modify Leopold’s policy. Like Leopold, the Belgian colonial administration pursued the expansion and consolidation of Belgian economic interests. The then Belgian Minister of Colonies, Louis Frank, confirmed it in 1921 when he wrote that the first major goal of Belgium in the Congo was to develop ‘the economic action of Belgium’.<sup>159</sup> This means, to use Nzongola Ntalaja’s terms, that, “whatever the claim made by the ideologues of the so-called civilizing mission concerning Belgian Rule in the Congo”, the colonial enterprise had to be judged in strictly business terms, that is in terms of whether or not it was profitable.<sup>160</sup>

The policy towards traditional authorities did not change neither. As Leopold II, Belgium continued blowing hot and cold. The decree of May 2, 1910, issued two years after the annexation of the Congo by Belgium, is more of a continuation of Leopold II’s policy than a break. It kept the procedure of officially inaugurating of traditional authorities and even extended to second-in-commands with the possibility to be salaried (article 11). It did not nevertheless modify the ‘customary relationships’ between chiefs and their second-in-commands (article 15). It contributed to increasing the power and prestige of the traditional authorities who were recognized. In the declaration from March 1, 1911, the Governor General of the 1<sup>st</sup> March 1911 aimed at implementing that Decree:

“Les fonctions confiées aux chefs et sous-chefs en font des auxiliaires directs du cadre territorial et il convient de les traiter avec la mesure et la considération qui doivent être attachées à leur rôle, qui en fait les éléments de base de notre organisation administrative. Leur autorité doit être soutenue à chaque occasion, et il n’est pas de meilleur stimulant pour eux, ni de meilleur exemple pour leurs administrés, que leur accorder des marques de considération réelles et mesurées d’après leurs fonctions. L’attitude des agents européens à l’égard de cette catégorie d’administrés doit rester correcte, polie, bienveillante, exempte de familiarité ou de vivacité”.

This power of traditional authorities become sooner short-circuited with the creation of a new level of authority: the *Territoire*.

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<sup>158</sup> *Ibidem*, p. 444.

<sup>159</sup> Louis Frank, La politique indigène, le service territorial et les chefferies, Congo Vol. I, n° 2, February 1921, pp.189-201, quoted by NZONGOLA NTALAJA, “The Second Independence Movement in Congo-Kinshasa”, in Peter ANYANG’ NYONG’O(ed), *op. cit.*

<sup>160</sup> NZONGOLA NTALAJA, *op. cit.*, p.115.

### 3.1.4. *The setting up of a new territorial and administrative restructuring.*

In 1912, the principle of creating the “Territoires” was established and the Governor General and his assistants were in charge of organizing them. In that mission, they were asked to make the *Territoires*’ limits correspond to chieftaincies’. This “ethnic” definition of *Territoires* failed, however. This was partly because many leaders started envying the post of traditional chiefs and split up traditional chieftaincies into small units. In some places like in Maniema there were chieftaincies of about fifty taxpayers. Since they were small and, and thus not viable to become *Territoires*, the colonial administration regrouped them<sup>161</sup>. This regrouping was initiated by the Minister Louis Frank in 1920 in the RUFAS (Recueil à l’usage des fonctionnaires et des agents du Service territorial au Congo belge).

The RUFAS contains orientations aimed at giving greater impulse to the rural policy in the Congo. Frank proposed regrouping small chieftaincies to make a “*Secteur*”, which would be placed under the control of a council. The implementation of the RUFAS produced the following result<sup>162</sup>:

Years	Chieftaincies	<i>Secteurs</i>
1917	6.095	0
1938	1.222	340
1953	460	519
1958	402	521

Two moments characterized the legislative implementation of the RUFAS: in 1933, when the Decree of December 5<sup>th</sup> was issued and in 1957, when two Decrees were issued on January 22<sup>nd</sup> and on May 10<sup>th</sup>.

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<sup>161</sup> DE SAINT MOULIN Léon, «Histoire de l’organisation administrative du Zaïre», in *Zaïre-Afrique*, n°201, janvier 1992, p. 38. See also «La politique d’administration indirecte et ses conséquences sur l’autorité indigène», in *Problèmes d’Afrique centrale*, n°43, 1<sup>er</sup> trimestre 1959, Bruxelles, p. 28.

<sup>162</sup> «La politique d’administration indirecte et ses conséquences sur l’autorité indigène», *op.cit.*

#### 3.1.4.1. *The Decree of December 5, 1933.*

This decree officially recognized the *Secteurs* and instituted the council of notables (*Conseil de notables*) both at the *Secteur* and the chieftaincy levels. But, unlike the council of the Chieftaincy whose members were notables appointed according to customary law, the Council of *Secteur* had two categories of members: members *de jure* and those appointed. The first group included all the traditional authorities incorporated in the *Secteur* and the customary judges of the *Tribunal de Secteur*. The second group was made of notables appointed by the District Commissioner in each *Secteur*'s constitutive entities. That council was entitled to elect one of its members to be *Chef de Secteur*.

As it appears, peoples not endowed with customary powers were excluded from partaking in the composition of deliberative bodies both at the chieftaincy's and the *Secteur*'s level.

This Decree recognized also the *Territoires*. Based on that grouping organized under the RUFAS, the *Territoire* could include one or more *Secteurs* and/or Chieftaincies, depending on their territorial and population size.

The creation of *Territoires* at that particular period of time posed two types of problems: First, *Territoires* had no foundation in local tradition/custom –they were fabricated ex nihilo. Thus, instead of using the hereditary principle common to traditional systems, Administrators were appointed by colonial administration using its discretionary powers. Unsurprisingly, until the independence, those Administrators were all white. Second, in the rural administration, *Territoire* came to be inserted above the traditional powers, and were intended to become the base of the administrative architecture in substitution of the chieftaincy. *Territoires* were preferred as the best way to introduce democracy and decentralization in the colony. Indeed, legislator pretended to take the first steps in preparing the rural populations for democratic self-governance and the selection of governors, starting with the lower level. This second component was attested with particular enthusiasm in the following legislative reforms, namely the decrees made on January 22 and May 10, 1957<sup>163</sup> related respectively to the *Territoires* and to the indigenous constituencies (called “*circonscriptions indigènes*”). This latter expression included not only the chieftaincies and the *Secteurs*, but also the so-called *Centres extra-coutumiers* i.e. non-customarily organized built-up areas whose importance was such that they could develop in

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<sup>163</sup> BOLLE Jacques, “Le processus d'évolution politique du Congo belge”, in *Problèmes d'Afrique Centrale*, n°43, 1<sup>er</sup> trimestre 1959, Bruxelles, p. 12.

all domains. In those areas, the chief was appointed after consultation with the councillors and with respect to inhabitants' preferences.<sup>164</sup>

#### 3.1.4.2. *The Decrees of the January 22 and May 10, 1957.*

Before giving the content of the two decrees and analyzing whether their objective was ever reached, I would like to mention the particular political and social context in which they took place.

##### 3.1.4.2.1. Description of the context.

In the period prior to their adoption, the need for more public participation in public affairs had already taken root in the public opinion, moving from the cities to the countryside. It was influenced by industrial development and the emergence of a proletariat class, the return of soldiers from abroad, an increase in the urban population, the development of transportation, the media, fear of Apartheid, the development of nationalism and increasing foreign influence (especially from neighbouring colonies and the United Nations Organization),... Since then, both the majority of blacks and the minority of whites were claiming a significant participation in the political institutions of the colony.<sup>165</sup> The colonial power found somehow constrained to catch up with that evolution. That's what it did in the above mentioned decrees of 1957. What were the main innovations introduced by those decrees?

##### 3.1.4.2.2. Innovations:

At the *Territoire's* level: the Decree of January 22, 1957 instituted a Council whose composition was variable, depending on the importance of the population(article 2-8). The following table gives more details on that respect.

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<sup>164</sup> DOMONT J.M., «Prélude à la démocratisation des institutions politiques congolaises», in *Problèmes d'Afrique Centrale*, n°39, 1<sup>er</sup> trimestre 1958, p. 18. See also the articles 19 and 20 of the Decree of the 5<sup>th</sup> December 1953.

<sup>165</sup> "La politique d'administration indirecte et ses conséquences sur l'autorité indigène", *op. cit.*

<b>Population</b>	<b>Elected councillors</b>	<b>Appointed councillors</b>	<b>Total</b>
Less than 30 000	12	6	18
From 30 001 to 60 000	14	7	21
From 60 001 to 90 000	16	8	24
From 90 000 to 120 000	18	9	27
From 120 000 to 150 000	20	10	30
Form 150 000 to 200 000	22	11	33
From 200 001 to 250 000	24	12	36
More than 250 000	26	13	39

The District Commissioner was in charge of appointing a third of the member of the council. In that mission, he was required to choose among the indigenous and non-indigenous peoples those who were competent and had social influence<sup>166</sup>. According to Jacques Bolle, because of this, a certain amount of posts were guaranteed to Europeans as well as traditional leaders who had acquired political experience. They were thought to be the most capable of addressing rural political and economic issues. Furthermore, by providing the possibility for traditional chiefs to acquire positions outside general elections, the colonial administration succeeded in avoiding the foreseeable risk of the disarticulation of traditional entities inherent in the creation of new institutions (*Territoire*)<sup>167</sup>.

The attributions of the council were limited (articles 7-17): drawing up the list of needs of the *Territoire*, exercising the regulatory power recognized to the Administrator of *Territoire*, and creating small taxes and redistributing the amount among the indigenous constituencies (Chieftaincies, *Secteurs* and *Centres extra-coutumiers*). A *Territoire* had no legal status. As such, it had no proper patrimony and could not establish a proper budget financed by proper resources. According to Jacques Bolle, the legal status was planned for 1963 and the aim of the colonial administration in transferring the taxation powers to the *Territoire* at that stage was that of initiating the council to find resources in different ways than from central administration fund, as a prelude to the *Territoire's* future budgetary responsibilities<sup>168</sup>.

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<sup>166</sup> DOMONT J.M. *op. cit.*, p.7.

<sup>167</sup> BOLLE Jacques, *op. cit.*, 13.

<sup>168</sup> *Ibid.*, p.15.

The Administrator of *Territoire* was the president of the council, but he did not have voting power and the mandate of councillors was free.

As for the chieftaincies and the *Secteurs*, the decree of May 10, 1957 extended the procedure of composition of the Council of *Secteur* to the Council of Chieftaincy. As a consequence, the chieftaincy's Council of notables, whose customary base consisted in the "council of the elders", came to have *de jure* members on the one hand and appointed members on the other. Only the members of the first category were appointed according to customary law while the second were appointed by the District Commissioner after a mandatory consultation with the inhabitants in conformity with a procedure that was to be established by the Governor General. The innovation here is that people without any customary authority could also be appointed, by virtue of their competence or the interests they represented.

The council was in charge of deliberating on issues of local interest and those submitted to it by the hierarchy, approving the annual accounts and the budget, presenting their preferences and motions to the superior authority concerning general interest, deliberating on regulations related to taxes and tolls, alienations, transactions, building local roads, mandatory work, and applications of administrative personnel.

The other innovation of this decree is the institution of a permanent college in charge of assisting a chief with his daily administration and management both at the chieftaincy's and *Secteur's* level. Its members were elected by and within the council of constituency (*conseil de circonscription*). J.M. Domont commented that the college would have exercised considerable influence if the choice of its members had appeared to be representative of the relative importance of those populations<sup>169</sup>. Besides that proportional representation, attention should be paid to the extent of a chief's sphere of authority and to the ability and the capacity of a college to effectively influence that chief's decisions.

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<sup>169</sup> DOMONT J.M., *op. cit.*, p. 19

### 3.1.4.2.3. Appreciation of the Decrees of January 22 and May 10, 1957.

J.M. Domont, a commentator on the above mentioned decrees, attributed three main advantages to them:

First, they laid the foundations for the country's political structure by placing institutions that could start and develop the Congolese people's political participation, for making government accountable and the people to take charge of political responsibilities progressively.

Second, they established the electoral principles by which people can chose their rulers and representatives instead of having them imposed. Simultaneously, these principles reduced the influence European authorities had over indigenous communities' administrations.

Third, they constituted a patrimony and established financial rules for initiating the transformation of Congolese communities into local governments.<sup>170</sup>

This praise calls for some moderation, however:

1°. Although it was admitted in principle, popular participation to the political system was not, at this stage at least, effective. Concerning, for example, the above-mentioned council of the constituency, the position of the authorities appointed according to the customary law, for the most part, actually just occupied positions in their respective sub-constituencies (villages, locality and other groupings). Moreover, although the capacity to appoint a third of the members of *Territoire* council and half of the members of Constituency council (Chieftaincy, *Secteur* and *Centre extra-coutumier*) was determined democratically, that democratic consultation was held as just an opinion poll and, as such, it could not offer the validity of a proper voting system. By favouring someone who would lose in general elections, a District Commissioner was able to determine government to his own ends.

District Commissioners were given these powers for two main reasons:

On the one hand, the colonial powers considered Congolese populations politically immature; they were believed to be unable to vote objectively and judiciously for their representatives. The high rate of illiteracy of most of the adult peoples and the belief that the multiple clans would influence on indigenous people were the main causes for that alleged inability.<sup>171</sup> The District Commissioner could theoretically transcend these obstacles and, thus, could chose the best candidates on the behalf of the population.

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<sup>170</sup> *Idem.*

<sup>171</sup> *Ibid.*, p.7. see also ENGLEBERT Pierre, *Sate Legitimacy and Development in Africa*,

On the other hand, the colonial administration give the political inexperience of the future elected people as an excuse to secure positions for Europeans and customary authorities (called notables) who were supposed to already have experience with the different economic and social interests they represented.<sup>172</sup>

In the meanwhile, little effort was made to combat the illiteracy and poor experience of the indigenous leaders, so when the country became independent three years later (on June 30, 1960), about only ten people had attained higher education. A few others received enough education to hold subordinate positions in the administration. Conversely, Europeans enjoyed a complete education to prepare them for the majority of the senior positions. In no case, could these reforms be expected to modify this “(dis)equilibrium”.

It is clear that, in comparison to the political claims of actual African leaders for a generalized electoral system in those councils, these decrees represented a step backward for the movement toward democracy.<sup>173</sup>

2°. It is an exaggeration to say that those decrees established proper patrimony and financial rules for the institutions. It is worth mentioning that the decree of December 5, 1933 was the first to recognize the official creation of the till at the chieftaincy and *Secteur* level. The decrees of 1957 did nothing but reproduce that disposition and extend it to the *Territoire*. Could any institutions (*Terrritoire*, Chieftaincy, *Secteur*) be said to establish a proper patrimony?

From 1933 et 1957, the colonial administration claimed to be trying to strengthen the relationship between the population and its administration and create a body that would consult with the main interest groups. Léon de Saint Moulin criticised this, however, saying that the decentralization they pretended to pursue was, in reality, a mere deconcentration: neither the provinces, districts, or *Territoires* obtained legal status or proper patrimony.<sup>174</sup> In fact, legally speaking, without legal status it is absurd to attest that an entity has been endowed with proper patrimony because, in order to have it, the entity first needs to have legal existence.

As for the chieftaincy, the *Secteur* and, latter on, the *centre extra-coutumier*, to which that legal status was recognized, the colonial administration was reluctant to make any of them more effective. In consequence, until Congo became independent, all the different

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<sup>172</sup> BOLLE Jacques, *op. cit.*, p.12

<sup>173</sup> “L’actualité politique congolaise et les autorités indigènes”, *op. cit.*, pp.21-22.

<sup>174</sup> SAINT MOULIN Léon de, *op. cit.*, p. 47.

services of the central government were grouped together under seven different departments and were kept under tight control. Thus, decentralization remained a mere mirage to be pursued without ever actually being reached.<sup>175</sup> Therefore, reference to any legal status seemed to aim only at allowing the entities in question to remain functional (i.e. to pose fundamental daily acts such as transactions, alienations, loans).

### **3.2. The (de)centralization issue during the post-colonial period.**

This section discusses the continuity between the colonial and the post-colonial periods. For doing so, I divide it into three subsections. The first is devoted to the early independence period (1960-1965). It shows how an amateur political class quarrelled for the right to lead the new state. The second deals with Mobutu's take over of the state and the subsequent "centralization-dispersion" system (1965-1997). The last analyses the post-Mobutu era. This period starts with the continuation of the logic of centralization but is followed by noticeable signs of decentralization, particularly in the new constitution and laws. Those changes still need, of course, to mature both in their design and their implementation.

#### ***3.2.1. The openness and the confusion of the early independence period.***

To a large extent, the postcolonial period appears to have been more a continuation of the (inherited) colonial centralized administrative system than a break, in the sense that it neither increased decentralization nor clarified the status of the traditional chieftaincy.

It is true that the newly independent Congo was endowed with a "constitution", hastily adopted by the Belgian parliament on the 19 May 1960. Indeed, as Pierre Englebert wrote, "until the very last minute, the Belgians had no intention –and no plan- to surrender control over Congo and to grant independence to its citizens. (...) It was riots in 1959 that chocked them into a rapid and confused process of decolonization. A roundtable was convened in early 1960 with a handful of political leaders and independence was granted a mere six months thereafter."<sup>176</sup>

That "given constitution" was taken from the then Belgian parliamentary system with only slight modifications, such as compensation for the lack of a monarchical tradition by the

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<sup>175</sup> *Idem.*

<sup>176</sup> ENGLEBERT Pierre, *op. cit.*, 2000, p. 108.

institution of the head of the state<sup>177</sup> elected by the two chambers of the legislature. It established, in a federal-like way, a clear share of power between the central government and the provinces. At the central level, it instituted a parliament of two chambers, in which the lower chamber represented the people and the upper chamber represented the provinces. A parliamentary majority determined who the prime minister would be. The prime minister was the head of the cabinet and, all together, they were responsible to the parliament. Regarding the provinces they were recognised with legal status for the first time. They were granted an elected assembly in charge of electing the governor, exercising political control over the provincial executive, and issuing edicts in the domain of its constitutional attributions. Concerning the lower levels of authority, the article 8 of the fundamental law stipulated that the legislation in force during the colonial period would continue to be applied .i.e. the decrees of January 22 and May 10, 1957.

This institutional framework was temporary in the sense that the fundamental law was limited to a period of four years(i.e. until the June 30, 1964) within which the representatives of the people were supposed to write a truly national constitution and (re)define the status of the lower tiers of authority (including the chieftaincy). But secessionist movements began just after the independence, both in the central and the south-eastern parts of the country (the latter involving the former metropolis), which, when coupled with the under-prepared abilities of the new elites as well as the leadership quarrels, undermined this plan. Pierre Englebert describes this chaos as follows:

*“Only days after the country was emancipated from Belgian colonialism, in June 1960, large segments of its army mutinied, and the Katanga province announced its secession, followed in [January] 1961 by the secession of the ‘Great Mining State of South Kasai’. Meanwhile, after a mere few weeks, the central government in Kinshasa disintegrated, with the President Kasavubu and the Prime Minister Lumumba dismissing each other before the latter was eventually arrested and assassinated in early 1961. Following Lumumba’s dismissal, his supporters organized a rival government based in Stanleyville, in the east of the country, from 1960 to 1962, while other radical opponents of the regime organized rebellions and revolutions throughout the eastern and the central regions from 1963 onward. The secession were eventually terminated under the influence of a UN intervention, while the numerous*

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<sup>177</sup> The fundamental law avoided systematically to speak of the ‘president of the republic’, to keep open the option of the form of the state that the newly independent state would chose to adopt. The former colonial power was even expecting the Congo to chose to remain under the presidency of the Belgians’ King.

*rebellions were put out with significant help from foreign powers, including Belgium, France, and the United States*".<sup>178</sup>

For these reasons as well as the lack of consensus amongst the different parties in the parliament, the lack of constitutional competence, the enduring conflict between the executive and the legislative, the elaboration and the adoption of the constitutional project by the chambers were delayed. Basically, until the end of the ordinary session in June 1963, no substantive work on the issue was done. Convoked by the President for a hundred days, an extraordinary session began in August 1963 with only one point on the agenda –to produce the definitive constitutional project. However, the parliament opposed to this agenda. It considered this extraordinary session to be infringing on its own competency, notably that of passing the vote of censure in the parliament.

On September 29, 1963, the President Joseph Kasavubu decided to suspend the parliament *sine die* and instituted an *ad hoc* constitutional commission in charge of elaborating the project of constitution, with the intention that it be submitted for popular referendum to avoid further constitutional vacuum. Latter on, November 27, 1963, an *Ordonnance* by the head of the state fixed the way the commission had to be constituted. According to that text, the commission had to be presided over by a member of the central government and included ten categories of participants: the representatives of the central government (4), of the provincial assemblies (42), of the provincial governments (42), of trade unions (12), of employers (16), of rural entities (9), of the national council of the youth (2), of the media (2), of the students (2), of the religious faiths (6). These different groups were given 15 days to appoint delegates. On December 30, 1963, two *ordonnances* intervened, one published the list of the participants and the other fixed the seat of the commission in Luluabourg and the opening of the session on January 10, 1964 for a term of hundred days.<sup>179</sup>

The commission started working on January 10<sup>th</sup>, as planned. Since the (Lumumbist) majority opposed the President's decision, it was not represented in that commission. Instead, it created the "*Conseil national de libération*" on October 3, 1963 with the aim of opposing

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<sup>178</sup> ENGLEBERT Pierre, "Life Support or Assisted Suicide? Dilemma of US Policy toward the Democratic Republic of the Congo", Nancy Birdsall et al.(eds.), *Short of the Goal: US Policy and Poorly Performing States*, Washington D.C., Brookings Institution Press, for the Center of Global Development, 2006, p. 57.

<sup>179</sup> BAKAJIKA B. Thomas, *Partis et société civile du Congo/Zaire. La démocratie en crise : 1956-65 & 1990-97*, Collection Editions africaines, Paris, L'Harmattan, 2004, p. 130.

the president's decision and overthrowing the cabinet headed by Cyril Adoula (then prime minister). That council started the “*mulelist*” rebellion which, in 1964, had “liberated” almost two-thirds of the country<sup>180</sup>. Only territory held by the central government participated in the constitutional referendum from June 25 to July 10, 1964.

This constitution marked the triumph of the federalist thesis over the ‘unitarist’ one<sup>181</sup>, despite the fact that the commission members agreed to use neither “unitary” nor “federal” in the definitive constitution. Agreeing not to adopt these terms avoided making winners and losers over the delicate question on the form of the state. Besides the institution of a bicameral parliament and the election of the president by the two chambers borrowed from the fundamental law of 1960, the new constitution reduced state control over the provinces<sup>182</sup>.

Unlike the fundamental law, the constitution asserted a republican thesis and increased the powers of the president. The president of the republic became the head of government. To avoid the conflict the president had with both the prime minister and the chambers, the new constitution gave clear protection of the executive from the legislative. Hence, parliament lost the power to impeach or expel members of the government and the executive lost the power to dissolve the chamber. This reciprocal independence was expected to bring about stability.

However, like the fundamental law, this constitution organised only the functioning of the central and the provincial institutions.

### ***3.2.2. Mobutu's take over (24 November 1965 - 17 May 1997) and the consecutive centralization-dispersion system.***

Mobutu, -then military chief of staff,- took the power by pleading for a strong power capable to displaying the state's authority across the country and securing its unity. In the eyes of many people, Mobutu was the man of the situation, “a stalwart of uprightness amid the political immaturity of the Congolese political class of that time.”<sup>183</sup> The first eight years of his rule were successful, but the governance system he put in place afterward paved the way for the disaster that he would eventually be swept away in.

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<sup>180</sup> It was divided into two blocs: one MNL/Gbenye with Soumailot, Laurent-Désiré Kabila, and MNL/Bocheley with Antoine Gizenga, Pauline Lumumba, Pierre Mulele and Lubaya. The country remained divided until late 1964 when the army, commanded by the colonel Mobutu, with the help of the USA and Belgium, regained the control of the situation. *Ibidem*, p. 138.

<sup>181</sup> That was of the group faithful to Lumumba(non represented).

<sup>182</sup> BAKAJIKA B. Thomas, *op. cit.*, p. 138.

<sup>183</sup> ENGLEBERT P, *State Legitimacy and Development in Africa*,...p. 107.

He established the constitution of 1967 to formalize his power. This constitution underwent seventeen revisions, most of which aimed at conferring more power to him and creating new institutions with which he could incorporate the clients of his regime. For instance, the only Central committee of the former single party, MPR (*Mouvement populaire de la révolution*), was made of about 450 members, all appointed by Mobutu without any regard for popular representation<sup>184</sup>. Meanwhile, while when Mobutu took power in 1965, Government consumption was 9 percent of the GDP, it had reached 24 percent by 1988.<sup>185</sup> And that was not the end. In 1992, two years after he had offered to liberalize the system, 95 percent of the country's budget was earmarked for his own discretionary spending.<sup>186</sup>

The power of the state to control the country became menacing. The institution of the single political party also blurred the distinction between institutions within the state. Every political position, from the centre to the furthest corner of the country, resulted from one's appointment by the chief of the MPR, who was at the same time the sole candidate for the presidential elections. The accumulation of power and resources at the centre went hand in hand with the weakening of real local governments (including the traditional chieftaincy). I will examine the following main texts to illustrate that situation:

The Ordonnance-loi n° 69-012 of March 12, 1969 concerning the reorganisation of local authority, followed in January 5, 1973, by the law n° 73-015 on the territorial and administrative organisation of the Republic. Those texts were followed, a few years later -on the July 1, 1977, by the announcement by the President of the Republic for a new orientation of decentralization. The law n° 78-008 of January 20, 1978 was supposed to take the first steps toward that reform while the law n° 82-006 of February 25, 1982 would have come to reinforce it. The latter remained in force until 1995, when the Law n° 95- 005 of December 20<sup>th</sup> was passed, but this law was never applied.

With regard to the particular objective of this study, the status of the chieftaincy from that period will be focussed on. Of course, to understanding of this require some knowledge of the general context of the country and its position relative to other levels of authority. To that end, a quick examination of the above-mentioned texts will demonstrate their

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<sup>184</sup> Gaspard Muheme mentioned that people from Kinshasa started calling humorously the Central committee "Marché commun"(Common market). MUHEME Gaspard, *Ces guerres imposées au Kivu. Intérêts économiques ou management social ?* Louvain-la-Neuve, Académia-Bruylant, 1999, pp. 154-155.

<sup>185</sup> World Bank, *World Development Report*, Washington, D.C., The World Bank, 1990.

<sup>186</sup> ENGLEBERT Pierre, *op. cit.*, 2006, p. 56.

inconsistency with decentralization and how Mobutu's decentralization discourse that accompanied some of them was empty rhetoric.

### 3.2.2.1. *The Ordonnance-loi n° 69-012 of 12 March 1969*

This *Ordonnance-loi* was enacted by application of the so-called “*Constitution révolutionnaire*” of the 24 June 1967 according to which local governments were to be organized by the law (article 65, paragraph 1). The *Ordonnance-loi n° 69-012 of 12 March 1969* started by suppressing the terminology “*circonscriptions indigènes*” (indigenous constituencies), which had been used by the colonial power. It replaced it with “*collectivités locales*” (local governments). It also disbanded “*collège permanent*”, instituted in 1957 to assist the chiefs in their daily administration and management both at the chieftaincy's and Secteur's level and whose members were elected by and within the council of the constituency. The motive was that they tended to encroach on the chiefs' attributions. The third reform was to recognize the legal status of the chieftaincy and, at the same time, to integrate the local authority into the MPR. They became local party leaders in their respective entities. By becoming the local representatives of the “Enlightened and enlightening guide”, their power was reinforced.<sup>187</sup> But this change would last only for a short while.

From 1973, the regime started to reveal its true face. Overestimating its capacity to master the whole society, it embarked on a series of unpopular reforms that brought about serious challenges for the regime and started digging the tomb for its foreseeable -although lent- decay. Like during the Leopoldian and Belgian colonization periods, those reforms touched on the three main domains: the land, authority within the state and the economy. Unlike the colonial management that developed and maintained an economic rationality to secure a return on its investments, the Mobutu regime engaged in liquidating the country as much as possible for a short term profit.

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<sup>187</sup> This reinforcement of the power of traditional chiefs corresponded to the orientations of the new regime which, according to the preamble of that law, was that of pursuing the centralization of power. See *Moniteur congolais*, 1969, p. 258.

### 3.2.2.2. 1973: The beginning of Mobutu's delusions of grandeur.

#### 3.2.2.2.1. The first attack against the traditional authority(Loi n° 73-015 of January 5, 1973)

The law n° 73-015 of January 5, 1973 marks the beginning of Mobutu's delusions of grandeur. It was conform to the decision of the first ordinary congress of the MPR to strengthen the party.

Besides making some minor changes in different constituencies' appellations (such "collectivité locale" became "collectivité" and "Groupement" became "localité"), that law reduced the chieftaincy to a mere administrative constituency without legal status. In addition, the law officially ruled out the customary laws of the administrative organization across the country. The monopoly of that organization were transferred to the state and its written law. On the other hand, it prescribed to substitute civil servants for hereditary chiefs. These civil servants were to be appointed by the central government, which could also remove or transfer them to other entities.

Unsurprisingly, that law encountered serious resistance from traditional chiefs and most of them marshalled support from their subjects, all the more that few months after, on July 20<sup>th</sup>, 1973, a new law affected the land issue and the economy in general.

#### 3.2.2.2.2. The nationalizations' era and the start of the descent into Hell

Like the colonization enforced the foreign political and economic domination, Mobutu decided to complete his political with economic power. He did so by nationalising several sectors under the pretence of restoring the economy. On June 7, 1966, with *Ordonnance-loi* n° 66-343<sup>188</sup> generally known as *Loi Bakajika*, he had already nationalized the land and declared state-ownership over all unexploited concessions within a month. That law was followed, the year after, by the nationalization of the giant mining company *Union Minière du Haut Katanga*(UMHK) which became *Gécamines*. In 1974, the famous "zaireanization"<sup>189</sup> occurred. With this, Mobutu confiscated the most profitable assets of foreigners and

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<sup>188</sup> *Moniteur Congolais*, n° 15 du 15 août 1966.

<sup>189</sup> Ordonnance-loi n° 74/019 du 11 janvier 1974 portant transfert à l'Etat de la propriété de certaines entreprises privées, in *Journal officiel*, n°13, 1<sup>er</sup> Juillet 1975.

appropriated or redistributed them to his relatives, members of his ethnic group, close friends and political clients.

The irrationality of both those measures and their beneficiaries ended in stifling the economy. As Depelchin mentions, people assisted in a sort of disorder where enterprises were given to incompetent and unscrupulous entrepreneurs.<sup>190</sup> They embarked on stock liquidation to buy new cars, houses and clothing. Less than a year later, shops in the main cities, beginning in Kinshasa, ran out of stock and peoples started making long queues for basic consumer goods like food. Workers were given notice and replaced by the relatives of the new bosses.<sup>191</sup> The management of public enterprises followed the same line and became cash cows for the regime. In the early nineties the *Gecamines* that “at the apex of its production capacity, was responsible for 70 percent of all earned foreign exchange and half of the national budget”, saw its industrial capacity fall to 5 percent of what it was<sup>192</sup>.

### 3.2.2.2.3. The land reform: a dead-end.

When, in 1973, a new law on land concession appeared<sup>193</sup>, it was as a consequence of the *Loi Bakajika*. The land reform established the procedure for acquiring land concessions and the official institutions to intervene at different stages of the procedure. It enumerated the only possible concessions over land that could be made and their only admissible mode of proof: the *Certificat d'enregistrement*. Except for testifying about vacancy of a parcel of land, traditional chiefs were not recognized to have any authority over land issue any longer.

While those changes seem to be both radical and general, the law remained silent on the status of the rural lands in the ended, and revealed its peculiar character. It only roughly mentioned that they had become state property and, for its authority, it referred to another that was never adopted. In the meanwhile, according to the law, those lands had to continue to be managed according to customary law.

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<sup>190</sup> DEPELCHIN, J., *De l'Etat Indépendant du Congo au Zaïre contemporain (1885-1974): Pour une démystification de l'histoire économique et politique*, Dakar, CODESRIA, 1992, p. 187. In the same vein, William Reno mentions that the 1991 quarterly report of the Central Bank in Zaire indicated government's tax revenues decreasing from 61 percent in 1973 to 28 percent in 1978. RENO W., *Warlord Politics and African States*, Boulder & London, Lynne Rienner Publishers, 1998, p. 152.

<sup>191</sup> WEISS HERBERT, F. & CARAYANNIS, T., “The Enduring Idea of the Congo”, in LAREMONT RICARDO, R.(Ed.), *Borders, Nationalism, and the African State*, Boulder & London, Lynne Rienner Publishers, 2005, p. 143.

<sup>192</sup> MARYSSE S., *op. cit.*, pp. 191 & 198.

<sup>193</sup> Loi n° 73-021 du 20 juillet 1973 portant régime général des biens, régimes foncier et immobilier et régime des sûretés, telle que modifiée et complétée par la loi n°80-008 du 18 août 1980, in *Journal officiel de la République démocratique du Congo*, 45<sup>ème</sup> année, Numéro spécial, 1<sup>er</sup> décembre 2004.

Two observations are worth to mention here:

First, the customary law that had been ruled out restarted at the top, temporarily according to the law, but permanently in practice.

Second, speaking of land issue in customary law amounted to re-appealing to the authority of the traditional chiefs. It is them -and not the government appointed civil servants – who are at the basis of the socio-economic relationship. The land is the natural support for their traditional political authority and the locus of their groups’ cultural reproduction.

It is noteworthy that many scholars criticized that law and highlighted the confusion and the wheeling and dealing it engendered. Among them, Séverin Mugangu mentioned, for instance, how, instead of favouring the rural populations that the colonial system relegated/confined on marginal lands, it engendered the recuperation of Europeans’ concessions by the new political, bureaucratic and business elites. He also showed how many chiefs, feeling their power threatened, adopted strategies that aimed, not only at counteracting the state’s invasion of their authority, but also at maximizing their interests in the case that the misfortune could not be warded off. Two factors helped them:

First, although the political changes seemed unfavourable to their power, many continued benefiting from considerable prestige and solicitude from their subjects and from some urban elites who originated from their chieftaincies.

Second, as always, traditional leaders continued and still continue to control wide zones of uncertainty both for the peasants who want to secure their tenures and for the elites in search of political support or for land to register<sup>194</sup>.

As a result of the mixture of the opportunities and the constraints of the new law on land on the one side and the continued application of the customary law on the other side, there emerged a system *sui generis*. Mugangu gave an excellent account of that situation in three chieftaincies of the Bushi (Kabare, Kalehe and Ngweshe), located in the Sud-Kivu province of the DRC. According to him, in order to curb the tendency of rural populations to register their lands, traditional leaders skilfully covered the gap in the law by multiplying the formalities in order to get the right to register the land. Inspired from the “*bugule*” (sale contract) introduced by the council of chieftaincy during the colonial period, those formalities aimed at liberating both the land and the applicant from the different rights and obligations that resulted from traditional land system. Their main characteristics were threefold: they were compensatory, solemn, and likely to offer progressive protection to the applicant. At the

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<sup>194</sup> MUGANGU Séverin, *op. cit.*, pp. 264 & 266.

end of the procedure, the applicant received a document named “Act of assignment” (*Acte de cession*, in the chieftaincy of Ngweshe), “Act recognizing a customary land agreement” (*Acte de reconnaissance d’accord foncier coutumier*, in Kabare), “Attest of redemption of customary tributes/tolls” (*Attestation de rachat de tributs coutumiers*, in Kalehe)<sup>195</sup>.

But as Mugangu points out, only the big concessionaires (businessmen, lawyers, politicians, senior civil servants, churches...) are more concerned with complying with the requirements of the law on land. The ignorance of the law, transaction costs and the social consequences of the breaking-off from the chain of solidarity, all of which are engendered by the registration, explain why the peasants either content themselves with customary contracts or manage to get those new (discharging) titles from the chieftaincy. The effect of the latter is to put the land in a transitory situation in which it goes unregulated both by customary law and by the reforms. Nevertheless, the peasants are protected, both by the traditional authority and by the state’s administration. State’s jurisdictions apply to them the “general legal principle” *pacta sunt servanda* and the general principles of the credit law. Peasants also benefit from the land administration’s attention because it accepts their claims and acquisitions without questioning their legality<sup>196</sup>.

In most of the cases, pursues Mugangu, the chiefs did not register their domains since they were more like political fiefs than *latifundia*-type domains. Some chiefs did, however, register their domains, or at least some portion of them either to avoid losing them to the administration or to keep their subjects from becoming emancipated because of the state’s registration of individual plots of land. In so doing, however, they consolidated their position vis-à-vis the customary hierarchy since registration conferred more rights to them than customary law. They also definitely jeopardized the local social reproduction<sup>197</sup>.

This soft way was not the only kind of response that the society gave against an increasingly intrusive and pervasive state. The increasing discontent among the populations became acute when the Katanga region attempted twice, in 1977 and 1978. Those secession attempts were terminated, thanks to the intervention of France, Belgium, and Morocco, and with logistical support from USA in the name of American’s “stalwart of anticommunism” in the region (especially given the situation in Angola).<sup>198</sup>

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<sup>195</sup> *Ibidem*, pp. 268-270.

<sup>196</sup> *Ibidem*, pp.270-271 & 281-282.

<sup>197</sup> *Ibidem*, p. 268.

<sup>198</sup> ENGLEBERT Pierre, *op. cit.*, 2006, p. 58.

In response to all of this discontent, on July 1, 1977, Mobutu announced a new orientation of the political and administrative organisation toward decentralization. The law n° 78-008 of January 20, 1978 was supposed to take the first steps toward that reform.

### 3.2.2.3. *The law n°78-008 of January 20, 1978.*

The law n°78-008 proposed that the election of the chief of a chieftaincy be held within the chieftaincy council. Among the conditions for a chief to be elected were an age requirement of a minimum of 35 years and an education consisting of at least three years post-elementary school, unless the candidate had already 3 years of continuous experience in the management of a chieftaincy (article 39).

This new attempt, like the former, was strongly challenged so that after four years, in 1982, there was a strong movement to return to the situation before the law had been passed. Apparently the authors of that law did not learn from similar previous experience.

### 3.2.2.4. *The O.L. n°82-006 of February 25, 1982<sup>199</sup> and the rehabilitation of the traditional authorities.*

That law was highly praised for bringing about the most advanced degree of democratisation and decentralization.<sup>200</sup> However, it is only in analysing its content and in inserting it in the context from which it emerged that one can understand fully the vacuity of such claims. 1982 corresponds to the year in which Mobutu changed the status of the MPR from being the highest institution of the republic to being the only institution of the republic. The party became the equivalent of the state and all the other institutions (including the legislative, the executive and the judicial) became mere organs at the disposal of the party.

This spirit of the new regime appears clearly in *O.L. n°82-006 of February 25, 1982*. It created three organs: the popular committee, the council and the local executive at the different local authority levels, and granted them legal status (region formerly called province, city, zone -formerly called *Territoire-*, *Secteur*, and chieftaincy).

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<sup>199</sup> *Journal Officiel de la République du Zaïre*, n°6, 15 Mars 1982.

<sup>200</sup> The preamble of the O.L. n°82-007 of February 25, 1982 organizing the elections of the members of the legislative, the regional assemblies and the local councils (at the cities', zones' and chieftaincies' level) attests : « *Pour arriver à ce stade avancé de démocratisation, il a fallu au Président Fondateur du Mouvement Populaire de la Révolution, Président de la République, opérer la décentralisation des institutions administratives en vue de rapprocher les gouvernants des gouvernés* ».

The popular committee, which was an organ of the party and whose powers were defined the President of the Republic after this change, was placed hierarchically above the deliberative body. It was made up of a series of civil servants of the party and state who operated at the local level and who were appointed by the president of the Republic, except for the representatives of the traditional powers appointed according to customary law. The heads of the local executive branches were, *de jure*, the president of that organ. The local councils who, if a true decentralization had occurred, should have embodied the autonomous power of a decentralized entity, were pushed into the background.<sup>201</sup> In so doing, that law opened the door for the ineffectiveness of local government.

Indeed, except for the chieftaincies in which the customary law regained acceptance, all executives were appointed by the President of the Republic. As such, they could easily escape from the control of the council, since, not only they did not emanate from it, but they also enjoyed the status of local presidents of a higher party's organ.<sup>202</sup>

The same could be said for chieftaincies whose chief, although designated according to customary law, was also *de jure* president of both the popular committee at the chieftaincy level and the president of the local council.

At all these levels, the tendency to sacrifice local interests in favour of those at the centre, where power and/or resources were derived from, prevailed. As we mentioned before, the most important economic sectors were under the control of the central government (mining companies, transport, water and electricity production and supply). It also controlled the financial flows from foreign aid. As for local governments, they were recognized the right to raise (marginal) taxes that the continuous fall in production, exchange and consumption of good and services rendered more and more trivial. This was the case, for instance, in the rural areas where people rely on farming, but whose yield has been continuously declining because of demographic pressures and successive reduction in farming land and the prevalence of poorly developed farming methods. That situation has a direct impact on the budget of local entities who devote rubrics to tax on livestock, tax on market garden produce, etc.

Worse, transfers from the centre to compensate for the local entities' budget imbalances was either irregular or insignificant, as if the mandatory restoration to provinces of only 10 percent of taxes to the provinces as authorized by the financial law<sup>203</sup> was not low

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<sup>201</sup> ISANGO Idi Wanzila, «La décentralisation administrative pour le développement: Quelques écueils à éviter», in *Zaire-Afrique*, February 1998, n° 222, pp. 85-97.

<sup>202</sup> *Ibidem*, p. 38.

<sup>203</sup> Except for the capital city Kinshasa where the bulk of the taxes collected there are central taxes. "Loi financière n° 83-003" of February 23, 1983, completed by "L'Ordonnance-loi n°87-004" of January 10, 1987.

enough! The state was no longer providing the operating expenses or paying the salaries (sometimes for a decade), and, even when the payment did occur, it was less than 10 American dollars per month.

As a result, many local authorities started abusing their powers by extracting what the central state failed to provide from their citizens. The way had been opened for corruption, misappropriation of public funds, extortion. As Mugangu observed, the law that fixed the taxes granted to “decentralized entities” gave the chieftaincy the right to tax all rural activities which were not already subject to taxation at other levels. The lack of control over the tax legislation engendered an unbearable taxation system in which, for example, taxes were imposed on banana plantations, on the sale of bunches of bananas, and on banana vines themselves for sale.<sup>204</sup>

This law of 1982 is the one that best characterized the political and administrative organization of the country. Unlike the three previously mentioned laws, whose duration were about 4-5 years, the law of 1982 remained in force even after Mobutu was overthrown by Laurent Désiré Kabila on May 17, 1997.

### 3.2.2.5. *The law n° 95-005 of December 20, 1995: the history of obsolescence.*

True, in 1995, the parliament of the transitional period, instituted after the *Conférence Nationale Souveraine*, passed law n° 95-005 on December 20, 1995. This law arranged for territorial, administrative and political decentralization until elections could be organized<sup>205</sup>. The slowness of the administration and the outbreak of war kept this law from going into effect, and it remained so until Mobutu was kicked out from power on May 17, 1997. The regime change deprived the law of its *raison d'être* and it was suddenly outdated. A quick look at its content will allow us to understand why.

From April 24, 1990, the President was pushed to put an end to the single party and to open the political space to the opposition. As a consequence, the *Comité populaire* (popular committee), instituted in all territorial and administrative entities, was disbanded. This was reflected in the 1995 law. The greatest particularity of that 1995 law was the system it sought to establish. This reflected the bipolarity of the Congolese political space after 1990: *La Mouvance présidentielle* and *l'Union sacrée de l'opposition radicale et alliés*. The

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<sup>204</sup> MUGANGU Séverin, *op. cit.*, p. 264.

<sup>205</sup> *Journal Officiel du Zaïre*, 37ème année, numéro 1, 1er Janvier 1996.

*Conférence nationale souveraine* was stopped before it could examine the last two reports of the so-called “*Commissions sensibles*” (sensitive commissions) namely those dealing with political assassinations and ill-gotten gains. The political crisis was solved by a sort of compromise. The compromise held that, until elections could be possibly organized, every political position, whether in the deliberative or in the executive bodies, was to be evenly shared between the two “political families”. Of course, with a monopoly of the means of violence at his disposal, Mobutu continued to have supremacy over the rival bloc.

That law instituted a collegial executive with a titular, his assistant, and two *échevins* for every “decentralized entities” (Region, Ville, Zone, *Chefferie* and *Secteur*). Only the chief of the chieftaincy did not have an assistant.

The greatest gain from that law was that it would have reconciled the two “political families”. It would have facilitated also an efficient administrative management by encouraging the members of the executive college to share responsibilities (article 119). Also the association of people from opposing political groups would have created the system of checks and balances that the government lacked.

It posed however as many problems as it was intended to solve. Its first main weakness was that it was an *ad hoc* law tailored to the then bipolarised political scene. It was outdated just by the mere fact that Mobutu regime was overthrown. But, even then, it continued to pose a serious legal issue since it expressly abrogated the law n° 82-006 of February 25, 1982, but nevertheless continued to be selectively applied.

Inattentive and/or loath to act, neither Kabila nor his personal staff managed to solve this problem immediately. The *Décret-loi n° 031 L.D.* Kabila signed on October 8, 1997 limited itself to changing the names of the different administrative entities and authorities.<sup>206</sup> The real solution to that legal problem had to wait until July 2, 1998, when LD Kabila signed the *Décret-loi n° 081 portant organisation territoriale et administrative de la République démocratique du Congo* (I will examine this in the subsection).

The second weakness of the 1995 law was the administrative complexity and fragile equilibrium it created for local governments. On the one hand, the above-mentioned article 119 stated that the executive college had to act as a body and although it could share the administrative attributions among its members, the latter did not acquire any individual decision-making powers. On the other hand, the equitable representation of the two political

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<sup>206</sup> The Zone reverted to its colonial name of “Territoire” in the rural area and the “Commissaire de Zone” that of “Administrateur de territoire” while in the urban area the “Zone” took the name of “Commune” and its ruler that of “Bourgmestre”. The same happened for the “Région” which became “Province”.

families at all levels of governance would likely paralyse its ability to function. It would have been enough that, from a deliberative impasse, one of them withdrew its members. The problem of getting the required majority for a decision was foreseeable, since one bloc could unanimously decide to vote against the one whose opinion it did not share. At the central level, this situation played to Mobutu's interest in maintaining the *status quo* and extending his presidency or, when he needed a decision to be made, to impose his views by force, if necessary.

As mentioned earlier, that law did not have an effective application and was outdated with Kabila's take over on May 17, 1997. This, the administration continued to refer to the law of 1982. However the law of 1982 was not fully applied either. In many respects, it was adjusted according to the constraints and opportunities of the time. For more than a decade the deliberative bodies were either nonexistent or "pragmatically" constituted. After the five year mandate of the councillors,<sup>207</sup> no other elections were organised twenty years after. In addition, in Kivu province<sup>208</sup>, the legislative and local elections of 1987 were voided and the organization of new ones was postponed *sine die*.<sup>209</sup> Thus, from 1987 on in the former Kivu province and later on (i.e. from 1992), all over the whole country, the so-called decentralized entities remained without deliberative bodies.

Some entities filled the vacuum as they wished. For example, in Ngweshe (Sud-Kivu Province) an administrative council of the chieftaincy was instituted. It consisted of the Chief, the sixteen *Chefs de Groupement* constituent of the chieftaincy, and the heads of the offices in charge of development, personnel, topography, census centralization and registry office. That council met every last Thursday of the month until August 1998, when it had to stop because of the war initiated by the *Rassemblement Congolais pour la démocratie*.<sup>210</sup>

Given the absence of the councils, the executive adopted discretionary power over their tasks. In the Sud-Kivu Province, during the war, the local executives (Province, City, *Territoire* or Commune, Chieftaincy and *Secteur*) were renewing the former budgets for two

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<sup>207</sup> Who elected on the basis of the *Ordonnance-Loi n°87-002* from the 10<sup>th</sup> January 1987.

<sup>208</sup> This is prior to its 1988 division into three provinces: Sud-Kivu, Nord-Kivu and Maniema. See the *Ordonnance-loi n° 88-031* du 20 juillet 1988, in *Journal officiel de la République du Zaïre*, n° 3, du 1<sup>er</sup> février 1989.

<sup>209</sup> BUCYALIMWE MARARO Stanislas, *op. cit.*, 2005, p. 162.

<sup>210</sup> NAMEGABE Paul-Robain, *Evolution du pouvoir coutumier en République démocratique du Congo: Plaidoyer pour une réorganisation de l'administration rurale*, undergraduate thesis, Université Catholique de Bukavu, 1998-1999, p. 33.

or more years. Those budgets were adapted to requirements issued by the occupying power through different texts.<sup>211</sup>

### 3.2.3. (De)centralization between 1997-2008.

#### 3.2.3.1. *The first attempts at economic decentralization through the mining code.*

Mobutu's overthrow by LD Kabila initially aroused hope for change. Kabila immediately attempted to renew the contacts with international partners. With the technical support of the UNDP, he elaborated a three-year reconstruction program. This was followed by the meeting of the "Amis du Congo" (Congo's friends) organized by the World Bank in December 1997. Seventeen donor countries and nine bilateral and multilateral agencies attended that meeting and promised to offer about 1.7 billion US dollars for a quick program of economic recovery and stabilization. Payment was on the condition that the Congolese government engage a series of economic and institutional reforms. It was in the attempt to implement that condition that divergences occurred, for LD Kabila preferred to adopt strongly nationalist policy that was unlikely to arouse enthusiasm in his foreign partners. Hence the promise of the "Amis du Congo" was never realized.<sup>212</sup>

The real break started when Joseph Kabila took over the government father was assassinated on January 16, 2001. Unlike his father, he complied with the requirement of economic reforms and what opened a progressive involvement of international financial institutions<sup>213</sup>. As always in the history of Congo, the reforms started with the mining sector, which was considered fundamental for economic recovery. The joint effort of the Congolese official and the experts of the World Bank resulted in the publication of the new mining law in July 2002.<sup>214</sup>

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<sup>211</sup> Among those texts was the list of taxes proposed by the Conference of Governors of the Provinces occupied by the *Rassemblement congolais pour la démocratie (RCD)* and sanctioned by the *Arrêté Départemental n° 035/RCD/99* from December 13<sup>th</sup> 1999.

<sup>212</sup> MAZALTO Marie, *op. cit.*, pp. 264-265.

<sup>213</sup> MARYSSE S., ANSOMS A. and CASSIMON D., *The Aid 'Darling' and 'Orphans' of the Great Lakes Region in Africa*, Discussion paper/2006.10, University of Antwerp, Institute of Development Policy and Management, November 2006, p. 16.

<sup>214</sup> Loi n° 007/2002 du 11 juillet 2002 portant Code minier, in *Journal Officiel de la République démocratique du Congo*, n°5, numéro spécial du 15 juillet 2002.

#### 3.2.3.1.1. Content of that law.

Marie Mazalto has presented the main characteristics of that law well<sup>215</sup>. The first main characteristic is, unsurprisingly, the liberalisation of the mining sector. It was largely opened to foreign investment and the role of the state was limited to regulation and control. Consequently, the discretionary power of the government was highly reduced. The government also abandoned its privileges in favour of the free play of concurrence laws. The new code marked a move away from the conventional system where investors were exposed to long and tedious negotiations and possibly to arbitrary decisions from the head of mine. Previously, the latter could reject applications for delivery or permit renewals without the possibility of either compensation or appeal. In order to promote transparency and to secure investments, the new code placed the mining contract under ordinary regulation, wherein all mining actors are treated alike, and it recognized the “*principe de priorité d’instruction*” (Code, titre II, chap. III). According to that principle, the mining right is delivered to whoever complies with the conditions required for the right in question first.

The second main characteristic is that it created a fiscal system that allowed for a transfer of resources to decentralized institutions and a share of benefices from the mining sector with local communities. Unlike the former system, which monopolized the central government’s revenues, the new code shares them among the centre (60 percent), the provinces where the projects are located (25 percent) and the communities living in city or the territory where the project is implemented (15 percent).

#### 3.2.3.1.2. Two problems and attempts to solve them.

This new code poses two general problems:

- With regard to the weakness or absence of public powers in some areas, are local entities able to take the maximum of advantage that this code offers?
- What about the provinces that are not well endowed in terms of natural resources: will this provision create a developmental disequilibrium between rich and poor provinces at the national level?

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<sup>215</sup> MAZALTO M., *op. cit.*, pp. 268-287.

Two solutions can be offered to solve the first problem. One consists in what was discussed already in chapter two on role of the centre in a decentralization, i.e. the necessity of a legitimate and better equipped central authority that can intervene to enforce and promote locals' capacity to draw the maximum benefits from that financial opportunity. The center can also, in a case of obvious deficiency, such as when one or more appeal(s) were made but not followed upon, substitute any local authorities with itself in order to perform some mandatory decisions or acts that normally fall within the competences of those authorities.

The second solution is the possibility for the decentralized entity to use one of the attributes of its legal status, which is the possibility to concede control of resources to the central government, the province or a private institution until it is able to develop its own expertise.

As for the problem of development disequilibrium between rich and poor provinces, two solutions are also possible. One is mentioned by Stefaan Marysse. It consists in making the equalization fund effective. The role of equalization fund consists exactly in funding public investment projects and programs in order to promote national solidarity and to correct development disequilibrium between country's different entities. Although this fund was explicitly instituted by the 1983 financial law, it has never been active<sup>216</sup>. It was provided that it be funded both by the decentralized entities whose revenues exceed the national middle income and the annual funds from the central government(art. 41). The *Décret-loi* of 1998 as modified in 2001,<sup>217</sup> and the new constitution promulgated in February 2006 renewed that equalization fund.

The second solution results from a combined intervention of the central government traditionally in charge of correcting the provincial inequalities and the provinces themselves. The idea here is that, besides having possible recourse to the equalization fund, the central government should orient its investments by priority towards the poorly endowed regions/provinces in order to give them the opportunity to develop a comparable level of development. The rich provinces should do the same in making their resources available to benefit communities located in poorer areas so they can have a standard of development comparable to their "rich fellows." Among the advantages of this solution is that it would likely avoid creating first and second class provinces or communities. It would also prevent

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<sup>216</sup> MARYSSE S., *op. cit.*, p. 201.

<sup>217</sup> Décret-loi n° 081 du 02 juillet 1998 portant organisation territoriale et administrative de la République démocratique du Congo inséré au *Journal Officiel* n° 14 du 15 juillet 1998, tel que modifié et complété par le Décret-loi n°018/2001 du 28 septembre 2001, *Journal Officiel*, 42 année, numéro spécial du 28 septembre 2001.

the population migrations from poor to rich regions. All these factors would create distortion and instability.

3.2.3.2. *The Décret-loi n°081 of July 2, 1998 as modified and completed by the Décret-loi n° 018/2001 of September 28, 2001.*

3.2.3.2.1. Content:

This law was published in between two wars, the first one from October 29, 1996 to May 17, 1997 and the second from August 2, 1998 until June 2003. It reduced the amount of “decentralized entities”. The Communes (except in the capital city of Kinshasa), the *Secteurs* and the Chieftaincies lost their legal status. Like the District, the *Cité*, *Quartier*, *Groupement* and the *Village*, they become mere administrative constituencies. Only the Province, the *Ville*, *Territoire* and the Communes in Kinshasa kept their decentralized status. Despite that, the authority of those “decentralized entities” as those of the mere administrative constituencies continued to be appointed by the central government like before. The only exception remained the traditional entities (*Chieftaincy*, *Groupement*, *Village*).

The provincial and local assemblies at all levels of the “decentralized entities” remained without the share of the elected members. Its composition had to be representative of the main professional categories (articles 19, 39, 69, 97, 119): government officials, delegate of the Chamber of Commerce (*Fédération des entreprises du Congo*), delegates of all the officially recognized trade unions, and delegates of civil society, who included NGOs, churches, and association of Congolese pupils’ and students’ parents.

3.2.3.2.2. Problems:

The first problem involves the move to give legal status to the *Territoire* and not the chieftaincy. It reminds the colonial system attempt to establish the supremacy of the former over the latter. It turned out to be a permanent source conflict between the two entities. Here again, the head of the *Territoire* was the hierarchical authority of the chieftaincy and, as such, he could invalidate the decisions of the latter (art. 145).

The second problem comes from the confusion that the spirit and the wording of the law of 1998, as modified in 2001, were likely to create. While they lost their legal status, the Chieftaincy and the *Secteur* were authorized to keep functioning according to their customary

laws (art. 140). This is an implicit recognition of their autonomy. The list of their attributions was almost identical to when they were recognized legal status in 1982. Among those attributions, article 145, paragraph 14 of the 1998 law entitled the *Chef de chefferie* or the *chef the Secteur* to appoint personalities in charge of representing the *chefferie* or the *Secteur* in the associations of which those entities are members. Although in 1982 such a decision was, according to article 132, paragraph 10, subject to deliberation of the council of Chieftaincy or *Secteur* (which vanished with the *Secteur* and Chieftaincy's lose of legal status), the transfer of that power to the *Chef de chefferie/Secteur* did not solve the fundamental legal problem that the new provision posed.

In strictly legal terms, by losing their legal status, the Chieftaincy and *Secteur* were supposed to have lost the legal capacity to become the member of any association. That capacity had to fall under the responsibilities of either the state or the *Territoire*, of which the *Secteur* and the *Chefferie* had become mere administrative subdivisions. In not taking this fact into account, the 1998 law accidentally contradicted itself (it denied legal status to the *Secteur* and the chieftaincy and at the same time it authorized them to perform some acts that presuppose the legal status).

#### 3.2.3.2.3. Ulterior modifications.

The ulterior modifications that this law underwent did not solve the issues just raised. Instead, they adjusted the law to the political system that was introduced in 2003, after the “Global and Inclusive Agreement”<sup>218</sup> between the belligerent parties. This agreement aimed at putting an end to the war that had split the country since August 1998. Among the four main parties in this agreement (the Government of Kinshasa, the armed opposition, the non-armed opposition and the civil society), one, the armed opposition, was made up of two groups who controlled the two-thirds of the national territory militarily. These two groups were the “*Rassemblement congolais pour la démocratie*”(RCD) and the “*Mouvement de libération du Congo*”(MLC).

This agreement introduced the system called 1+4, meaning a president with four vice-presidents. From that period, all the political and administrative positions whether in the central or local government, the state-owned corporations, the army, etc. were systematically shared among the agreement's signatory parties (the so-called “*composantes*”). Of course, the

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<sup>218</sup> This Agreement was signed in Pretoria(South Africa) on the 17<sup>th</sup> December 2002.

ex-belligerents dominated the other parties (namely, the non-armed opposition and civil society).

In 2004, the so-called decentralized entities were affected by the share of the state's spoils. Here the head of the executive at all levels had to be from a different "*composante*" than the head of the deliberative council. The expectation was that this power sharing would decrease tensions between the challenging parties and that it would be a checks and balances mechanism, in the absence of any other based on democratic elections. Since both the executive and the members of deliberative body were appointed by their respective *composantes*, they were expected to control each. This was especially the case if they wanted to succeed in the elections expected at the end of the transitional period. The reality of those elections showed however that the governance shares were not the only resources available resources for getting votes and that money and ethnic bond could and did play the role more efficiently<sup>219</sup>!

### 3.2.3.3. *The new constitution and the post-election political order.*

After being drafted and adopted by the two chambers of the parliament of the transitional period, a new constitution was put up for popular referendum. Only after that referendum was the constitution promulgated and published in February 2006. What were the main innovations that constitution introduced?

First, the new constitution increased the number of provinces from 11 to 26. At the same time, it organized both a clearer distribution of power between the central government and the provinces as well as the share of revenue between them (*Titre IV*). Article 171 establishes a distinction between the finances of the central government and the provinces. And article 175 allocated 40% of the national revenue raised on their territory to the provinces (while the central government would keep the other 60%). In that, the constitution went in the same direction with the 2002 mining code we mentioned earlier. In order to avoid the inconvenience of the former system, where the centre was not returning money to the provinces, this constitution allows the provinces to make the deduction of their share at source.

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<sup>219</sup> NAMEGABE Paul-Robain, "Enjeux et résultats électoraux dans la ville de Bukavu", in MARYSSE S., REYNTJENS F. and VANDEGINSTE S. (Eds), *L'Afrique des Grands lacs. Annuaire 2007-2008*, Paris, L'Harmattan, 2008, pp. 221-244.

Second, the constitution transferred competence to the constitutional court to settle conflicts of competences between the central government and provinces (art. 161).

Third, once again, the constitution has a provision about the equalization fund: it is to be financed with 10 percent of the central government's share of the national revenue. That fund is endowed with legal status and is under the control of the government (art. 181).

Fourth, the constitution institutes provincial assembly made of both elected and co-opted members. The number of co-opted members are limited and cannot exceed one tenth of the assembly (art.197). Like during the colonial period, this is supposed to guarantee that traditional leaders hold some positions.

The provincial assembly of each province elects the governor and the vice-governor. After being elected, the governor forms a cabinet with a maximum of ten people, which has to be representative of the whole province and elaborates his program. But, the provincial executive can take on its functions only after the cabinet and its program have been approved by the provincial assembly (art.198).

The other decentralized entities are the city, the communes, the *Secteur* and chieftaincy that the law organizes (art. 3). Their autonomy to manage their economic, human, cultural and financial resources is recognised.

Fifth, the constitution instituted a conference of governors whose mission is to ensure a certain degree of harmony among the provinces themselves and with the central government. Headed by the President of the Republic, that conference plays the role of adviser to both the provincial and the central levels of the state (art. 200).

The sixth innovation is the institution of the economic and social council (*Titre V*), which is in charge of providing advice on development issues to the central institutions (such as the President of the Republic, government and parliament).

Seventh, the constitution, in article 205, forbids any interference of the central government in the attributions of provinces and vice versa, unless the level to which the attribution belong to allows for it to do so. As for the domains of concurrent competence of both central government and provinces, the constitution gives supremacy to the former over the latter. Hence, in case there is a conflict between provincial law and national law or regulation over those issues of concurrent competence, the provincial law is null and *de jure* abrogated.

Eighth, article 207 of the constitution recognizes traditional authorities and the exercise of their power according to customary law, as long as it is not contrary to the

constitution, the law, public order, and good moral standards. The same article assigns the duty of promoting national unity and cohesion to traditional authority.

#### 3.2.3.4. *Conclusion.*

From 2002, it is easy to observe a sort of turn toward decentralization on different points of view (economic with the new mining code), political, administrative and financial in the DRC. In making such a turn, the new laws and constitution lay the foundation for real decentralization and with it the emergence of real provincial and local powers. Many issues brought about by the new constitution still need to be addressed. Among them is the question about the political, administrative and financial implications of the creation of new centres of power, especially the creation of new provinces. For instance, how should the share of infrastructure and personnel, or the use of state's services and personnel be organized among or within the provinces.

Another question regards the recognition of the chieftaincy and its traditional authority. The original contribution of the new constitution is that there is now a clear provision in the constitution and, adopted by referendum, that confirms the chieftaincy's quality of being a decentralized entity. This also confirms the chieftaincies core position in the political and administrative sphere now and in the future. But on many occasions, the chieftaincy did have that status, although through only legal recognition, but not constitutional recognition. It will be more important to see now how this authority can contribute to democratization and development of the hinterland. It will also be more important to dispel some legal impasses over the position of the chieftaincy on the land issue and conflict settlement. Some tracks regarding this will be explored in the fourth and the fifth chapters. But before that chapter three will address the dualism of the Congolese legal system that evinces the historical legal course this second chapter and its consequences for decentralization.

## **4. THE ONGOING DEMOCRATIC DYNAMIC AND THE RURAL DECENTRALIZATION ISSUE.**

### **4.1. The role of a traditional chieftaincy-based decentralization policy in state's legitimacy building.**

#### **4.1.1. Double extreme position about traditional chieftaincy.**

Most of the time, the debate about the role of traditional authority systems in the modern state takes two extreme directions, one idealistic and somehow nostalgic and the other pessimistic and repulsive. The former tends to portray traditional communities and their authorities as constitutive of “social harmony”. As such, they are “natural cell for democracy, well-being and social balance”<sup>220</sup>. “In a sufficiently decentralized governing system, people could participate directly, not only in input and feedback processes, but also in governmental conversion processes. Local governments not only provided services, but served as forces promoting liberty, a form of business, a learning institution, a conflict resolution agency, an advocate, and an institution for combating bureaucracy's worst evils”<sup>221</sup>. The second position tends to make traditional authority responsible for all the social evils and backwardness preventing the society from evolving towards modernity. It engages itself then in getting the pure suppression of that form of authority.<sup>222</sup>

Both these attitudes have a certain amount of naivety. On the one side, depicting the harmony of traditional institutions tends either to create an illusionary world that has never actually existed or to be blind to traditional authority systems' own evils, injustices, which of course vary both in time and in space. Moreover, such a praise tends sometimes to plea in favour of some remote institutions, behaviour, ways of life which already vanished and can no more be re-established despite the good will for so doing or whose reestablishment would require a great social cost.

On the other side, pretending to introduce modernity by the mere fact of suppressing its so-called (traditional) impediment makes the defenders of modernity facing Michel

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<sup>220</sup> Layeye, 1988:50-51 quoted by SEIDMAN Ann and SEIDMAN Robert B., *op. cit.*, p.187.

<sup>221</sup> Rondinelli, 1982:136 and Jones, 1981 quoted by SEIDMAN Ann and SEIDMAN Robert B., *op.cit.*

<sup>222</sup> DAVIDSON Basil, *The Black Man's Burden. Africa and the Curse of the Nation-State*, New York, Times Books, 1992.

Crozier's evidence: *On ne change pas la société par décret*<sup>223</sup>. The solution for the under-performances of an institution does not necessarily consist in its abolition, especially for some so emotionally and culturally charged institutions. As Ashis Nandy warns, in most of the southern societies, when state tried to engage itself in such an adventure, culture displayed “more resilience than expected by the learned and knowledgeable” so that the state gave way to culture. All the more that this culture resilience ended sometimes in a sort of “spirited resurgence of ethnic self-awareness”<sup>224</sup>.

I mentioned elsewhere<sup>225</sup> how, for instance, in the Sud-Kivu province of DR Congo before the war of 1996, some traditional leaders were in serious tension with their ruled and the civil society. The main reason of that tension was that those chiefs involved themselves, sometimes in connivance with the administration, in the spoliation of the small farmers' lands in application of the law of 1973 on land. They were registering on their behalf the land that was exploited by their ruled or they were delivering the certificate of vacancy even over land for which their subjects had already paid off the customary duty called “*kalinzi*”<sup>226</sup>. But when the war started and the rebels backed by Rwandan and Ugandan troops started killing some traditional leaders and replacing other who were not in favour with them by those in their play and vandalizing royal courts, the populations attached their fate to that of their kings and chiefs. The idea suddenly developed that something precious was in danger and should be defended. It became a matter of group's survival. In consequence, instead of weakening the traditional authority in order for the belligerents to deploy their power over ownerless spaces, it's the contrary effect that occurred: local populations mobilised both to defend their territory and to protect their chiefs. That allowed some chiefs to recreate for themselves a kind of political virginity and to make up with the civil society.

Furthermore the state's moral authority to abolish traditional chieftaincies is in itself questionable for the main reason we encountered earlier, namely its illegitimacy derived from either its artificial creation<sup>227</sup> or its own under-performances or even both of them.

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<sup>223</sup> CROZIER Michel, *On ne change pas une société par décret*, Paris, Grasset, 1979.

<sup>224</sup> NANDY Ashis, *op. cit.*, pp. 1-2.

<sup>225</sup> NAMEGABE P.R., *op. cit.*, 2005, pp. 211, 226, 233-234.

<sup>226</sup> The payment of that duty confers to the beneficiary the full use of the land and the right to transmit it to his descendants. It does not imply, however, a full property since the land remains a common property of the community. For more details about land spoliation, read MAPATANO B. J., *Administration traditionnelle et question foncière à Kabare, Région du Sud-Kivu, Zaïre*, Genève, Institut Universitaire du Développement, 1995.

<sup>227</sup> Note that Hobsbawm and Ranger argued that chieftaincies and traditions in African societies were also pure colonial invention and as such artificial. They based their claim on how traditional authority was imposed in some acephalous societies and on how, where that authority pre-existed, colonial power used different strategies (internal divisions, alliances, bureaucratic arrangements, encapsulation into a system of indirect rule) to modify

Surprisingly even the African state whose creation is both more recent and more artificial than traditional entities and which is no less inefficient on many respects has nevertheless come to get such an emotional value that its restoration seems less harmful than its collapse even when the latter appears to be more certain (recently in Liberia, Rwanda and DR Congo and nowadays in Somalia). At least, for the only sake of preventing the circle of humanitarian catastrophes.

#### ***4.1.2. Taking traditional chieftaincies for what they represent nowadays.***

For all those reasons, I think that a more wise way of proceeding is to take traditional institutions for what they are nowadays. Although it is possible to generalize on some of their current situation or attributions (their effective power over their entities and their subjects, their legitimate authority in conflict mediation and settlement, their customary power over land), some aspects like their more or less “justice”, their participatory degree, their taking into account of the gender issue, are unevenly displayed and require to be examined case by case. It is about exploring in a pragmatic way the potentialities of the participation of the present-day traditional leaders in the democratic and decentralization changes to increase their own legitimacy and that of the state.

It implies recognizing that despite the defect of traditional chieftaincies, they still have in Congo, as in many other African countries, a large degree of effective authority and acceptance that requires to involve them in the process of democratic and decentralization changes. Such strategy, if it succeeds, can considerably contribute to increasing state legitimacy.

First, if people can actually experience in their concrete life the improvement of their well-being or their social conditions thanks to a traditional institution which is locally rooted and with which they identify themselves, that fact will certainly increase the legitimacy of that institution. But that fact is likely to contribute to state’s legitimacy as well if people (come to) realize that the change they are actually experiencing is promoted and sustained by the state (whether by contributing to its funding or by coordinating and controlling it).

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its functioning to accommodate it to his personal interests. Customary law was modified in the same way so that it came to be “products of codification, petrification and coercion under modernist projects of colonial rule, missionary activity and postcolonial state formation”. See HOBBSBOWN Eric and RANGER Terence, *The Invention of Tradition*, Cambridge, Cambridge University Press, 1983, referred to by DIJK, Rijk van & ROUVEROY VAN NIEUWAAL, E.A.B., “Introduction: The Domestication of Chieftaincy: The Imposed and the Imagined”, in DIJK, Rijk van & ROUVEROY VAN NIEUWAAL, E.A.B. (eds.), *African Chieftaincy in a New Socio-Political Landscape*, African Studies Centre, Leiden, 1999, pp. 1-3. I mention further forward in this chapter (see the point on “conditions under which chieftaincies and decentralization form complementary logics”) the main criticism that this position encountered.

The second consideration is derived from the previous one. It means that empowering traditional institutions should not necessarily<sup>228</sup> be interpreted as a “zero-sum game” for the central government, where the attributions and/or resources that are recognized or transferred to the former are considered as lost for the latter. Thus the necessity that tasks be distributed in such a way that it allows to see in which sense local attributions are an extension of state’s ones and vice versa and how the two levels of authority complete each other in their respective limits. This will avoid local entities to be understood as competing with the (central) state (and vice versa). As Adriaan van Rouveroy van Nieuwaal observed, “if the citizen has the feeling that both parties are sharing in each other’s power (...), a certain mingling of powers occurs and the dichotomy becomes to an extent invisible to the citizen. In this situation, the metaphor of the zero-sum game no longer holds, for it is applicable only if the matter over which the two actors are competing can be defined”<sup>229</sup>. It also requires that relationship between the two parties be symmetrical with stable and regular contact, in order for negotiations to result in mutual legitimacy<sup>230</sup>.

But this idea of competition is not to be totally excluded, especially in the relationship between different decentralized entities. Taken in the positive way, it can contribute to enhance state’s efficiency by stimulating different institutions to perform as well as or better than “concurrent” institutions. It can also stimulate poorly-performing institutions to associate among themselves or to collaborate with those that perform better on a temporary or even on a permanent basis in order to increase their efficiency and thus reduce progressively the internal institutional barriers in favour of the development of horizontal cooperation.

The idea of horizontal cooperation is worth to mention here since it can facilitate a change both in the state structural setting and in the current working methods of nowadays existing entities. It offers a best guarantee of cohesion between the different entities of the state<sup>231</sup>. Take for instance the case of the Bushi with about seven chieftaincies (Buhavu, Burhinyi, Kabare, Kaziba, Luhwinja, Ngweshe and Nindja) sharing the same language, “*mashi*”, over a territory of about 5, 000 km<sup>2</sup> <sup>232</sup>. Many historians and anthropologists

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<sup>228</sup> Sometimes it happens to be the case especially in the domains where the authority of traditional leaders and state overlap (for instance concerning the power over land and the judicial power). If both of them behave like profit-maximizing actors seeking to perpetuate or consolidate their respective position, then what one gains will at the expense of the other. ROUVEROY VAN NIEUWAAL, E.A.B. van, “Chieftaincy in Africa : Three Facets of a Hybrid Role”, in DIJK, Rijk van & ROUVEROY VAN NIEUWAAL, E.A.B. (eds.), *African Chieftaincy in a New Socio-Political Landscape*, African Studies Centre, Leiden, 1999, pp. 24-26.

<sup>229</sup> *Ibid.*, p. 29.

<sup>230</sup> *Ibid.*, p. 34.

<sup>231</sup> BRASSINNE Jacques, *La Belgique fédérale*, Editions du CRISP, Bruxelles, 1994, p. 100.

<sup>232</sup> DUPRIEZ Hugues (dir.), *Bushi, Asphyxie d’un peuple*, mai 1987 (unpublished).

analyzed the Bushi in terms of cultural sphere where, beside the precious language tool<sup>233</sup>, people also share the same myth of origins of the traditional power and a similar political, land and judicial system<sup>234</sup>. But that area is divided into four Territoires<sup>235</sup>. It is possible to conceive some mechanisms of cooperation for example in justice matter in order to create a common high customary jurisdiction. Such jurisdiction could be jointly constituted by the representatives of all members entities elected or designated on the basis of their knowledge of customary matters, their experience and their integrity. Such an institution can contribute to improving traditional justice image, jurisprudence unification in that area and in the end, if such an initiative is echoed in many other areas presenting similar characteristics, to the elaboration of a more locally inspired state legal system. This initiative can also favour the creation of entities on a voluntary basis with great chances to work in synergy since they are based on common project about the future...

However, its chances of succeeding –like for any other project of this kind- depends on how well negotiated it is, especially how clearly are articulated its objectives and how both responsibilities and advantages are shared among the parties. Otherwise, it would not go that far, exactly as it was the case for a similar one by the chief Alexandre Kabare in 1959. At that time, right in the electoral period on the eve of the independence, the chief was just coming back from a 23 years forced exile from his chieftaincy by the colonial administration. Well-known for his resistance to the colonial power, the long exile increased his popularity in the region. He managed to rally behind him the chiefs Ndeze (Muhunde), Kabinda, Katana (Mushi) and Simba (Mifulero) in an interethnic union called “Union des Bashi”, which held

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<sup>233</sup> Many authors emphasized the importance of language in political communication and in the construction and/or the reinforcement of national identity. See KYMLICKA Will, *Politics in the vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford University Press, 2001. See also COPANS Jean, “The Long March Towards Modernity”, in MOHAN Giles & TUNDE Zack-Williams(eds.), *The Politics of Transition in Africa. State, Democracy and Economic Development*, Revue of African Political Economy(ROAPE), Sheffield, 2004, p.166. In this article, Jean Copans insists on the importance of not only speaking but also learning and teaching local language. According to him, “liberty of thought, of opinion and of expression can be experienced at an oral level but the true learning and sharing of political experience can only be discussed and valued objectively through the written form”. The written form makes possible the accumulation and the distribution of information and knowledge concerning and between the different cultural and political traditions.

<sup>234</sup> DUPRIEZ Hugues, *op. cit.*, COLLE P., «Organisation politique des Bashi», in *Congo*, II, Liège Saint Lambert, 1921 ; COLLE P., *Essai de monographie des Bashi*, CELA, Bukavu, 1971 ; OUCHINSKY A., «Eléments de codification des coutumes foncières du Bushi, Kabare », 1955, in MASSON P., *Trois siècles chez les Bashi*, 2<sup>ème</sup> édition, Bukavu, la Presse congolaise, 1966, pp. 123-171 ; NDAYWEL è NZIEM Isidore, *Histoire du Zaïre. De l'héritage ancien à l'âge contemporain*, Louvain-la-Neuve, Editions Duculot, 1997 ; NJANGU Canda Ciri et al., *Les conflits au Sud-Kivu des anciens royaumes à 1996 : rôle de la femme*, Bukavu, Editions de l'AFECEP, 2000.

<sup>235</sup> Buhavu belongs to the Territoire of Kalehe, Burhinyi and Luhuindja to that of Mwenga, while Kabare and Nindja constitute the Territoire of Kabare, and Ngweshe and Kaziba constitute the Territoire of Walungu. SAINT MOULIN, Léon de, *Atlas de l'organisation administrative de la République démocratique du Congo*, Kinshasa, Centre d'Etudes pour l'Action Sociale (CEPAS), 2005, pp. 134-139.

its first congress in March 1960. But the Union was soon dislocated since the chiefs Lwanwa and Katana opposed what they considered as a hold of Kabare's family over the Bashi traditional areas<sup>236</sup>.

In any case, the need for those kind of entities that should be veritable action units, made according to local communities' specific development objectives is more and more expressed. Léon de Saint Moulin argued in that sense when he was criticizing the current territorial subdivision. According to him, that subdivision dates back to a large extent to the colonial period where it resulted from an arbitration of conflicts of power at the local level for the interest of the colonial power<sup>237</sup>. This move requires, of course, the emergence of what Jean Capans calls "a new category of intellectual and cultural brokers and synthesizers"<sup>238</sup> able to identify and to promote aspects for a dynamic interaction in the local backgrounds so that local entities can stop living like isolated islands.

A third dimension which pleads in favour of democratizing and empowering local levels of authority, including the traditional power, is to allow them to develop the capacity of starting to correct social injustices from the lower level. The idea is that in Congo like in many other African states, for a long period of time the social structure, starting from its bottom to the top, has been based on an unfair set of rules and practices. At the same time, there was ( and still is) a great disequilibrium of power and resources in favour of the centre so that in order to get or to secure the little position in the remote region of the country, one needed to have at least a connection in the capital. That situation developed among people the habit of looking down on everything that is local and the sentiment that they cannot improve their condition without an hypothetic central or foreign intervention. And would that change happen at the local level, people still have the sentiment that it would/might remain fragile and marginal if not guaranteed and protected by the centre. Its consequences are both positive and negative for the centre.

This attitude consolidates the centre in its unbridled quest of hegemony. But at the same time, the (central) state becomes a target of all claims, including those concerning the least corner of the country and which could find solution there. Since like the central state, local institutions –including the traditional ones- were (and, to a certain extent, are) bolted to

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<sup>236</sup> WILLAME J.C., *op. cit.*, p. 127.

<sup>237</sup> SAINT MOULIN, Léon de, *op. cit.*, 2005, p. 10.

<sup>238</sup> COPANS Jean, "The Long March Towards Modernity", in MOHAN Giles & TUNDE Zack-Williams(eds.), *op.cit.*, p.167.

any participation and to the expression of any voice, people use whatever means they can, including violence, to find solution at the highest level, the centre. Controlling state apparatus (or getting positions there) allows the access to its resources and eventually to become the protector or even the avenger of one's kin whose voices are not otherwise understood.

That's the reason why I am still convinced that if capital cities are so lusted after as to become the ultimate target of violence in Africa and elsewhere in centralized non-democratic countries, it is not only because it secures to the belligerents the international recognition - since the international community is generally hostile to secession as Pierre Englebert believes<sup>239</sup>. It is basically also because in those capital cities was/is developed a system of governance that potentially or actually get them caught in the crossfire of (being the only ultimate relevant sphere of) political competition. Those who are not represented in that structure feel ipso facto insecure and compete -even by violent means- to control it while for the same reason those who hold it fight for not losing its control. Not forgetting that the groups in area of which is localized the capital tend to take it in hostage considering that it is in their right to control it without paying the attention to repercussion that this control would have on other groups' interests. And when the capital falls under the control of "non natives" or "outsider", their power is felt as foreign and faces local resistance<sup>240</sup>. Thus the status of African political capitals becomes the most problematic for its "symbolic" meaning.

A real decentralization policy is likely to transform the whole state's territory into source of political power and leads to a real decentralization of the political competition. When decentralization of responsibilities is accompanied by transfer of resources and opens the competition for positions, the local level becomes attractive because the politically ambitious are interested to run for office to control those resources, and to get the job and opportunities which are created.<sup>241</sup>

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<sup>239</sup> For this author, in declaring their intention to occupy the capital and to control the whole country, rebellions or belligerents avoid to be suspected of secessionist intention and can expect to be recognized if their fight succeeds. ENGLEBERT Pierre, [XXX](#)

<sup>240</sup> The current case of Kinshasa under the rule of both Laurent-Désiré Kabila and his son Joseph Kabila falls somehow into that hypothesis.

<sup>241</sup> GRINDLE Merilee S., "Local Government That Perform Well: Four Explanations", in RONDINELLI Dennis A. and CHEEMA G. Shabbir, *op. cit.*, 2007, p. 61.

## **4.2. Difficulties for traditional authority systems to adjust themselves to the democratic process**

The questions to be addressed here are those of determining under which empirical conditions do chieftaincies and decentralization form complementary logics? Under which conditions do they form conflicting logics? In the latter case, which mechanisms and strategies are likely to bring about a successful decentralization process?

### ***4.2.1. Conditions under which chieftaincies and decentralization form complementary logics***

#### *4.2.1.1. Chieftaincy's effectiveness*

Different studies in Africa in general and in Congo in particular have confirmed the important role that traditional authority systems still have in rural area and even in urban societies. A recent study carried out by Léon de Saint Moulin mentions 737 traditional entities all over the country (256 chieftaincies and 481 Secteurs) to only 21 cities and 98 small towns<sup>242</sup>. The power of those entities is still effective and benefits from a large acceptance. That is the reason why the new constitution adopted by referendum recognizes to them the status of decentralized territorial entities (art. 3 and 207). Part of that is the fact that a wide majority of the population is still living in the rural areas where the customary system prevails. Traditional leaders continue to control many aspects in relation with the daily-life of the peasants (access to land, administration of justice particularly for family matters and land disputes). Their importance in local governance increased with state's weakness and its inability to display its authority and activity all over the country<sup>243</sup>. Indeed, in Congo, structures and the impact of the modern state are invisible in many areas so that the only authority people are in front of in their daily-life is the traditional one.

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<sup>242</sup> SAINT MOULIN, Léon de, *op. cit.*, 2005, p. 185.

<sup>243</sup> BEKE Dirk, "African Traditional Chiefs, Partners Against Poverty? Experiences from Uganda and Congo(Kinshasa)", Paper presented at the Second International Regional Conference "*Shared Governance: Combating Poverty and Exclusion*", International Institute of Administrative Science, Yaoundé(Cameroon), 14-18 July 2003.

#### 4.2.1.2. *Experience of autonomy.*

It is derived from the essence or the origin of the traditional power. Except the case of the few entities that were created by the colonial power, all the others have a prior existence to the “modern” state and all over the time, both the pre-existing and the newly created entities developed a (semi-)autonomous existence vis-à-vis the state. They can rely on their own mechanisms and structures to implement their own policies.

Some of them have also a certain experience in development projects, the capacity of mobilisation, networks, financial autonomy through local taxation (from the markets held on their land) and the rental fees from royal properties, land royalties<sup>244</sup>,...

#### 4.2.1.3. *Capacity to adapt.*

Another dimension is the traditional authority system’s extraordinary capacity to adapt to the different contexts/ worlds in which it has been received. As we have mentioned in the second chapter, this institution underwent profound transformations and adaptations from the colonial period until now. What is very important is that people did not assist passively to those changes. On the contrary what was imposed to them met or was combined with what they imagined, desired, sought after and longed for<sup>245</sup>. As for traditional leaders, they appealed to a wide range of strategy combining resistance, loyalty, negotiation, concessions, sycophancy, informing, etc. and managed to impose themselves or to continue being accepted as local leaders and spokesmen of their entities vis-à-vis the state and different other actors, whether national or international. “The result was and is that local leaders themselves started

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<sup>244</sup> BEKE Dirk, *op. cit.*, 2003 and “Modern Local Administration and Traditional Authority in Zaïre. Duality or Unity? An Inquiry in the Kivu”, in DIJK, Rijk van & ROUVEROY VAN NIEUWAAL, E.A.B. (eds.), *op. cit.* p. 91.

<sup>245</sup> That’s the reason why some authors like Eric Hobsbawn and Terence Ranger faced serious criticisms when in their 1983 work *The Invention of Tradition*, published at Cambridge University Press, they exaggerated the role of the colonial power in inventing traditions. The main question they failed to address was that of explaining how in some instances the invention become legitimate and accepted whereas in other it encountered serious challenges. Ranger did revise his position in 1993 when he wrote “The Invention of Tradition Revisited: the Case of Colonial Africa” in T. Ranger and O. Vaughan(eds.), *Legitimacy and the State in Twentieth Century. Essays in honour of A.H.M. Kirk-Greene*, London, MacMillan. In this article he mentions among others that “Traditions imagined by whites were re-imagined by blacks: traditions imagined by particular black interest groups were re-imagined by others. The history of modern tradition has been much more complex than we have supposed” (pp. 81-82), quoted by DIJK, Rijk van & ROUVEROY VAN NIEUWAAL, E.A.B., *op. cit.*, pp. 1-3.

to legitimise their positions along the lines of the codification of not only original but of also “modern”, newly created and propagated “traditions”<sup>246</sup>.

Different qualifications have been attributed to those leaders. Adriaan van Rouveroy van Nieuwaal analyzed them in terms of “chief of manoeuvre” with a whole range of strategies at their disposal within a wider space than the one that people tend to formally recognize them. According to that author, even when traditional leaders are officially recognized within state’s structure, they continue forming a world apart because of their capacity to mobilize two different orders, the traditional and the modern. Which makes that the chieftaincy is not fully absorbed or controlled by the elites that seem to have the control over state’s apparatus<sup>247</sup>. In the work they edited in 1999, Rijk van Dijk and Adriaan van Rouveroy van Nieuwaal gave traditional leaders new qualifications, that of “brokers” between what is imposed and what is imagined; “converters” because they convert the power of the past to that of the present, the power of the secretive into public power, the law of the ‘tradition’ into codified ‘customary’ law, and the power of ritual into manifest political activity<sup>248</sup>.

Although some of the dimensions mentioned can hinder decentralization policy as we’ll see in the next point, other can be of precious help. First, the capacity to use both traditional and modern discourse and to convert the power and laws form one into that of the other can allow new policies designed under the decentralization label to penetrate softly into the traditional realm and start looking like customary to the local community. That could be for instance the case of elementary education, sanitary policies, improvement of cultivation methods, changes in the eating habits... All these domains can find in some areas strong cultural impediments if proper channels are not used for their introduction.

Second, decentralization policy design and implementation requires a wide political and social dialogue/bargaining with all the most relevant actors, and traditional authority leaders represent serious spokespersons able to sustain or to challenge state’s positions, to put forward their owns and to participate in the implementation.

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<sup>246</sup> BEKE Dirk, “African Traditional Chiefs, Partners Against Poverty? Experiences from Uganda and Congo(Kinshasa)”, ... 14-18 July 2003.

<sup>247</sup> ROUVEROY VAN NIEUWAAL, E.A.B., “States and Chiefs: Are Chiefs Mere Puppets?”, in RAY Donald I. and ROUVEROY VAN NIEUWAAL, E.A.B.(eds.), “The New Relevance of Traditional Authorities in Africa’s Future”, *Journal of Legal Pluralism and Unofficial Law*, n°37-38, 1996, special double issue, Foundation for the Journal of Legal Pluralism, Netherlands, 1996, p.7.

<sup>248</sup> DIJK, Rijk van & ROUVEROY VAN NIEUWAAL, E.A.B., *op. cit.*, 1999, p. 5.

#### 4.2.2. *Domains of conflicts*

The first possible or actual domain of conflict between democracy and decentralization policy on the one hand and traditional forms of authority on the other hand lies in the origin of the latter. Dirk Beke used proper words to mention it when he wrote that “traditional authority systems find their origin in structures and mechanisms developed before the introduction of the republican notions of statehood and/or in contradiction with democratic and republican principles. Traditional leaders generally obtain their power by birthright or appointment by restricted power elite (elders). Their legitimacy is often based on sacred elements. This does not exclude that some of those forms of authority incorporate(d) democratic participation”<sup>249</sup>.

As I will argue in the point related to the basis for civil chieftaincy, democratizing the functioning of traditional chieftaincy does not necessarily imply holding open elections of “traditional” chiefs. Whether in Africa or elsewhere, the expectation that chiefs be elected in order to occupy officially their political responsibilities has never been fully realised<sup>250</sup> and many monarchies have become model of democracy despite the lack of competition at their head. Their democratic characteristic depends on the representativeness of their organs, the decision-making rules, the checks and balances and mechanisms of control aiming at limiting the action of the rulers, rights and freedom that citizens enjoy... And that is what most of the time misses in many traditional authority systems. Indeed, many traditional leaders continue exercising an absolute and strongly authoritarian power over their subjects and/or their property through a hierarchical political organisation with little or no horizontal checks and balances. Here prevails the tendency of entertaining a royal rather than a democratic tradition and when checks and balances exists against the absolute authority and power of the chiefs, it is exercised by immediate members of the ruling class (or aristocracy) without any participation of the commoners<sup>251</sup>. Those leaders are likely to use those “archaic” methods and structures to block any attempt at change<sup>252</sup> or divert the advantages derived from their position of go-between between local populations and the state in order to consolidate their position and fulfil personal goals.

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<sup>249</sup> BEKE Dirk, *op. cit.*, 2003.

<sup>250</sup> ROUVEROY VAN NIEUWAAL, E.A.B, *op. cit.*, 1996, p. 45.

<sup>251</sup> SIMIYU V.G, “The Democratic Myth in the African Traditional Societies”, in OYUGI Walter O. et al. (eds.), *Democratic Theory and Practice in Africa*, Portsmouth & London, Heinemann – James Currey, 1988, p. 55.

<sup>252</sup> CONAC, G., *op. cit.*, p. XL.

The second domain of conflict between traditional authority systems and decentralization is the existence of what V.G. Simiyu referred to as an insular type of structures, i.e. structures without upward mobility or open recruitment outside the laid down rigid rules of procedure. In some instances, he argues, there was no chance of any upward mobility at all. So the lower classes could not compete since the social, political and economic roles were hereditary and therefore permanent, or ascriptive<sup>253</sup>.

The third is the age-set system which tends to thwart or contain the aspirations of the more volatile, active and probably intelligent younger generations in many African traditional systems. In some cases the age-set system might have combined with the class structure to suppress forever the aspirations and the rights of the lower echelons of the society.<sup>254</sup>

Commenting on that set of unequal relations found in many traditional authority systems and which are the product of along socio-historical relations, Mahmood Mamdani considered them to be voluntary, since peasant enters into them because of the force of objective circumstances, in the absence of any direct compulsion.<sup>255</sup> But I do not personally share that view for a very simple reason. A poor peasant without any resource and who is constrained, as a question of survival, by the objective conditions to enter into an unequal relationship that he is not able to change cannot be said to have fully used his will. The only alternative he has is that of escaping. But that solution is not easier neither since it offers him no guarantee of being better off. It also implies cutting oneself off from things of emotional value like one's community, ancestral lands, ...

The fourth domain of conflict is borrowed from Sophia Mappa and consists in the double dispossession of the society operated by the traditional power. According to her, this power is felt as something that the society refrains itself from instituting. People give to it other origins (nature, ancestors,...) and prefer to comply with it instead of envisaging the possibility of changing it. But the chief is also somehow dispossessed since he does not hold his position in merit of his personal competences or his personal action, but thanks to some non verifiable merits of his ancestors or of the nature. And when it is attributed in merit of the capacity to actually protect the clan or to preserve the unity of the group, the beneficiary tends to deny this power to himself<sup>256</sup>.

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<sup>253</sup> SIMIYU V.G., *op. cit.*, p. 56-57.

<sup>254</sup> *Ibid.*, p. 69.

<sup>255</sup> MAMDANI Mahmood, "Contradictory Class Perspectives on the Question of Democracy : the Case of Uganda", in Peter ANYANG' NYONG'O(Ed), *Popular Struggle for Democracy in Africa*, London & New Jersey, Zed Books Ltd & The United Nations University, 1987, p. 80.

<sup>256</sup> MAPPA Sophia, *Pouvoirs traditionnels et pouvoirs d'Etat en Afrique. L'illusion universaliste*, Paris, Karthala, 1998, pp. 13 and 102.

The fifth domain comes from the traditional chiefs' syncretism mentioned above by which they combine political, administrative and judicial roles with socio-religious ones. According to Adriaan Rouveroy, that syncretism makes uneasily predictable chiefs' behaviour/conduct<sup>257</sup>.

It is worthy to mention that all these aspects we have just mentioned are not cumulatively and evenly present in all the traditional authority systems and that some of those systems did enjoy or are still enjoying some forms of democratic rule. The point of mentioning those domains of conflict is, first, to warn against the belief that introducing traditional authority into democratic and decentralization change is a panacea. Indeed, some manifestations of this authority are somehow incompatible with such an attempt and have deep roots so that they should be taken into account by the different partners in that project. Secondly, the point is also to show the limits of the different Congolese legislations we analysed in the second chapter that either refer without reservations to customary law or put forward those reservations mostly concerning the respect of public order and good moral standards.

#### ***4.2.3. The risk of a two-tier change i.e. having a democratic and decentralization process limited to the town while rural area is still under what Mahmood Mamdani calls "decentralized despotism"***

##### *4.2.3.1. Caveat*

In this section I do not intend to contradict the main criticism I addressed in the introduction against Mahmood Mamdani's clear divide between towns and rural areas where the former is presented as enjoying civil rights and modern law while the latter bends under the yoke of the customary law. I share Rijk van Dijk & Adriaan Rouveroy van Nieuwaal's warning that "it would be a mistake to think of urban areas as 'modern', and thus unsuited to 'traditional chiefly authority', while regarding the village as 'traditional' and as such he playground for that authority"<sup>258</sup>. First, because the recent and rapid growth of cities in Africa led to the formation of specific forms of urban chieftaincy<sup>259</sup>. In Congo, that phenomenon reminds of what is called "*Communes Urbano-rurales*" to qualify the particular status of

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<sup>257</sup> ROUVEROY VAN NIEUWAAL, E.A.B, *op. cit.*, 1999, p. 22.

<sup>258</sup> DIJK, Rijk van & ROUVEROY VAN NIEUWAAL, E.A.B., *op. cit.*, 1999, p. 8.

<sup>259</sup> Idem.

some communes that are parts of a modern institution(the city) and as such they partly enjoy being applied the written law while keeping applying the customary law in some other specific domains like land issue and conflict settlement. That is the case of Mont Ngafula in Kinshasa or Kasha in Bukavu, to name a few of them. Second because the individual subject adopts a *homo economicus* behaviour where, like a transactionalist, he tries to maximize on choices based on continual cost and benefit calculation. Thus for some aspects (like purposes, needs, moments of identification) of social individuals whether in the rural areas or in the cities they opportunistically imagine themselves as living under chiefly authority<sup>260</sup>.

Having said that, the predominance of traditional leaders and customary law is to be understood in terms of degree. Without neglecting their influence in the towns, here they face a serious concurrence of other customary laws and leaders due to the fact that cities are the meeting point of peoples from different cultural background. But also more than in the rural areas, it is likely to find in the cities people that “did not belong to the chief’s social, political and cultural traditions in the past, and never will in the future. Some recognise no chief at all and others have chosen rural-urban migration to escape the chiefly order of their village and try to start new lives as more autonomous citizens”<sup>261</sup>.

Beside those two elements, towns’ particular position is due to the fact that most of the political debates over reforms are negotiated in the cities where are concentrated most of the intellectuals, politicians, the main organisations of civil society and the media. All of them contribute, sometimes without noticing it, to its translation into a discourse/language accessible to city-dwellers. The risk here is to keep (once again) traditional authority system and the countryside aside from the debate on decentralization. Its consequence would be that instead of getting the reforms that this institution requires or needs, the future legislation would keep repeating the usual and unquestioned formula of referring to the customary law for the organization and functioning of traditional authority or if that institution came to undergo any reform it would become a (mere) reform from above.

Although I support the opinion that customary law should continue to be applied in the chieftaincies, a space should be created for and the opportunity given to those who live under its rule to have a say on it and its functioning, to question some of its imperfections and to explore new perspectives for its improvement.

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<sup>260</sup> *Ibid.*, pp. 8-9.

<sup>261</sup> *Ibid.*, p. 8.

That's the reason why in the two points that follow I would like to warn against a danger of a double despotism in the decentralization process, which is despotism by traditional leaders and despotism by state's "enlightened" officials and other political entrepreneurs. I shall then show why empowering the "subjects" in allowing them to have a say on customary law and its possible change in the decentralization process is strategic to overcome possible resistance of chiefs to change.

#### 4.2.3.2. *Despotism by traditional authorities:*

On many occasions in this study I have mentioned the importance that traditional leaders still play in Congo in particular and in the African political system in general. So was it also concerning the role of customary law mainly in the rural areas where more than 70 percent of the population is still living, but also in the cities. For that reason, any strategy aiming at democratizing and decentralizing the Congolese political system must be attentive to and take seriously the traditional authority system.

The experience has shown that this is not always –if ever- the case for many reasons. On the one hand, because some political leaders do not consider it as a priority and prefer organising reforms and running for positions at the centre(parliament and government) and province(governor, provincial executive and assemblies) for their higher pay-off and (external) visibility their secure to their holders<sup>262</sup>. On the other hand, the status quo is preferred in order to continue manipulating it or taking advantages from it. But the status quo may also be due to the fact that political leaders do not know exactly what to do, how to proceed and if they know it, they fear the uncontrollable/unpredictable consequences that change may bring about. In that way the status quo appears as the lesser of two evils<sup>263</sup>.

These explanations cannot be excluded in the understanding of the abstinence from codifying the rural land tenure since the ambitious declaration of intention of 1973, or the little eagerness in creating the "Tribunaux de paix"(kind of police tribunal) supposed to replace of the customary/chieftaincy tribunals<sup>264</sup>, and recently, in the elaboration of the law on decentralization. Only the latter case deserves more clarifications since the other two have been treated in the second chapter.

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<sup>262</sup> MAPPA Sophia, *op. cit.*, p. 198.

<sup>263</sup> ISANGO Idi Wanzila, *op. cit.* 1992, p. 155.

<sup>264</sup> I have to clarify my position here: I do not support that process aiming at unifying the judicial and the land tenure law as it was pursued from 1973. On the contrary, I am in favour of more flexible solutions inspired by legal pluralism approach. See the section on the "basis for civil chieftaincy" in this chapter.

According to the “*Accord global et inclusif*” that the belligerent and non-belligerent (civil society and non-armed political opposition) signed to put an end on five years of war and make up a transitional government in Congo, the electoral process that had to conclude that transitional period was supposed to start with local (city, commune, chieftaincy) elections and end with the legislative and presidential elections. But the parliament avoided adopting a law on decentralization during its three years mandate starting from June 2003, preferring keeping it for the next elected parliament. As a consequence, the electoral schedule underwent some modifications: the electoral commission started from the summit in organizing the first round of the presidential elections that it combined with the legislative on the 30<sup>th</sup> July 2006 and then the second round of the presidential elections that were combined with the provincial elections (i.e. election of the provincial assemblies and governors of province). The newly elected parliament did also take two years before it could adopt the law on decentralization whose publication intervened on the 1<sup>st</sup> August 2008. That publication allowed the electoral commission to hope that it could possibly organize local elections by the end of the second trimester 2009.

This lack of interest or that fear is likely to allow some traditional leaders to continue perpetuating some very authoritarian forms of governance, fully incompatible with the democratic and the decentralization spirit. At the end, the democratic and decentralization process would be trapped from below and lack any effectiveness in the daily life of a wide majority in society. The main political role of the latter risks to be reduced only to being called upon to vote for recycling the political elite while it will remain disempowered to control, orient and influence the traditional system under the direct and close authority of which they live.

#### 4.2.3.3. *Despotism by state’s “enlightened” officials and other political entrepreneurs.*

Two dangers against a genuine decentralization process are implied under this title. The first one comes from the tendency to call peasant 'ignorant, conservative and irrational' - as it was the case in Tanzania under Julius Nyerere rule- and thus to denigrate mass capacity and relevance to bring any substantive contribution to its designing. That tendency gives place to the introduction of reforms from above and sometimes to the use of strong or authoritarian

means in order to break the “resistance to change”<sup>265</sup> that state’s officials will be in charge of executing. Against such an attitude, some authors proposed a wise position consisting in considering that “public forms part of the solution, not part of the problem”<sup>266</sup>.

The second has its source in people’s lack of internalization of their rights and duties either because of their lower level of education or because of having been kept aside in the process of decentralization policy conception. It may also find its source in the abuse by the leaders (whether elected or not) that hold or come to power. All these situations are likely to bring about a sort of decentralization of dictatorship where a small local elite would emerge and capture the benefits of the process and exploit the ignorant or disempowered population. The president of the senate of the Democratic republic of Congo, Léon Kengo wa Dondo, has exactly mentioned this danger in his speech during the inauguration of the budgetary session of the senate. He added that decentralization implies for many actors that the power is coming back into their land. But instead of using that opportunity to elaborate and implement developmental policies for their entities, some of those actors are investing in increasing regionalism and the revival of identity conflicts<sup>267</sup>.

#### **4.3. Basis for a civil chieftaincy.**

The question is to examine the ways in which traditional authorities can be brought into the decentralization process as members of a society who share equal rights with their fellow citizens.

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<sup>265</sup> ERGAS Zeki, “Why Did the Ujamaa Village Policy Fail? Towards a Global Analysis”, in *Journal of Modern African Studies* 18/3, 1980, p. 389, quoted by SEIDMAN Ann and SEIDMAN Robert B., *op.cit.*, p. 186.

<sup>266</sup> SEIDMAN Ann and SEIDMAN Robert B., *op.cit.*

<sup>267</sup> In this speech, he referred to the recent bylaws by the Mayor of Lubumbashi conditioning the entry and the movement of non-residents –regardless of them being Congolese or not- to the indication of the motive and the term of the stay, the place of residence and the means. See the « Allocution de l’Honorable Léon Kengo wa Dondo, Président du Sénat, à l’occasion de l’ouverture de la session ordinaire le 15 septembre 2008 ». [http://www.parlement-  
rdc.org/senat/IMG/pdf/Discours\\_du\\_President\\_lors\\_de\\_la\\_Session\\_Ordinaire\\_de\\_septembre\\_2008.pdf](http://www.parlement-rdc.org/senat/IMG/pdf/Discours_du_President_lors_de_la_Session_Ordinaire_de_septembre_2008.pdf)

#### **4.3.1. *Trutz von Trotha's eight principles for turning the "administrative chieftaincy" into a "civil chieftaincy".***

In 1996, Trutz von Trotha published an article<sup>268</sup> in which he analysed the institutional nature of African chieftaincy with a particular reference to its future. He claims that the colonial and post-colonial despotism transformed that chieftaincy into an intermediary between the state and local community. That is what he calls "administrative chieftaincy" and says that that is a clear sign of lack of integration between the state and the society. It expresses itself by a series of antagonistic dualities: rulers and ruled, capital city and hinterland, urban centres and peasants". That administrative chieftaincy became a "double gate-keeper between the state and the local people, restricting and guiding access of one to the other in matters of state action, clientelist politics, national and local culture, state and local legal orders, the individual and the economic matters". He also mentions the different pressures that chieftaincy underwent all over its evolution until now and concludes that "neither chiefs nor the state are going to disappear in the near future, but they need to be transformed together". He thus proposes to turn the "administrative chieftaincy" into a "civil chieftaincy" that would be more just, responsive and responsible just as the new type of central government would be. He gives eight principles by which that transformation can be evaluated:

1°. The state has to recognise the *de facto* legal pluralism and institutionalize the independent legal system of chiefs, except in some cases like the use of violence. He is aware of the fact that the local judicial system may perpetuate the injustices of the local order but he believes that local autonomy in these issues is preferable.

2°. Local problems must be settled locally. As long as injustice is not addressed locally, external interventions should be measured. Local populations should determine their own interests.

3°. The legal pluralism of state and local systems of conflict resolution should be recognised as leading to a rich legal competition that urbanisation should not destabilise. Where the legal pluralism is represented by chiefs' courts that the state should recognise, people should have more options in the way of solving their conflicts.

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<sup>268</sup> TROTHA, Trutz von, "From Administrative to Civil Chieftaincy. Some Problems and Prospects of African Chieftaincy", in *Journal of legal pluralism and unofficial law*, n°37-38, special double issue, Foundation for the journal of legal pluralism, Netherlands, 1996, pp. 79-108.

4°. The fourth and the fifth principles are about the organisation and the competence. According to Trutz von Trotha, chiefs should not only be the custodians of tradition, but they should also be active agents of the present and the future in promoting the wellbeing of the community. For him, that is what actually gives them all their importance, not only the calls for the “auto-folklorisation”. He adds that it is wrong to think that since hereditary norms limit the access to power at the head of the chieftaincy, then the latter is incompatible with democracy. The chieftaincy depended in past on a competent leadership and those leaders who prove to be incompetent could be replaced. Now the forms of competences that chiefs must have are changing and the chiefs have to do with the modern economy exigencies, administrative and political challenges and tasks...

5°. Chieftaincy has to become a “civil chieftaincy”. When chiefs speak of being the representatives of their peoples, they do not mean that they represent them in the common sense where an individual can represent another. Instead they refer to the representation as embodiment of sacred traditions. However, for the author, political and economic exchanges associated with the colonialism, the post-colonial state and the market economy have modified this chiefs’ claim to representation. Chiefs should adopt new basis for representation and conflict resolution. He proposes that under the civil chieftaincy, chiefs become a forum where problems can be debated and resolved, and where local interests can be articulated. Chiefs should also stand as defender of local interests in the discussions with the central government.

6°. Trutz Von Trotha holds that the civil chieftaincy cannot adequately represent the local order without being constitutionally integrated in the central government. Among the different mechanisms of this integration, he proposes the creation of second chambers for chiefs that should formally incorporate the diversity of local interests and the sources of legitimacy that the chiefs represent.

7°. Trutz von Trotha does not plead for uncontrolled chieftaincy. On the contrary, his last principle attests that mechanisms should be developed to make sure that chiefs as well as the central government will be subjected to democratic practices of checks and balances. Those mechanisms should be instituted respectively at these two centres of power to avoid their abuse of power with their allies.

### 4.3.2. Comments

Although I widely share Trotha's approach, I would like to present two sets of comments related respectively on the concept of "legal pluralism" and on the idea of creating second chambers for chiefs.

1. Trutz von Trotha's three first principles on legal pluralism are strongly indebted to Sally Moore's analysis of that concept, especially when he speaks of the "semi-autonomous social field"<sup>269</sup>. According to Moore, a "semi-autonomous social field" means a "social organization that elaborates and enforces rules that govern members of a group". It is described as "semi-autonomous" because its capacity to produce and to enforce its rules is limited by other social fields' capacity to produce and enforce their own. The wider social field is thus made of the coexistence (although not necessarily harmonious) of these different semi-autonomous normative orders (state, traditional chieftaincy, church, mafia,...).

Statist approaches claiming the supremacy of the state over all other normative orders have proposed and attempted to achieve the unity of the law in the name of public order, the general interest,... But some legal pluralists have shown, on the basis of empirical studies, the very relative success or even a complete failure (especially in land tenure) of this endeavour<sup>270</sup> while others, among them Griffiths, did not find better than describing it as purely and simply an utter utopia<sup>271</sup>.

Legal pluralists are thus in favour of a moderate state regulation, especially in civil (as opposed to criminal) matters. They propose that the state creates a space within which these different semi-autonomous social fields can develop their activity, as a way of deploying and expressing the diversity of the society. The state can go further in establishing an ancillary/subsidiary legislation that people can use either to fill in a lacuna in a particular semi-autonomous social field, or because they belong or adhere to different semi-autonomous fields, or simply because they want their rapport to be regulated by that ancillary legislation. The state can also admit the opposability of some deeds executed in another semi-autonomous field (for instance when a marriage celebrated in the church is recognized the validity before

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<sup>269</sup> MOORE Sally F., *Law as Process. An Anthropological Approach*, London, Routledge and Kegan Paul, 1978, p. 58-59.

<sup>270</sup> FISIY Cyprian F., *Power and Privilege in the Administration of Law: Land Law Reforms and Social Differentiation in Cameroon*, Research Report, n° 48, Leiden, Afrika Studiecentrum, 1992, pp. 10-14; ROUVEROY VAN NIEUWAAL E.A.B., "Law and Protest in Africa. Resistance to Legal Innovation", in ROUVEROY VAN NIEUWAAL E.A.B. and ZIPS W.(eds.), *Sovereignty, Legitimacy and Power in West African Societies. Perspective of Legal Anthropology*, Hamburg, LIT Verlag, 1998, pp. 70-119.

<sup>271</sup> GRIFFITHS, John, "Legal Reasoning from the External and the Internal Perspective", *New York University Press*, 53, 1978, pp. 147-163.

state's institutions) or keep the two legal orders separated or take the comply with the formalities of a particular legal order as a precondition for state's own legal order. An example of the latter case can explain better this situation. In Congo, the state recognizes no effect to the marriage celebrated in the church. As a consequence, believers go to both the administration and the church for their marriage in two completely separated ceremonies. In practice, some churches, especially in the cities, encourage people nowadays to start with the civil marriage before the religious, especially to secure women position. Instead the state gives an important position to the customary marriage so that before the celebration of the civil marriage, the civil servant has to make sure and register that the customary formalities have been observed. And according to the law, in the case of conflict between the customary laws of the spouses, that of the bride prevails.

Finally, the state can call upon those semi-autonomous social fields to use their own mechanisms in order to enforce its rules, like when the state recognizes traditional jurisdictions the right to pursue and punish minor crimes.

Among the advantages of those solutions inspired by legal pluralism is the avoidance of useless clash between state and the society, or the situation where state's law would remain suspended in midair upon the society without (ever) touching it<sup>272</sup>, or even the situation where the law is used to achieve other aims than could ever have been the intention of the law reformer.

The greatest problem posed by legal pluralism occurs when state's order clashes with that of another semi-autonomous social field. Many options are open: the issue may be solved by the balance of power between the forces in presence or by the opening of negotiations between them. Two hypotheses are possible: if the parties are in symmetrical relationship, the result may be a "mutual recognition of authority and of each other's legitimacy. Both actors will exploit the other's position in order to validate or consolidate the legitimizing process and their own authority"<sup>273</sup>. But if the parties are in an asymmetrical and unbalanced relationship, the negotiation will be toilsome. "In many cases, the central government will consider itself the superior party, exerting political power through legislation, administration of justice, pure physical (military) violence and threat of dismissal, with little consideration to its challenger"<sup>274</sup>.

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<sup>272</sup> HYDEN Goran, "Problems and Prospects of State Coherence", in D. Rothchild and V.A. Olorunsola(eds.), *State Versus Ethnic Claims: African Policy Dilemmas*, Boulder, Col., Westview Press, 1983, p. 69.

<sup>273</sup> ROUVEROY VAN NIEUWAAL E.A.B., *op. cit.*, 1999, p. 32.

<sup>274</sup> *Ibid.*

2. As for the idea of creating second chambers reserved to traditional leaders, I have to mention that this idea starts seducing many authors. In 1999, Gaspard Muheme proposed to institute in Congo a parliament made of representatives of the 450 ethnic groups and social organisations he identified. Traditional leaders should be co-opted in the parliament and they should be consulted before the adoption of any outline laws<sup>275</sup>.

I criticised that solution<sup>276</sup> for three main reasons: the first inconvenient of such a parliament is of being overcrowded and expensive, two main defaults of political institutions in this country. Both during the transitional period of 2003-2006 and now after the first democratic elections after forty years the two chambers have been made of respectively five hundred deputies and hundred twenty senators. This overcrowding reminds of the former “*Comité central*” of Mobutu single party, MPR, that was made of four hundred fifty members appointed by the President of the republic regardless of any criteria of representation.

Second having a regard to the size of the country, I propose to limit more and more the solutions whose effect is that of concentrating all the main socio-political personalities at the centre of the country. Their inconvenient is to keep those personalities far away from their respective entities and thus to weaken the latter, most of the time for a long period. Many chieftaincies in Congo experienced for decades that problem of habitual absentee chiefs and the rare times that they were in their entities, they were like tourists. As a consequence, not only their entities were deprived of their presence and their impulse, but also many problems that chiefs’ temporary representatives created or refused to solve under the motive that they fall under the only competences of the chief remained unsolved for a long while.

Third, concerning the outline laws that Muheme speaks about, they relate to different issues some of them without any direct incidence on traditional authority system per se to justify the general and permanent mobilisation of traditional leaders.

Instead of gathering all chiefs in the national parliament, it would be better to organise chambers of chiefs at the provincial level. Those chambers should serve as framework for chiefs to debate on the different issues that they face in their respective entities, to find the ways and means to solve them, to formulate the demands to put to the hierarchy, define common goals and evaluate the way in which they have been implemented and the difficulties faced during that implementation. They can use that framework to define some plans to be realised either individually or jointly in the case they want to take advantage from the economies of scale.

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<sup>275</sup> MUHEME Gaspard, *op. cit.*, pp. 154-155.

<sup>276</sup> NAMEGABE Paul-Robain, *op. cit.*, 2005, pp. 230-231.

Those provincial chambers could then appoint their representative to make up a national committee. Its role would be that of representing the interests of its members at the national level and advise the central government in customary issues. Among the advantages of referring to the provincial chambers of chiefs to appoint their representatives at the national level is to avoid that this representation be captured by some influential and politically well connected leaders.

#### **4.4. How to conceive a better power sharing among the central state and traditional entities.**

##### ***4.4.1. Making the state play the role of facilitator.***

Most of the time, decentralization policy is led in the same way as was led the planned economy. “You must industrialize, until you do this you will not be able to advance and therefore you must milk the peasants. If the peasants don’t like it, send the troops”. Although I do not contest that decentralization policy should be planned, the plan should not have the effect of supplanting local initiatives. As Basil David puts it, the African state’s role should be better formulated as “a facilitating role.” This requires a fundamental change of attitude in order to transform the government cadre from a “doer” and “dictator”, to facilitating others to do<sup>277</sup>.

In concrete terms, it is more about turning the role central government into that of assisting local initiatives in the decentralization process. In this perspective, local initiatives will have to ask for it and for more transfer of both responsibilities and means and show that it is a realistic request. It is not central government, but them. It is up to them to make the request and if the government thinks it is useful having a regard to their plan of action, their potentialities, their performances, it will give it to them. “It is different from the planning concept which says, there should be this, therefore the peasants should have it, they may not want it”<sup>278</sup> or be able to take care of it.

Of course, ministry officials can produce plans, but local councils must be in a position to challenge or to redress them. So local authorities will not be regarded merely as policy implementing but also as policy formulating agencies and the planning task will cease

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<sup>277</sup> DAVIDSON Basil & MUNSLOW Barry, “The crisis of Nation-State in Africa”, in MOHAN Giles & TUNDE Zack-Williams(eds.), *The Politics of Transition in Africa. State, Democracy & Economic Development*, Revue of African Political Economy (ROAPE), Sheffield, 2004, p. 192.

<sup>278</sup> *Ibid.*

remaining the realm of government's "experts"<sup>279</sup>. It is only in that way local communities will feel that the results achieved are due to their own efforts and have not been imposed from above.

Decentralization should work as a learning process, as mutual interaction, gradual, where the central government and local entities are willing to try different alternatives, discard them when they seem unworkable and try others. What Joseph R.A. Aye says about participation in development applies also in the decentralization process. According to him, "the blueprint approach, which assumes that solutions to the problems are well known and that predetermined interventions and techniques are certain to produce expected results in a given situation, is unlikely to be as successful as the process approach. By contrast, the process approach assumes that there are many imponderables in the life and, therefore, it is marked by constant openness to redesign and adaptation to the changing situations. Studies of the problems on the ground and an interactive style of problem solving are preferred to remote expertise"<sup>280</sup>.

It requires also a change in the traditional state's conception of itself and of policy implementation. Indeed, the nation-state is traditionally presented as political authority that controls "a centralized state that can uniformly apply policies throughout a given territory, and the inhabitants of this political system owe their allegiance to the state"<sup>281</sup>. Our claim here is that state's policy should whenever necessary adapt to the particularities (problems, sensibilities) of different areas and groups. Otherwise, it may end up in not getting people allegiance and face even serious resistance.

#### ***4.4.2. For a decentralization by stages or progressive decentralization.***

It presupposes the willingness of both the central government and the local entities (here the chieftaincies) to effectively decentralize and to cooperate in that process. *The idea of decentralization by stages or progressive decentralization process should, in my view, operate at a triple level:* First, at the central level, it requires a clear definition of responsibilities reserved to itself and those which are transferable. That power sharing should be open to wide participation including the different groups of interest, particular and the

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<sup>279</sup> *Ibid.*

<sup>280</sup> AYEE, Joseph R.A., «Participation, Poverty and Social Exclusion», DPMF Publications: DPMF Workshop and Conference Proceedings, <http://www.dpmf.org/participation-joseph.html>

<sup>281</sup> SCHRAEDER Peter J., *African Politics and Society: A Mosaic in Transformation*, 2ed., Ed. Belmont, CA: Thomson/Wodsworth, 2004, quoted by BRADLEY TODD M., *op.cit.*, pp. 414-415.

entities that will have to carry out the (new) responsibilities. Second, it implies recognition of traditional chieftaincies' (semi-)autonomy and discussion with the central government and other intermediary levels of decentralized governance about the responsibilities they can actually take on. Third, progressive transfer of responsibilities on the basis of local entities' plan of action and of the performances realized. Here decentralization is not to be understood as an operation which has to be accomplished once and for all. Neither is it a one-way mechanism. Given the weakness of some institutions and their little experience, decentralization should be a progressive process that avoids the situation where a certain responsibility is transferred to a level that is actually unable to carry it out. This is the main problem of some decisions taken at the central level, and which are inspired by the necessity of generality and uniformity and are supposed to be easily "manageable". In running the risk of ending up in creating impotent institutions, decentralization inspired with these considerations would be just useless (since it does not solve any problem and probably it will create more problems than it solves). I sustain that, at anytime, it should be possible, when some objective reasons plea in favor of that, for some responsibilities to be transferred, at least temporarily, either to the upper or to the lower level.

#### ***4.4.3. Necessity for a permanent commission on decentralization.***

Its role should be that of collecting the different problems faced by decentralized entities and assist them in finding the solution to them. It should also facilitate the share of experience and information among different entities to avoid that each of them evolves without any contact with the outside world.

#### ***4.4.4. The technical decentralization issue.***

##### *4.4.4.1. Justification*

The issue of technical decentralization, although rarely discussed, is the spine of a genuine decentralization. It is related to the administration, to the services. Indeed, as centralization is made possible through the administration (as the means by which central government implements or materializes its attributions), so decentralization is as well. As the latter requires a transfer or sharing of attributions, it call also for a sharing of means. The means imply not only financial resources but also to rethink the whole administrative

structure, the infrastructures, the personnel, and the power relationship over them in order to mark the break with a centralized administrative model.

The technical decentralization avoids many inconvenient among which:

- Having a formal but not effective decentralization if the main domains of the state, even those transferred to local entities, continue to be managed through the former usual administrative schema, and thus promoting or keeping a *de facto* centralization. Administration which is known as responsible for these sectors can continue keeping this confusion; thus rendering decentralization illusive.

- Conflicts between the centre and local government about the control over different issues and administration. The conflict on towards whom the latter owes loyalty can paralyze its activity, create tension with the level whose authority is not taken into account or is competed,... Besides that, giving the administration the opportunity to appreciate to whom it has to obey is dangerous and a clear sign of lack of coherence in state's apparatus insofar as the administration is not an independent body so to speak, but an executive instrument of central government's and local entities' regulation. Even in the case of public enterprises or public services endowed with a legal status, the level of authority that exercises the constitutive power and/or the supervision authority over them has to be clearly specified.

- "*Double emploi*", institutional dualism and their corollary, the underemployment and the cost. The idea here is that, as we have mentioned, in order to carry out their attributions, local entities will need both human and material resources. If these resources are not provided to them or if the conditions for using state's ones are not specified, those entities will find a solution in looking for their own. They will need to organise new recruitment, build up new infrastructures, get some equipment goods. If those entities are intervening in the sectors that were formerly under the total control of the central government, the risk is to have two administrations or administrative structures dealing with the same issues (institutional dualism). Besides the conflict of attributions we have already mentioned, that situation is (uselessly) costly and likely to engender an underemployment on one or both sides in a particular context where resource scarcity is the rule!

- Risk of weakening the state's apparatus: one of the main differences between the legislative and the executive apparatus on the one hand, and the administration -except for some cases where, by the lack of genuine participatory mechanism which can promote the change in power, many personalities have become "perpetual" presidents, ministers or deputies- on the other hand is that the administration is made of (senior or not)civil servants who are intended to make career in the administration. As such, they have a greater knowledge of state's affairs,

technical competence and/or experience, how-know, than members of government or assemblies' do, particularly in the Congolese context where these legislative and executive bodies are, most of the time, full of many amateurs. Thus, in decentralizing, the attention has to be paid to how the (new) entities will take advantage of/make good use of the existing administration's how-know, instead of having recourse to newly recruited and inexperienced agents.

These two first dangers are perceptible in the recommendations formulated by a two days mini-forum on decentralisation and local good governance hold in Mbuji-Mayi from April 16-17, 2007. This meeting of representatives of public administration, civil society and enterprises raised at the attention of both the domestic Ministry and the national Parliament in charge of elaborating the new law on decentralisation many questions on administrative, financial, organisational issues. Among them was the question of the future status of the different "*chefs de Division*" (Department heads) who represented until then the different Ministries in the administrative services in the provinces. Since the new constitution has distributed the attributions between the central state and local entities, and allowed the latter to constitute their own governments which are accountable to locally elected assemblies, the participants found necessary to clarify in the law to come the relations these administrations and their representatives will develop with the central and local government.<sup>282</sup>

#### 4.4.4.2. *Some basic principles.*

- Human and material resources attached to the services exercising the competences that are partially or fully transferred to local entities should be transferred as well at the same time with those competences. From that time, local entities can reorganise those services by virtue of the principle of self-administration, including the administrative and financial status of their personnel, the pay scale, the amount of civil servants they want to keep or recruit, etc. However, to avoid some strong divergences among entities, the latter should agree jointly with the central government upon some general principles applicable to all personnel concerning the administrative and financial status, the pensions, trade unions, etc. It is necessary that civil servants of either the local or national government have similar treatment.

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<sup>282</sup> <http://www.radiokapi.net/index.php?i=53&a=12965> [page du 18 avril 2007]

- Local entities can create artificial persons and public organs, or associate with the private sector in order to create private artificial persons. They can also transfer some of their attributions to other entities, fix their cooperation among themselves and/or their services, hold common meeting and organize common services.

- The entities should be allowed to use some services that remain under the central of the central government given their know-how and the cost that the creation of new services involves.

- An inventory and an evaluation of the infrastructures should be done when attributions are transferred to local entities for a double motive. On the one hand, it helps to make sure that those entities can actually care them out with the existing infrastructures or not. And in the latter case, the evaluation allows them to know for which sector(s) they need to gather and orient their resources in order to get the required infrastructures. On the other hand, at the national level, it helps to identify the entities that are comparatively advantaged when the transfer occurs since they will have a good starting point and those who are not and possibly need some financial support.

## **5. PARTICIPATION, REPRESENTATION AND THE ETHNIC MINORITY ISSUE.**

In the second chapter of this study I insisted on the correlation between decentralization and democracy and claimed that decentralization without democracy is likely to be decentralized despotism or a decentralized centralism. In particular I mentioned that decentralization should not limit itself in bringing the administration and the centre of decision closer to the population without promoting civic liberties, popular participation and representation. Decentralization should allow people to appropriate the process by increasing their influence and control over the authority and decision-making process on the one hand, and partaking in the implementation of those decisions on the other hand. Decentralization implies also increased empowerment in three different and intimately linked domains: economic, social and political domains. “In economic terms, it means being able to engage freely in any economic activity. In social terms, it means being able to join fully in all forms of community life, without regard to religion, colour, sex or race. And in political terms, it means the freedom to choose and to change governance at any level, from the presidential palace to the village council.”<sup>283</sup> Decentralization should thus widen people’s choices, enable them gain more access to much broader range of opportunities and to become real master of their own destiny.<sup>284</sup>

The question of participation and representation that decentralization implies requires first to define the category of people who are concerned, i.e. people who are entitled to be involved in the process. The very quick answer to speak of citizens. In the particular context of the DRC, however, the determination of who is citizen has become difficult to make for long period, particularly in the Kivu region. I will show, in the first section, how the inheritance of colonialism and the political dynamic of the post-colonial period in the Central Africa’s great lakes region have contributed to that impasse and show how that question of citizenship has become strongly associated with the claim for minority status. In the second section I will focus on how citizenship and minority claims affect decentralization and how a combined actions of the centre, local government and local communities are needed to address the issue posed.

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<sup>283</sup> [http://hdr.undp.org/reports/global/1993/en/pdf/hdr\\_1993\\_ch2.pdf](http://hdr.undp.org/reports/global/1993/en/pdf/hdr_1993_ch2.pdf)

<sup>284</sup> Idem.

## 5.1. Citizenship in Congo and the Kivu issue.

The fact that the Kivu issue has always been at the centre of all the political and scientific discourses about citizenship in the Democratic Republic of Congo is indisputable. With regard to the complexities of the issue, I will limit myself in raising the main points at stake<sup>285</sup>.

### 5.1.1. Main characteristics of the different Congolese laws on citizenship

Three main characteristics dominate the Congolese laws on citizenship from the colonial period until now: they are regionally influenced, *ad hoc* laws and ethically marked. I will analyse the first one separately and the last two together.

#### 5.1.1.1. Regionally influenced laws.

Congolese laws on citizenship are all regionally influenced by the far-off and the recent past of the Kivu region where a great concentration of peoples from neighbouring countries (especially from Rwanda and Burundi) occupy under very controversial conditions lands on which autochthons claim ownership. The latter argue the threat of territorial expansion of those populations considered as foreign and the fear, well-founded or not, that they are robbing their lands to enlarge their cultural area.<sup>286</sup> As a consequence, cohabitation among those groups is punctuated by recurrent tensions and violent confrontations.

In 1966, immediately after the first violent confrontation that started in 1965 in the North-Kivu, the Ministry of the Interior sent a mission well-known as “Mission Teuwen” to evaluate the situation. That mission classified those populations into four categories:

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<sup>285</sup> For more details, one can usefully consult the writings and bibliography of some authors like : GUICHAOUA André (Sous la Dir.), *Exilés, réfugiés, déplacés en Afrique centrale et orientale*, Paris, Karthala, 2004 ; MATHIEU P., LAURENT P.-J., MAFIKIRI TSONGO A., MUGANGU S., *Conflits fonciers, relations ethniques et violences au Kivu*, Louvain-la-Neuve, IED, UCL, 1997 ; MATHIEU Paul, LAURENT Pierre-Joseph et WILLAME Jean-Claude (sous la dir.), *Démocratie, enjeux fonciers et pratiques locales en Afrique : Conflits, gouvernance et turbulences en Afrique de l’Ouest et centrale*, Cahiers Africains, n°23-24, Bruxelles-Paris, Institut Africain-CEDAF-L’Harmattan, 1996 ; MUKULUMANYA Wa N’GATE ZENDA, *La guerre de l’Est : enjeux, vérités oubliées et perspectives de paix*, Kinshasa, Ed. ZENDA, 2000 ; NDESHYO O., *La nationalité de la population zaïroise d’expression kinyarwanda au regard de la loi du 29 juin 1981*, Ed. Electronique ASYST, Kinshasa, 1992 ; WILLAME Jean-Claude, *Banyarwanda et Banyamulenge : violences ethniques et gestion de l’identitaire au Kivu*, n° 25, Bruxelles-Paris, Institut Africain-CEDAF-L’Harmattan, 1997 ; MUCHUKIWA Bosco, *op. cit.*

<sup>286</sup> MAFIKIRI Tsongo, « Mouvements de population, accès à la terre et question de la nationalité au Kivu », in Paul Mathieu, Pierre-Joseph Laurent & J.-C. Willame, *op. cit.*, 1996, pp. 193-194.

- Free immigrants: this group is made of people who came voluntarily in what has become Democratic Republic of Congo. Among them are those whose establishment goes back to the 17<sup>th</sup> century (period when the Basinga clan -whose chief, named Rugabo, is the ancestor of the Mwami Ndeze- is thought to have arrived in the Bwisha) and people from Rwanda who joined their relatives during the territorial delimitation between the Belgian Congo and the eastern Africa German colony. According to that mission, the Banyarwanda of that category are considered Congolese.

- the fugitives including all the people that infiltrated into Congo for diverse motives (famine, insubordination to traditional leaders in their country of origin, fugitives from justice,...). It was difficult to determine the exact period of their immigration in Congo because they either benefited from the weakness and complicity of immigration services or they just exploited the porosity of Congolese borders. The mission mentioned just that their immigration could be situated in the period after 1918 and concluded that these peoples did not have the Congolese citizenship. The same conclusion was applied to the Banyarwanda of the two following categories.

- the Banyarwanda established in Congo by the Belgian authorities for the colony's needs. There were, among them, those who were recruited in Rwanda after the World War I for work in the great farming and mineral companies. This category encompassed also the Banyarwanda who have been "transplanted" during the Belgian policy that started in 1936 and aimed at solving the overpopulation in Rwanda. This policy is well-known as "*Mission d'Immigration des Banyarwanda*".

- the last category was made of refugees (mainly of Tutsi ethnic group) who fled from Rwanda after the Hutu revolution of 1959 that overthrew the monarchy led by king Kigeri. Most of those refugees settled in the North-Kivu (Masisi, Goma) and South-Kivu (Kalehe, Kabare, Uvira).

Two remarks are worth mentioning about these categories:

1°. The first is that these categories have evolved since then. The amount of legal and illegal immigrants continued to increase. On its side, the political dynamic in Rwanda and in Burundi has never stopped supplying the contingent of refugees from both Hutu and Tutsi ethnic groups. For instance, many Hutu fled from Burundi at the early independence when prince Louis Rwagasore was overthrown by the Tutsi elite on the 10<sup>th</sup> October 1961. Later on, following a failed attempt by Hutu military at reacting against the Tutsi hegemony in 1972,

many Hutu went in exile to escape the repression<sup>287</sup>. In the nineties, many people of both Hutu and Tutsi ethnic groups went in exile, as a consequence of a cycle of rebellions and violence that started after the killing, on October 21, 1993, of the first Hutu president democratically elected, Melchior Ndadaye.

As for Rwanda, in 1994 some Tutsi crossed the Congolese border fleeing from the genocide. Few days after, when the *Front patriotique rwandais*(FPR), a Tutsi rebellion led by Paul Kagame, took power in Kigali, it was the turn of Hutu(including those who were involved in the genocide of Tutsi) to flood in the North and South-Kivu. Although most of them were either massacred later in the refugee camps in 1996 when the Rwandan troops invaded the Congo or are still scattered around in the neighbouring countries, some of the rest decided to go back in their home country. Others, about six thousands, are still in the Congolese forests and villages. They constitute the hard core that resists hardly to repatriation since the majority of them are presumed to have been involved in the genocide of 1994 in Rwanda. Not only they hold many civilian refugees hostage in dissuading them from volunteering for repatriation, but also they commit atrocities against Congolese civilian populations, in particular to dissuade the government and the UN peace keeping mission repatriate them by force.

2°. The four categories are not unanimously recognised. On the contrary, most of the time, they are deliberately manipulated for political calculations. Some Congolese, willing to cast on them a common fate, do not hesitate for instance to call them all refugees, foreigners, immigrants or Rwandans<sup>288</sup>, who should be repatriated instantly and without preconditions.<sup>289</sup> On their side, the Banyarwanda do not facilitate the clarification of this situation either. They even keep entertaining confusion in order to unify their struggle and to have a decisive influence in the decision concerning their claims<sup>290</sup>.

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<sup>287</sup> CNDD, « La nature du conflit burundais : un cocktail d'intolérance et d'hypocrisie », [www.cndd-fdd.org](http://www.cndd-fdd.org) ; CHRETIEN Jean-Pierre, « Burundi : la démocratisation manquée », [http://www.african-geopolitics.org/home\\_french.htm](http://www.african-geopolitics.org/home_french.htm)

<sup>288</sup> MUGANGU Séverin et al., ‘‘Les politiques législatives congolaise et rwandaise relatives aux réfugiés et émigrés rwandais’’, in André GUICHAOUA(sous la dir.), *Exilés, réfugiés, déplacés en Afrique centrale et orientale*, Paris, Karthala, 2004, p. 666.

<sup>289</sup> See for instance the conclusions of the Information commission sent by the Congolese parliament (Haut Conseil de la République) to bring the truth about the ethnical troubles and violence that occurred in the Masisi from 1992 between the ‘‘Banyarwanda’’ and the autochthons to light. That commission is well-known as ‘‘Commission Vangu’’, because of the name of its president Vangu Mambuene. The conclusion of that commission were adopted by the parliament on the 28 April 1995.

<sup>290</sup> That is why for instance Oswald Ndeshyo Rurihose was criticized for having deliberately omitted to make such a distinction in his publication on *La nationalité de la population zaïroise d'expression kinyarwanda au*

3°. It would be wrong to think that the Banyarwanda, whether Hutu or Tutsi, has constantly been victims through all these episodes. On the contrary, they benefited simultaneously or alternatively from many advantages all over the period of their implantation in Congo. Those advantages may even have contributed widely to increasing a strong resentment against them. For instance, when, in 1936, the colonial administration “transplanted” some populations from Rwanda to the chieftaincy of Buhunde in Congo, each displaced family received five hectares of land for free. In 1940 the Governor General transformed the space where was realised the settlement of Banyarwanda, 39.9 hectares, into a new chieftaincy called Gishari, quite in the middle of the chieftaincy of Buhunde.

These decisions created a series of problems: first, they engendered frustrations among autochthons whose entity was cut and who were excluded from the advantages that the colonial administration provided to the new comers. Indeed, beside the five hectares of land, they received seeds and farming tools and, during the six months following their installation, they were provided food and exempt from head tax, customary duties and tolls for two years. And when the Gishari became overpopulated, its representatives started negotiating its extension to some neighbouring villages of Mahange, Chungo, Kihira and Mashango. The second problem concerned the administrative status of the immigrants. Indeed, the king of Rwanda thought he would continue exercising the competence *ratione personae* over his subjects who were displaced while Kalinda, the chief of the Buhunde, considered them to be under his authority. Moreover, Wilfried Bucyanayandi, who replaced Joseph Bideri at the head of the new chieftaincy, had no respect for Kalinda. He went even further in claiming the unification of his chieftaincy with Rwanda, to be fully autonomous vis-à-vis the Chieftaincy of Buhunde.<sup>291</sup>

The combination of all these reasons founded the chief Kalinda to request the abolition of the new chieftaincy of Gishari. That abolition occurred on January 16, 1957.

During the postcolonial period, Banyarwanda’s alliances with the different regimes have been the most shifting. Jean-Claude Willame mentions, for instance, that their number and their strategy allowed them to partake in the first central and provincial institutions of the early independence. Indeed, the political party they adhered to, the *Centre de regroupement africain (CEREA)*, won a large majority in the North-Kivu and about fifty percent in the

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*regard de la loi du 29 juin 1981*, Editions Electronique ASYST, Kinshasa, juin 1992, p. 1. For the critic, see P. Mathieu, P.-J. Laurent, A. Mafikiri Tsongo, S. Mugangu, *op. cit.*, p. 110.

<sup>291</sup> P. Mathieu, P.-J. Laurent, A. Mafikiri Tsongo, S. Mugangu, *op.cit.*, p. 119.

Kivu-Maniema. Other local communities were full of resentment and accused them of having presented only their “kin” on the list of the party and having organized massive infiltration in the Kivu.<sup>292</sup>

When Mobutu took the power, he surrounded himself with Banyarwanda and favoured them. Mercel Bisukiro, J. Midiburo, Cyprien Rwakabuba were appointed at the head of state-owned enterprises. Barthélemy Bisengimana was Director of Mobutu’ personal staff from May 1969 to February 1977. Others were appointed in the high command of the army, the intelligence service, international institutions, diplomacy,... Moreover, thanks to their massive acquisition of the Congolese citizenship in 1971-1972 and to their connections in the political institutions, they were among the first beneficiaries of enterprises’ and plantations’ nationalization. They also acquired wide real estates under the land reform of 1973. In Masisi and Rutshuru, they got about 90 percent of the Europeans plantations. These acquisitions allowed them to control about 45 percent of the land available in Masisi. In Walikale, the only corporation named RWACICO, owned by Cyprien Rwakabuba, got 230,000ha of land, which amounted to one tenth of the Territoire of Walikale<sup>293</sup>.

The political crisis that shook the regime late seventies and the opening-up announcement by Mobutu led people think that changes would occur. But that was an illusion. Basically, only some most influential people managed to be appointed or co-opted. The appointment of Ndeshyo and Rwanyindo, two professors at the University of Kinshasa, and Doctor Kaïsa, among the first 120 first members of the Central Committee of the party on September 2, 1980 caused an uproar that constrained him to replace them by the so-called “authentic autochthons”<sup>294</sup>. Few months after, in February 1981, the citizenship of Ndeze and Cyprien Rwakabuba was contested in the same Central committee, but thanks to their rank and their connection, they were not threatened<sup>295</sup>. The common feeling was, then, that the regime guaranteed Banyarwanda political representation and economic weight on an altogether different scale with their numerical importance.

However, within this group, some people started recently to raise their voice to say that one group received more dividends than the other.<sup>296</sup>

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<sup>292</sup> WILLAME J.-C., *op. cit.*, p. 47.

<sup>293</sup> That acquisition was revoked only after a deputy from the North-Kivu, Bamwisho Mihia, had lodged a complaint against it. *Ibid.*, pp. 54-56.

<sup>294</sup> MUKULUMANYA Wa N’GATE ZENDA, *La guerre de l’Est : enjeux, vérités oubliées et perspectives de paix*, Kinshasa, Ed. ZENDA, 2000, p.46.

<sup>295</sup> WILLAME J.-C., *op. cit.*, p. 57.

<sup>296</sup> BUCYALIMWE MARARO S., “Le TPD à Goma (Nord-Kivu): Mythes et réalités”, in Marysse S. and Reyntjens F.(eds.), *L’Afrique des grands lacs. Annuaire 2003-2004*, Paris, L’Harmattan, 2004.

Mobutu manipulated the conflict that emerged from that context to settle a score with the opposition that developed in the Kivu. He argued these conflicts to declare void the elections of 1965, 1987.

From the nineties, new developments occurred in the region. When the Rwandan Patriotic Front, dominated by Tusti refugees in Uganda, launched its rebellion against the Hutu regime in Rwanda in 1990, many Tutsi families in Congo sent their sons to back the movement. The Hutu community in Congo whose kin were invaded in Rwanda, used that situation to convince the Congolese opinion that, unlike the Tutsi, they kept loyalty to Congo and should deserve different treatment (including citizenship) than Tusti. At the same time, the Tutsi community became the target of both “autochthons” and Hutu.

The overthrow of the Hutu regime in Kigali, in July 1994, provoked a vague of about three million of Hutu refugees in the North- and South-Kivu, including those who had just achieved the genocide against Tusti. Not only those refugees continued threatening the new regime in Kigali since their camps were installed along the border, but also they increased the weight of the Hutu community and the threat against the Tutsi in Congo. This situation coincided with the adoption by the Congolese parliament of the Vangu Commission report that ordered the evacuation of the Congolese territory by all the Rwandan refugees by the end of 1995. The turning back operations that followed this report turned out to concern in priority the Tutsi. Their riposte was not long in coming.

Backed by the Rwandan and Ugandan armies in early October 1996, they invaded Congo and led a movement which removed Mobutu from power and installed Laurent-Désiré Kabila. Together with their allies, they deployed their control over the economic sector (starting with natural resources) and introduced their members in the political institutions, the army and the administration. This foreign and Tutsi hegemony increased once again the resentment within the population and forced Kabila to break his alliance with his Rwandan and Ugandan godfathers. Following that decision, Tutsi withdrew from the government and started a new rebellion, *Rassemblement congolais pour la démocratie (RCD)*, from the Kivu by the 2<sup>nd</sup> August 1998. They controlled about a third the Congolese territory in the East until June 2003. In his debacle, Kinshasa government enlisted the support of Hutu militias who were (or are) still in Congo (*Forces démocratiques pour la libération du Rwanda, FDLR*) to face the rebellion.

When, after the “*Dialogue inter-congolais*”, RCD’s leaders joined Kinshasa in a transitional government, the government of Kinshasa was forced to end his alliance with the Hutu militias and to expel them from Congo, as a price for reunification. State’s spoils -from

the centre, where its Secretary general Azarias Ruberwa was the Vice-president of the Republic, until the lower level- where shared among the parties to that dialogue (rebels, militias, civil society, Kinshasa government). Although the RCD (which in the meanwhile transformed itself into a political party) lost much of its importance during the 2006-2007 elections, most of its followers have comfortable positions in the administration and army thanks to this state spoils' sharing. As to the malcontents and losers in that process, whether civilians or soldiers, they withdrew once again in the North-Kivu (Rutshuru and Masisi) and in the South-Kivu (Haut-plateaux d'Itombwe and Kalehe) where they started new attacks. Their aim is essentially to negotiate new arrangements with the government and to protect the interests they accumulated over the time and to (re)gain new or lost positions<sup>297</sup>.

#### 5.1.1.2. *Ethnically marked and ad hoc laws.*

The tensions between autochthons and Banyarwanda are expressed at the state level in terms of conflict over citizenship. As Séverin Mugangu mentioned, through the contestation of citizenship to the “immigrants”, “autochthons” hope to get their ancestral lands back and to put an end to the usurpation of their quota in the political institutions and the immigrants' tendency to dominate the administrative and economic apparatus<sup>298</sup>.

Hence, in reading the different laws on citizenship, from the early independence until now, one finds that the definition of the Congolese citizenship by birth (“*nationalité congolaise d'origine*”) draws more attention than other modes of acquisition of the citizenship. This definition refers constantly to the subject's belonging to a Congolese ethnic group whose territory must be part of the current DRC. They are *ad hoc* laws, since they are used either to settle old scores or to find a compromise according to the balance of power. A quick reading of those laws can help us to better clarify this situation.

1°. Congo got its independence in June 1960 without a law on citizenship. During the political round-table negotiations of Brussels, prior to the independence, the parties decided to keep that question to the future Congolese parliament. However, the texts organising local, provincial and legislative elections late 1959 and early 1960 bear some marks of trouble over citizenship we have just mentioned. Indeed, the first article of the legislative ordinance

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<sup>297</sup> STEARNS Jason K., “Laurent Nkunda and the National Congress for the Defense of the People(CNDP)”, Marysse S., Reyntjens F. and Vandeginste S.(eds.), *L'Afrique des grands lacs. Annuaire 2007-2008*, Paris, L'Harmattan, 2008, pp. 245-267.

<sup>298</sup> MUGANGU Séverin, “La crise foncière à l'est de la RDC”, in Marysse S., Reyntjens F. and Vandeginste S. (eds.), *L'Afrique des grands lacs. Annuaire 2007-2008*, Paris, L'Harmattan, 2008, p. 395.

n°25/554 of the 6<sup>th</sup> November 1959 allowed peoples originating from Rwanda-Urundi the possibility of electing and being elected in the councils of Territoire, Commune and City under the only condition that they justify ten years of residence in Congo. Later on, the 23<sup>rd</sup> March 1960, the law organising the legislative and provincial elections made a distinction between the right to vote and the right to be elected. In order to be admitted to vote, the individual should be of Congolese status or his/her mother should be Congolese, be native of Rwanda-Urundi resident in Congo for five years minimum. As for running provincial deputy, beside being of Congolese status or having a Congolese mother, the candidate had to have twenty five years minimum and have resided in Congo for ten years minimum.

The distinction that these two texts establish between the indigenous of Congolese status and natives of Rwanda-Urundi continues to appear either directly or indirectly in the postcolonial laws.

2°. In 1964, when was adopted by referendum the first Constitution, as mentioned in the third chapter, only a third of the national territory that was under the control of the central government participated to the referendum. The rest was occupied by Mulele rebellion. The new constitution served indirectly to settle old scores with the Banyarwanda. Indeed, during the debate about the creation of new provinces, the Banyarwanda refused to support the autochthons' demand for the creation of the province of North-Kivu. Instead, the Banyarwanda demanded the organization of a referendum in Goma, Rutshuru, Masisi and Walikale. Despite their opposition, the new province was nevertheless created, but a referendum had to be hold in Goma and Rutshuru to determine whether they were willing to belong to the new province or to remain attached to the central Kivu. That referendum never occurred because of the tensions that preceded it. A parliamentary report of March 1963 mentions that Rwandan emigrated in droves from their country to Goma and received forged Congolese identification in order to partake to the referendum and support those who were in favour of that attachment<sup>299</sup>. When Mulele launched its rebellion from the eastern part of the country, the Banyarwanda were accused of backing him. In so doing, the autochthons received the support of the central government so that the war against the rebels served to solve local contradictions<sup>300</sup>. This is the context in which the Constitution of 1964, called Constitution of Luluabourg, was adopted.

Unsurprisingly, the definition of Congolese citizenship excluded widely the Banyarwanda. Its sixth article stipulates that Congolese citizenship is recognized from June

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<sup>299</sup> WILLAME J.-C., *op. cit.*, p. 49.

<sup>300</sup> MATHIEU P., LAURENT P.-J., MAFIKIRI TSONGO A. and MUGANGU S., *op. cit.*, p. 137.

30, 1990 (i.e. the independence day) to each person whose ascendant is or was member of a tribe or part of tribe established on the Congolese territory before the October 18, 1908 (when Congo ended being a private property of the Belgian King and become Belgian colony). As it appears, that disposition concerned only the Congolese citizenship by birth, while for the other mode of acquiring the citizenship, the constitution referred to the outline law that would be adopted in the future (article 7).

For that reason, unlike P. Mathieu, P-J. Laurent, A. Mafikiri Tsongo and S. Mugangu<sup>301</sup> who think that the legislative radicalism started with the law n°81-002 of June 29, 1981, I hold that it started with the constitution of Luluabourg.

3°. In order to solve once for all the problem of people from Rwanda and Burundi who settled in Congo and to give satisfaction to some of them who were in the presidential entourage, the ordinance-law n°71-20 of March 26, 1971 recognized them Congolese citizenship. In a single article, that text declared that people from Rwanda and Burundi installed in Congo on June 30, 1960 (independence day) are supposed to have got the Congolese citizenship at that date. The resentment that this law led the parliament to introduce a little modification the year after. The article 15 of the law n°72-002 of January 5<sup>th</sup>, held that people from Rwanda and Burundi who have settled in the province of Kivu up to January 1, 1950 and have continued residing in the Republic of Zaire until this law comes into force have acquired the Zairian citizenship on June 30, 1960.

4°. In late seventies and early eighties, when the regime started facing its first open contestation, a u-turn was done: the parliament passed the law n°81-002 of June 29, 1981 which abrogated retroactively the previous law and declared null and void the article 15 that recognized the Congolese citizenship by birth to people from Rwanda-Urundi established in Congo on January 1, 1950. Furthermore, according to this law, the citizenship by birth was recognized to all person whose one of the ascendants is or was member of one of the tribes installed on the territory of the republic in its limits of August 1, 1885 and their subsequent modifications. Its implementation led to the removal of the citizenship certificates delivered to the Banyarwanda in accordance with the law of 1972 on the pretext that they were fraudulently obtained.

Many writings have been devoted to this 1981 law. Some of them support it while other strongly and even emotionally criticize it. For my concern here, the new orientation taken by the law of 1981 is questionable on both legal coherence and even philosophy of law

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<sup>301</sup> *Ibid.*, p. 109.

grounds. The question here is whether a right acquired according to the law can be fraudulent. Put in other terms, the question is whether the general will expressed through the law can be mistaken. Can one invoke, like in contract theory, the vice of consent to a law to justify its abrogation and the annulment *ex tunc* of its effects?

Calling the conformity of an act or behaviour to the law a fraud implies that beyond the formal legality, there are other criteria of legality, other higher norms and principles in virtue of which social behaviour and the legislative activity's validity are evaluated. The research of the source of those norms and principles that constitute the foundation of the (positive) law points in two different directions. The first claims that they are derived from natural law, whereas the other attributes the faculty of producing them to the only pure reason.

Independently from the source that is chosen, their meeting point is that there are some values that constitute the very foundation of the society and that any positive law should conform to and safeguard. For our concern here, can the law of 1972 be considered to have undermined the foundation and the values of the Congolese society to deserve a retroactive repeal from the legal system?

The main point to mention is that citizenship is related to the identity of a person and as such, it is part of the individual fundamental rights. In order to deserve the treatment that the law of 1971 endured, it should have been established that maintaining it had caused or would have caused to the Congolese society damages out of proportion to the advantage or the fundamental right it conferred to the particulars it concerned. The primacy of the general interest would logically have commanded such a decision. However, the preservation of the categories habilitated to convey the Congolese original citizenship does not seem more important than the infringement of the rights of those who conformed to a law that recognized rights to them and who legitimately cited those rights for ten years. In doing so, the legislator cited his own turpitude as a ground for invalidate his former work.

The claim that this law was influenced by the Director of Mobutu's personal staff, Barthélemy Bisengimana, is equally irrelevant, mainly because the law is necessarily a human product. Although it expresses the general will, that will takes form into a text only because some individuals write it down. If the former Director of the President's personal staff inspired that law, if he drafted it -what is quite possible-, he did not either adopt or promulgate it. He should have been reproached of not being entitled to do so. But this is not the critic formulated against it here.

Another claim is that it was the consequence of a decision by the policy-making committee of the former single party (*Bureau politique*). That decision lead the president to

sign the ordinance-law of 1971 and, in virtue of this *ordonnance-loi*, the parliament adopted the law n°72-002 of January 5, 1972. We have to remind that at that period, the primacy of the party over the state commanded that the parliament conforms to the decision of the policy-making committee of the party. As for the President of the Republic, he was a law-maker and exercised that attribution through the so-called “*Ordonnance-loi*” (ordinance-law).

True, the legitimacy of those institutions was questionable, particularly their representativeness. The members of the policy-making committee of the party were appointed by the President. Even the members of first parliament that Mobutu put in place in the early seventies after his military coup of 1965 were appointed by him<sup>302</sup>. Those institutions may have profoundly modified the social contract without due popular representation and consent.

This debate raises the issue concerning the validity of laws established by illegitimate and/or non-representative institutions. I do not want to engage in the theoretical debate that this issue implies. I must only mention that the laws in question were adopted in conformity to the context and logic of the system in which they occurred. Many other laws and regulations were enacted in the same way and are still in force until now. If the condition changes require the modification or abrogation of those laws, no obstacle should prevent the competent institution to do so. A state cannot be constrained to keep in its legal system some laws that are proven to be inappropriate to the context in which they are to be applied or that the majority of the people no longer approves. This is also true for democratic societies. What should be avoided is to jeopardize the fundamental interests gained in virtue of the previous legislation. In other words, the retroactive application of the law should not be prejudicial to the rights and interests of the third party and the pretext of citizenship should not serve to contest the validity of the act that were performed prior to the new law.<sup>303</sup>

5°. In 2004 the Banyarwanda, (mainly the Tutsi) took advantage from the balance of power in their favour to obtain a new law on citizenship. Although that law does not explicitly mention them as its main addressees, the developments we have just made and the political negotiations that preceded the enactment of that law make easy to know those who were behind. For this law n°04-024 of November 12, 2004, the Congolese citizenship by birth is recognised to each person belonging to the ethnic groups or nationalities whose members and territory made what has become the Congo at the independence.

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<sup>302</sup> P. Mathieu, P-J. Laurent, A. Mafikiri Tsongo, S. Mugangu, *op. cit.*, p. 108.

<sup>303</sup> COURBE Patrick, *Le nouveau droit de la nationalité*, 2<sup>ème</sup> édition, Paris, Dalloz, 1998, p. 39.

## 5.1.2. *The Recognition of minority status: matter of fact or of opportunity?*

### 5.1.2.1. *The problematic of minorities within a multi-ethnic country.*

The concept of minority is subject to a series of contradictions. Some of them are factual, other have some opportunity concerns. A collaborative effort by Dutch scholars to clarify the concept of minorities for comparative and international legal purposes proposed the following definition of minority: “Minority is composed of a group of persons differing from the rest of a population with marked distinct ethnic, religious, linguistic characteristics, cultural bonds or ties, numerically in an inferior and non-dominant position, showing a will, if only implicitly to preserve and develop their patterns of life and behaviour”<sup>304</sup>.

Despite this effort of clarification, this definition can still face some factual objections. For instance, it excludes numerical majorities who are subordinate, like black South Africans particularly during the apartheid<sup>305</sup>. It tends to presume that the rest of the population is homogenous and/or in superior and dominant position.

Apart from the factual contradictions, the minority issue become more complex when opportunity concerns come into the picture. Barbara Walter gave a good account of the dilemma of the countries which face minority claims within their borders. In analysing the conditions under which government will choose to make concessions to minority groups to avoid violence, she observed that when there are many other minority groups in the country who may also claim in the future some particular rights, governments are likely to adopt tough behaviour and avoid accommodating minority claims, even if it is costly to do so<sup>306</sup>. Let's see how these contradictions play in the Congolese context.

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<sup>304</sup> Oldrich Andrysek, *Report on the Definition of Minorities*, Utrecht, Netherlands Institute of Human Rights, SIM Special Report N° 8, 1989, p. 60; quoted from Gurr, Ted Robert, *Minorities at Risk: A Global View of Ethnopolitical Conflicts*, Washington, DC., United States Institute of Peace Press, 1998, p. 3, note 2.

<sup>305</sup> GURR, Ted Robert, *op. cit.*

<sup>306</sup> She extends the same reasoning to the case of territorial disputes. According to her, when a country shares borders with many others, it is likely “to invest in reputation for toughness” instead of making concession in order to avoid giving other neighbouring countries the opportunity to challenge its borders in the future. WALTER, Barbara F., *Coming to Peace: The Successful Settlement of Civil Wars*, Princeton: Princeton University Press, 2002, quoted by WERNER Suzanne, DAVIS David and BUENO DE MESQUITA Bruce, «Dissolving Boundaries: Introduction», *International Studies Review* 5(4), 2003, p. 6.

### 5.1.2.2. *The Congolese case.*

The Congolese case illustrates well the contradictions about minority issue. I will use three examples, all from 2005, to show how.

1°. For the first time in the Congolese history, the new constitution, that was adopted by referendum from the December 18-19, 2005, has recognised clearly the existence of national minorities: article 13 forbids any kind of discrimination against them and article 51 assigns the obligation of protecting and promoting them to the state.

2°. And yet, in the same year, Herbert Weiss and Tatiana Carayannis published an article which was based on their field work in Congo and which contradicts somehow this constitutional provisions. These two authors wrote that when people are asked whether minorities exist in Congo, the common sentiment of Congolese is that they all are minorities.<sup>307</sup>

This position is advanced by people who oppose the recognition of minorities for two different reasons: they hold that Congo comprises 250 ethnic groups of which none is numerically dominant. Thus, for them, speaking of minorities in Congo, is just an absurdity. Other refuse the recognition of minorities for prudential reasons. They fear to open the Pandora's box for claims from different groups that will be difficult to handle and threaten national unity and security.

3°. The same year gain, Léon de Saint Moulin has contradicted the opinion which holds that Congo is a mosaic of 250 ethnic groups. He based his argument on the linguistic map of Congo on which he classified the Congolese populations in three groups: the Bantu, Nilo-Saharan and Ubangi languages. He found out that the Bantu languages dominate the others, because most of the Congolese populations speak them. These Bantu languages are divided in eight families within which a certain mutual understanding exists.<sup>308</sup>

It is only in searching to know the origin of the constitutional provisions which recognize minorities in Congo that Léon de Saint Moulin's position poses itself problem. Indeed, the Banyamulenge<sup>309</sup>, Tutsi component of the Banyarwanda, are those who imposed that recognition of minorities, first during the *Dialogue intercongolais* and then, when the new constitution was drafted. Their military power facilitated their position to prevail, since,

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<sup>307</sup> WEISS Herbert F. & CARAYANNIS Tatiana, "The Enduring Idea of the Congo", in LAREMONT Ricardo René(Ed.), *Op. cit.*, p.177, note 47.

<sup>308</sup> SAINT MOULIN Léon de, *op. cit.*, 2005, p. 200.

<sup>309</sup> This name designated originally the Tutsi established in Mulenge, in the Hauts-plateaux of the South-Kivu province. With the political evolution in Congo, it came to designate the whole Tutsi community.

as we mentioned earlier, they were leading the rebellion movement, RCD, which controlled a third of the national territory from 1998-2003. In looking at Léon de Saint Moulin's classification, we find, however, that this group that demanded the recognition of minorities is part of the linguistic majority, i.e. the Bantu languages' group. Within this group, the Banyamulenge could belong to "*la famille J du Nord et du Sud-Kivu*" that is said to include the *Kinyarwanda* and *Kirundi*.<sup>310</sup> Their military position allowed them also to dominate the group of Banyarwanda which includes not only Tutsi but also Hutu with whom they have been treated earlier in the different laws on citizenship.

## **5.2. Citizenship, minority and decentralization in Congo.**

The development we have just made concerning both citizenship and minority issues in Congo shows the challenges of the ongoing decentralization process, particularly for the North and South-Kivu provinces. In particular, decentralization carries dangers and offers opportunities.

The first danger would be to decentralize what would be considered as "Kivu problems", although their causes (namely colonialism, immigration, political instabilities in the neighbouring countries, laws on land and citizenship, political representation, etc.) and their consequences (political instability and violence) are not only local.

The second problem is the risk for the Tutsi group, which has militarily imposed its solutions in the new law on citizenship and in the constitution, to capture the benefit of local governance for its own benefit. Other groups can be encouraged to use force to secure their positions and thus, open up a cycle of violence that would be detrimental to the development of the region.

The third is inherent to the ethnic definition of the Congolese citizenship by birth. The fact that this citizenship is defined in reference to the individual belonging to an ethnic group whose members and territory constitute the current DRC, is likely to encourage territorial conquest in order to secure to one's group an ethnic territory. An illustration of this case is the creation of the *Territoire* of Minembwe in the South-Kivu when the *Rassemblement Congolais pour la démocratie* occupied the eastern part of the country. This *Territoire* was created on September 2, 1999 by *arrêté départemental n° 001/MJ/DAT/MB/ROUTE/1999* and includes the chieftaincies of Mulenge, Bijombo, Itombwe, Minembwe and Kamombo. The

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<sup>310</sup> SAINT MOULIN Léon de, *op. cit.* 2005, p. 200.

aim was, for Banyamulenge, to have a *Territoire* under their control. The status of this *Territoire* is contested in the Congolese opinion in general and in the province in particular and is expected to be highly disputed in the future law defining the new territorial circumscriptions. But I should mention that, legally, it has lost its importance since when it was created, the *Territoire* was still a decentralized entity. Now, with the new constitution, the *Territoires* have become mere territorial constituencies without legal status. However, the loss of the legal importance does not make emotional value vanish.

The fourth danger is inherent to the context in which have occurred the compromise that was made in the law on citizenship and in the constitution. These important concessions were made under military threat and a change in the balance of power could put them into question<sup>311</sup>. In that sense, the compromise may have been a mere cease-fire in the expectation of new hostilities.

Although very challenging for decentralization, these four problems can also find solution within it. They require the effort by local government and communities to be sustained by central state intervention and their availability to cooperate. Given the limits of this study, I will mention briefly some tracks.

The first is related to citizenship. As mentioned in the first section of this chapter, the different laws on citizenship in Congo tend to exclude than to complement each other. An effort should then be made to insert the citizenship issue in the long term view of the society. This requires first the reparation and/or the avoidance of the wrong of the past. In the present case, it would be better to avoid putting into question the compromise that was reached in the new law of 2004 and on which those who were victims of the multiple changes seem to have agreed. However, like its predecessors, this new law keeps the ethnic definition of the Congolese citizenship by birth, namely the individual belonging to an ethnic group whose members and territory made the current DRC. The main change introduced by that law is that it dates the location of these ethnic groups to 1960 to include more people among the Banyarwanda particularly. This ethnic criteria should be balanced by a greater account of the *jus sanguinis* and *jus soli*. For instance, although the different laws recognize the naturalization or the adoption, they do not seem to give importance to the possibility they offer to transmit citizenship by birth. Indeed, adoption and naturalization do not confer to the

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<sup>311</sup> STEARNS Jason K., *op. cit.*, p. 262.

beneficiaries an ascendant among the ethnic groups that constituted the DRC at any time in the history. However, they give them the capacity to transmit the Congolese citizenship by birth to their descendants. The citizenship of the latter should receive equal consideration from the law with the citizenship by birth from the Congolese ethnic groups.

The same reasoning hold for the possibility that the new law open for foreigners' children born in Congo. According to article 21 of the 2004 law, they can obtain Congolese citizenship once they are 18 if they present a written application and have a permanent residence in Congo. This possibility to acquire the Congolese citizenship was not recognized in the previous laws. It is an application of the *jus soli*, since it allows the birth and the residence on the Congolese territory to give a right to citizenship. But, like adoption and naturalization, it does not give to the beneficiary an ascendance among the Congolese ethnic groups. However it opens also to the beneficiary the possibility to transmit the Congolese citizenship to his descendants.

The second track is that citizenship corresponds to one side of the problem. It hides fundamental injustices, among which land and the political participation.

About the land issue, we saw how the law on land, but also political clientelism, corruption, and abuse of power have allowed immigrants to control wide real estates in the North-Kivu province. This situation had created strong resentment within the other communities who are confined on narrow spaces or are constrained to squat on immigrant's properties. For both of them, the citizenship has become manipulated. The autochthons contest the citizenship of the immigrants in the hope that they will get their lands once the immigrants will be expelled from the country. As for the immigrants, they claim citizenship and recognition of minority status to secure their properties and to require militarily more advantages from the state and local governments.

Any intervention in the land issue should be aware of these antagonistic interests expressed through citizenship and find a common ground for their conciliation. This effort requires identifying the legitimate claims of the parties, like the legal security and respect of private property for the immigrants and the right to access to land for the autochthons. As for illegitimate claims or attitudes, like illegal acquisitions of land rights (including violence, manipulation,...), they should be banned. The central government with local governments should engage negotiations with immigrants to get from immigrants lands that should be redistributed to autochthons. Some incentives can be used to encourage immigrants to concede lands, like tax exemptions, credit facilities,... In no case the land should be taken without compensation.

Concerning the local governments, decentralization is likely to reveal some contradictions about participation and representation, which were silent during the national and provincial elections. Indeed, in the chieftaincies where there is a great concentration of Banyarwanda, autochthones fear to be outvoted by them. During the provincial elections, the Hutu component of Banyarwanda won 15 of the 42 seats in the provincial government of the North-Kivu province, which place them in second position after the Nande who won 25 seats. The other autochthonous groups (Nyanga and Hema) shared the rest. Tutsi who did not win a seat in the provincial assembly, but were given a seat in the senate and in the local government to promote reconciliation<sup>312</sup>. Among the reasons for that, is the fact that about 35.000 and 45.000 of Tutsi are in the refugee camps in Rwanda and in Burundi. That is the reason why their leader, Laurent Nkunda, is demanding the repatriation of Tutsi before the organisation of local elections. Meanwhile, Nkunda rebellion's violence in the North-Kivu had displaced 846.699 peoples according to a report of June 2008.<sup>313</sup>

It is clear that peace is the first requirement for displaced and refugees to come back home and for organising elections. The second requirement concerns the political system that local government should adopt. In a political context where antagonistic groups prevail, the majority system or the "winner-takes-all" system is not recommended since it is likely to exclude -sometimes for ever- one group from power and to create violence. Instead, Arend Lijphart's "consociative model" is preferred. It consists in four principles<sup>314</sup> :

- "Power-sharing" or formation of "grand-coalitions" to ensure the representation of all the groups of the population in the decision-making process, and in the government;
- Autonomy through some mechanisms like decentralization or federalism;
- The proportionality rule to ensure group's representation in the political institutions (parliament, administration). The proportionality rule can also be used in the allocation of national revenue.
- The right to veto some decisions which are related to fundamental issues. This right is aimed at protecting minorities.

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<sup>312</sup> STEARNS K. Jason, *op. cit.* p. 252.

<sup>313</sup> BUCYALIMWE Mararo S., "Kivu, RDCongo: Les institutions postélectorales face aux multiples pièges de la transition", Marysse S., Reyntjens F. and Vandeginste S., *L'Afrique des grands lacs. Annuaire 2007-2008*, Paris, L'Harmattan, 2008, p. 198; who quoted from EYENGA S., "Le programme Amani confronté au drame humanitaire à l'Est", *Le Potentiel*, n°4360 du 15 juin 2008.

<sup>314</sup> LIJPHART A., DE MUCCI R. e DI GREGORIO L., *Democrazie in transizione*, Roma, Luiss Edizioni, 2002, p. 23; VANDEGINSTE S., "Burundi: Entre le modèle consociatif et sa mise en oeuvre", in Marysse S., Reyntjens F. and Vandeginste S., *L'Afrique des grands lacs. Annuaire 2007-2008*, Paris, L'Harmattan, 2008, p. 56.

According to Lijphart, power-sharing and autonomy are the pillars of the consociative theory, while proportionality and veto are secondary principles. The secondary principles can strengthen the two pillars. The combination of these principles can take different forms, some more advantageous than others.<sup>315</sup>

I would like to focus on the principle of autonomy in the particular context we are analysing in this section. In deed, most of the time, the recognition of autonomy to an ethnic group is associated with territorial dimension, i.e. the territory on which the group will be exercising its autonomous competences. This approach can work perfectly when the group in question is geographically concentrated. In this sense, the ethnic borders will correspond to the borders of the federal or decentralized entity. The situation changes, however, when the group is geographically dispersed. Two possibilities can be distinguished. First, the autonomy can be recognized to the group, but on a non-territorial basis. Second, the autonomy can still be recognised to a particular territory, with the consequence that it will not concern one group only, but many groups.

These two hypotheses are worth mentioning in the decentralization of entities where immigrants live together with autochthons. Since it is impossible to separate the two groups, consociative formulas can allow the different groups to partake in local government. But group-based decentralization can also be encouraged for groups whose members are scattered around. This can enable them to develop trans-entity solidarity with their members, organize some activities (like education, cultural programs, etc) without need for territorial restructuring.

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<sup>315</sup> LIJPHART A. et al., *op. cit.*

## 6. CONCLUSION

This thesis is in line with the scientific debate on the relationship between state and society in Africa. It is inspired by Pierre Englebert's book on "State Legitimacy and Development in Africa" in which he shows how historically determined structures of African states explain the diversity in their developmental capacities. In his approach, a state is legitimate when its structures have evolved endogenously and there is some level of historical continuity to its institutions. Here, pre-colonial authority systems play a key role. The variation in the extent to which they have been integrated or repressed explains the variation in states' legitimacy and in developmental capacity.

This led me to look at the status of these pre-colonial traditional institutions in the particular case of Congo from the colonial period until now and, from the result observed, to explore new basis for enhancing Congo's legitimacy and developmental capacity in which these institutions can play a central role. Decentralization was given preference for three main reasons.

The first is constitutional: the new constitution adopted by referendum in December 2005 recognizes the status of decentralized entities to traditional chieftaincies. The interest consisted in pointing out the implications of this recognition in comparison with former experiences.

The second reason is that I am opposed to a tendency in the Congolese political opinion –influenced by a current of literature- to confuse the debate on decentralization with the quarrel about the form of the state, which may be federal or unitary. In this debate, the fear of centrifugal forces that federalism could encourage is warded off by the option for unitary and, possibly, decentralized state. Decentralization ends up in being, in their view, a property that can only be applied to unitary state. I hold that decentralization remains relevant even in the case of federal state, since the constitutive states are not the last tier of the political organisation. They include cities, communes, chieftaincies, etc. which may require legal status of decentralized entities.

The third reason is that decentralization seems to be a realist solution in the current context of Congo weak state. Although it is true that decentralization can weaken a country even more and that it would be better to achieve, first, a strong state, the question remains how can the strong state be achieved in front the ongoing claims for more autonomy for local governments. Since achieving a strong state implies achieving successfully the hegemonic project, this can be reached only in two ways: on a voluntary basis for people and entities

which are involved or by coercion. Coercion is not a new phenomenon in African experience both in the colonial and postcolonial period to think that the failure of the hegemonic project is the result of insufficient violence. Africa has got more than its share of coercion and violence so that the failure of the hegemonic project can be analysed also as a response of the society to an alien or arbitrary state. Another element to mention about coercion is that it does not benefit any more from the same opportunities (namely tolerance) as before. To illustrate the time has changed, Laurent Gbagbo, president of Cote d'Ivoire, used the right formula in asking Africa has to make its 1789 revolution in the presence of Amnesty International.<sup>316</sup>

Decentralization is put in correlation with democracy so that pretending decentralizing without democratizing is likely to be decentralized despotism. Decentralization is understood in four dimensions borrowed from Dele Olowu: political (free and fair elections, accountability of the executive to public bodies empowerment of local governments), economic (support to private sector, reduction of state dominance in the economy, competitiveness), administrative (capacity building at local level, strengthening of field administration) and financial (tax power, transfer of resources from the centre to autonomous agencies, move of financial institutions away from the major capitals).

These four dimensions of decentralization served to question the decentralization rhetoric in the Congolese political leaders' discourse, in light of the legislation that has been actually applied from the colonial period until now. The result is that there is a parallel or continuation between colonial and post-colonial territorial administration and the absence of a real will to decentralize. The colonial power denatured the relationship between chiefs and their subordinates and used traditional authorities as intermediaries to reach indigenous populations and to get the compliance with demands of labour and other regulations. Ironically, this distortion of traditional authority was accompanied by their conditioning: chiefs who were recognized and inaugurated were ensured remuneration (that they were authorized to cumulate with the tribute from their subordinates<sup>317</sup>) and special protection in their relationships with their subordinates and their neighbouring chiefs. In the same ironical vein, traditional authorities were said to be exercising their power according to the customary law as far as it was in keeping with public order and good moral standards.

Even in 1957 when elections were proposed to designate the representatives of population in the different local government, half of the members of the council of chieftaincy were appointed by the District commissioner. The latter was a civil servant appointed by the

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<sup>316</sup> SMITH Stephen, *Négrologie : Pourquoi l'Afrique meurt*, Calmann-Lévy, 2003, p. 194.

<sup>317</sup> COQUERY-VIDROVITCH Catherine, *op. cit.*, p. 55.

centre and the very field agent of the colonial domination. He facilitated the very centralized management of the colony. In consequence, until Congo became independent, all the different services of the central government were grouped together under seven different departments and were kept under tight control. As for the economic power, it remained in the hands of the western elite.

In the postcolonial period, we observed that Mobutu threatened seriously traditional authorities in the seventies. In January 1973, he ruled out the customary laws of the administrative organisation across the country, took off chieftaincy's legal status, and prescribed to substitute civil servants for hereditary chiefs. In July of the same year, he unsecured the land power of traditional leaders with the land reform. Latter on, he proposed the election of chiefs (in 1978) and to replace progressively traditional tribunals with "*tribunaux de paix*". Although in 1982 he rehabilitated traditional leaders, who became at the same time local leaders of the single party, the threat on their land and judicial powers is still there. Some figures among traditional leaders were co-opted in the system, but it did not consist in the institutional reinforcement of traditional authority as local government. Its fiscal power remained limited to collect marginal taxes and its imbalances were irregularly and insufficiently compensated with transfers from the centre. In the meanwhile, the centre kept its dominance of economy which started with the "zairianisation" of foreigners assets in 1974.

The post-Mobutu era stared with a continuation of the logic of centralization, but one can observe some noticeable signs of decentralization which have been carried out recently, particularly in the new constitution of 2006 and laws. They include a share in the national revenue, elections of local assemblies and accountability of the executive to these assemblies. Those changes still need, of course, to mature both in their design and their implementation. This study explored some ways in which this improvement can be pursued.

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