

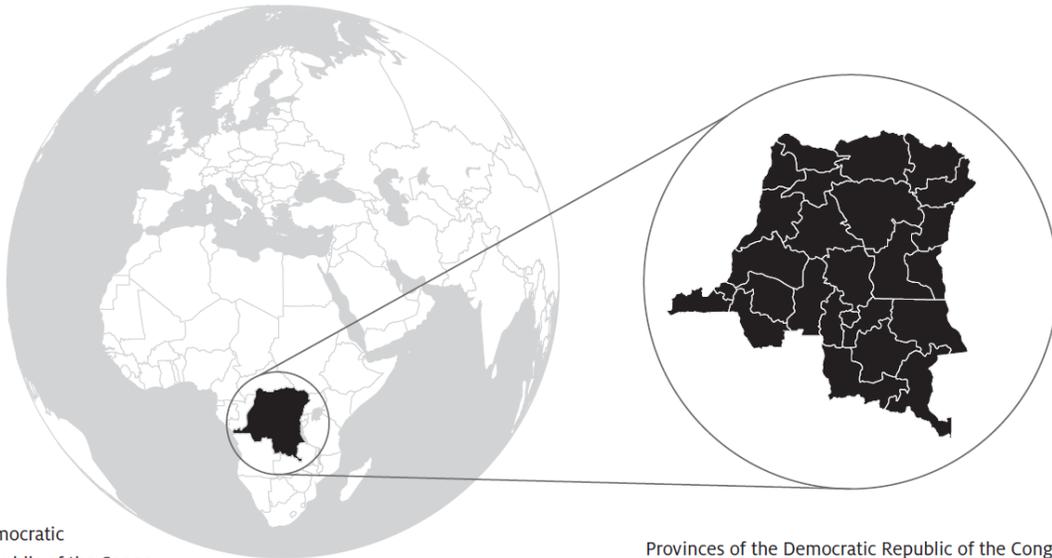


AUTONOMY ARRANGEMENTS IN THE WORLD

Democratic Republic of the Congo

Dunia P. Zongwe*

March 2019



Democratic
Republic of the Congo

Provinces of the Democratic Republic of the Congo

Recommended citation: Dunia P. Zongwe., “Democratic Republic of the Congo”, Online Compendium *Autonomy Arrangements in the World*, March 2019, at www.world-autonomies.info.

Content

1. Essential Facts and Figures
2. Autonomy and State Structure
3. Establishment and Implementation of Autonomy
 - 3.1. The Colonial Period
 - 3.2. The Post-Colonial Period
 - 3.3. Implementation of Autonomy
4. Legal Basis of Autonomy
5. Autonomous Institutions
 - 5.1. The Provincial Assembly
 - 5.2. The Provincial Government
 - 5.3. The Local Government
6. Autonomous Powers
7. Financial Arrangements
8. Intergovernmental Relations
9. Inter-group Relations within Autonomous Entities
10. Regional Citizenship with Special Rights
11. General Assessment and Outlook

Bibliography

List of abbreviations

Figures

Figure 1. Territorial and administrative organization of the DRC

1. Essential Facts and figures

The geographical space known today as the Democratic Republic of the Congo (“DRC” or “the Congo”) was created in 1885 following the 1884-1885 Berlin Conference. It was created as the property of the Belgian king Leopold II.¹ From then onwards, the Congo went through some structural changes. In 1908, the country became a Belgian colony. It was not until June 1960 that the country gained independence from its colonial master, Belgium.

From independence in 1960 to date, the DRC has known three republics, several constitutions, and various forms of greater or lesser devolution of power from the center to the periphery. Through these various stages, the country suffered a series of political, economic, and social crises. A few years after independence, Mobutu Sese Seko plotted a coup against the founding president Joseph Kasa-Vubu and replaced him as president of the republic. In 1997, Mobutu’s regime was, in turn, unseated by Laurent Désiré Kabila with soldiers from Angola, Uganda, Rwanda, and Burundi during the First Congo War. When Kabila asked his Rwandan and Ugandan allies to return to their home countries, the Second Congo War broke out. That conflict claimed the lives of millions of Congolese people. On 16 January 2001, Laurent Kabila was assassinated by one of his own bodyguards. The president’s son, Joseph Kabila, succeeded him as head of state.

On 19 December 2016, Joseph Kabila’s term as president ran out. Earlier on, the newly established Constitutional Court had allowed him to stay in power until fresh presidential elections could be held and a new government installed.² Kabila’s overstaying his term pushed the country into a severe political, constitutional and institutional crisis, which damaged the economy and the well-being of the population. In November 2017, the country’s electoral commission approved a timeline for the next presidential, legislative and provincial elections in the DRC. It slated those elections for 30 December 2018 (Radio Okapi 2017c). On 10 January 2019, the electoral commission declared that opposition candidate Félix Tshisekedi had won the

* Walter Sisulu University.

I partly drew the content of this case study from a paper I presented at the Fourth Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA) on 7 September 2016 in Stellenbosch (South Africa). I thank Charles Fombad, Leezola R. Zongwe, Karl Kössler, Jean-Michel Kumbu, Nico Steytler, Tapiwa V. Warikandwa, and an anonymous reviewer for constructive comments on earlier drafts. I remain solely responsible for any surviving errors or shortcomings in this study.

¹ For the billionaire king’s brutal reign and genocidal plundering of the DRC, see Adam Hochschild (1998).

² Constitutional Court of the DRC, Judgment R.Const.262 of 11 May 2016.

disputed December presidential elections, and on 17 January the Constitutional Court confirmed Tshisekedi as winner of those elections.

The DRC is home to about 79 million people³ living in Africa's second biggest country by land area.⁴ The DRC has more than 450 ethnic groups (Zongwe, Butedi and Phebe 2015), of which the majority are Bantus (CIA 2018). The four largest ethnic groups – the Mongo, Luba, Kongo (all Bantu tribes), and Mangbetu-Azande (Hamitic) – account for almost half of the Congolese population. Around 70% of the DRC's population is Christian (*Ibid.*). The three biggest cities by population are the capital Kinshasa, Lubumbashi and Mbuji-Mayi, in that order. Kinshasa has more than 7 million people, making it one of Africa's most populous cities.

The Congo needed to decentralize state power owing to a number of factors. Some of these are economic in nature. First, in view of the vast land area and population size of the country,⁵ administering the entire country through a purely unitary system would prove impractical. Second, the administrative efficiency principle would require that the state pass down power as local governments generally enjoy a closer proximity and fuller understanding of local issues. Through decentralization, the state would avoid wasting its resources. The Congo ought to share strategic natural resources between the central, provincial and local governments following a certain formula. Probably the continent's wealthiest country in terms of natural resources, the DRC, together with Guinea in West Africa, is sometimes depicted as a "veritable geological scandal"⁶ because of the large amount and variety of its mineral resources. The United Nations Environment Programme (2011, 22) estimated that the Congo has mineral resources worth 24 trillion US dollars and its tropical rainforest stretching over 1.55 million km² accounts for more than half of Africa's forest resources. Moreover, its Congo River is the world's second largest in terms of flow (i.e. 42,000 m³/s), thus having the capacity to supply the whole African continent

³ The DRC's National Statistics Institute (*Institut National de la Statistique*) acknowledges that there are no reliable and updated statistics about the Congolese population. The only national census carried out by the institute dates back to July 1984. Therefore, demographic information in the DRC relies on estimates. According to the CIA World Factbook (2018), the DRC has an estimated population of 85 million people.

⁴ The DRC measures 2.345 million km². It is Africa's second largest country after Algeria (2.382 million km²) and the largest country in Sub-Saharan Africa.

⁵ See also Utshudi (2009, 299).

⁶ The phrase "veritable geological scandal" is attributed to Belgian geologist Jules Cornet who did geological work in the Congo in the 1890s. That phrase translates his sheer disbelief in the face of the Congo's incredible geological wealth, i.e. mineral resources. See also Netherlands Institute for Southern Africa (2006, 6).

with electricity⁷ and the Congo possesses 52% of Africa's surface water reserves (Montejano 2013, 6). Unfortunately, this generous natural resource endowment tends to fuel conflict, rather than prosperity. The architects of the 2006 Congolese Constitution so designed it as to assist the country in reversing this trend. A more consensual sharing of resources (ADB/ADF 2009, 1), which works to prevent conflict, is one of the factors that motivated decentralization in the DRC. The DRC also sticks out thanks to its cultural diversity, which reflects its many ethnic groups. However, over time, regional and ethnic identities hardened, culminating into issues of regionalism and tribalism. Given this background, policy makers opted for decentralization as a way of combating regionalism, tribalism, and clan-based politics. For instance, with the splitting of the former Katanga province into four smaller provinces, people living in that province – and who used to identify themselves as “Katangese” – will most likely forge separate identities and, to some extent, develop fresh regional allegiances and loyalties. Secessionist and separatist sentiment in the former Katanga fed on regionalism and a strong feeling of distinctiveness as Katangese. In the case *Katangese Peoples' Congress v Zaire* before the African Commission on Human and Peoples' Rights, the claim made by the applicant – a “liberation movement” for the independence of Katanga and its people⁸ – rested on such feelings.

The Congolese people speak 210 living languages (Simons and Fennig 2017). The 2006 Congolese Constitution distinguishes between official and national languages. It proclaims French as the official language and Kikongo, Lingala, Swahili and Tshiluba as the four national languages. The government uses French – a legacy from colonial times – in all its official communication and French is the language of instruction in schools and universities. National languages are the ones most people speak in the country. While the state guarantees the promotion of national languages without discrimination, it has no obligation to use them in official correspondence or communication. The Constitution declares that the country's other languages are part of the Congo's cultural heritage.⁹

⁷ The Grand Inga project is the world's largest proposed hydropower scheme. For details see “Grand Inga Hydroelectric Project: An Overview” available online at <https://www.internationalrivers.org/resources/grand-inga-hydroelectric-project-an-overview-3356> (accessed on 12 February 2019).

⁸ African Commission on Human and Peoples' Rights, *Katangese Peoples' Congress v. Zaire*, [1995] Comm. No. 75/92. The Commission noted that no evidence was adduced to prove that the Katangese were a “people” in terms of the African Charter on Human and Peoples' Rights.

⁹ Article 1 of the 2006 Constitution.

The Constitution protects the right to education as well as the right to free primary education in public schools.¹⁰ The government has introduced measures to make primary education free and compulsory. However, rolling out of such policy has been hampered by huge obstacles on the ground, not least of which is that most Congolese do not speak French as mother tongue. The Congo has several universities¹¹ and a National School of Administration (*École Nationale d'Administration*) modelled on its namesake in France as an elite school for civil servants.

2. Autonomy and State Structure

The current decentralization framework must be measured against the singular political and institutional experiences of the Democratic Republic of the Congo (“DRC” or “the Congo”). The DRC attained its independence from Belgium on 30 June 1960. Since its independence, the country has been ruled by five leaders, namely Joseph Kasa-Vubu, Mobutu Sese Seko, Laurent Kabila, Joseph Kabila, and Félix Tshisekedi. Although the country has come a long way in terms of civil and political rights, the DRC still trails far behind on the road to democracy.

The 2006 Congolese Constitution defines the state as independent, united and indivisible, social, democratic, and secular.¹² It envisions a state where the rule of law prevails, and it fixes the national borders as those that existed upon the country’s independence. The Constitution espouses popular sovereignty in that it confers national sovereignty on the people, who exercise it directly through elections and indirectly through elected representatives.¹³

The Constitution divides state power in three branches (i.e. executive, legislative and judicial) and four institutions (i.e. president, government, parliament and judiciary). Executive power rests with both the president and the national government, legislative power with the parliament, and judicial power with courts and tribunals.

The president serves as the guardian of the Constitution, national independence, territorial integrity, and national sovereignty. The Constitution imposes a duty on the president to work with the prime minister on matters of security, defense and foreign affairs. This obligation

¹⁰ Article 43 of the 2006 Constitution.

¹¹ E.g. *Université de Kinshasa, Université de Lubumbashi, Université de Bandundu, Université Libre de Kinshasa, Université Libre des Pays des Grands Lacs, Université Protestante au Congo, and Université William Booth*. In the early 1990s, the government liberalized the higher education sector, which gave rise to private universities such as *Université Libre de Kinshasa, Université Protestante au Congo* and *Université William Booth*.

¹² Article 1 of the 2006 Constitution.

¹³ Article 5 of the 2006 Constitution.

sharply departs from pre-2006 constitutional practice where the president had exclusive powers in those matters. Citizens elect the president by universal suffrage for a once-renewable five-year term. The incumbent president is Félix Antoine Tshilombo Tshisekedi.

In terms of the Constitution, former president Kabila's term expired on 19 December 2016. Citing financial and logistical difficulties in organizing presidential elections, notably in registering more than 30 million voters in a giant and impoverished country (Shaban. 2016; Grill and Koelbl. 2017), the pro-Kabila government postponed those elections. The government and opposition parties signed in 2016 the so-called "New Year's Eve Agreement" to form a government of national unity and hold the presidential elections at the end of 2017. President Kabila's staying on after his term expired plunged the country into an acute political, institutional and humanitarian crisis. The New Year's Eve Agreement followed several weeks of street violence between security forces and protestors who demanded that president Kabila stand down.¹⁴ In the face of Kabila's apparent refusal to step down, several opposition parties formed a coalition to pressure him into respecting the Constitution and its term limits (Burke 2016). In November 2018, opposition parties united behind presidential election candidate Martin Fayulu, but shortly afterwards the union cracked and broke up into two major factions: *Lamuka* (meaning "Wake-up" in Lingala) led by Fayulu and Towards the Change (*Cap pour le Changement - CACH*) jointly led by Tshisekedi and another opposition leader. Finally, the presidential elections took place on 30 December 2018 and on 17 January 2019 the Constitutional Court held that Tshisekedi won. This was the first peaceful transfer of power since the country became independent. However, the chaotic organization of the presidential elections have cast serious doubts on their credibility. Observers noted a myriad of irregularities and, when the commission announced the outcome, some observers questioned it. Specifically, the Congolese Catholic church which deployed around 40,000 observers across the country produced compelling evidence that Fayulu had won more than 55% of the vote (Wilson, Blood and Pilling 2019). This situation prompted international players such as the African Union, the European Union, Angola, Belgium, and France to voice reservations about the elections outcome before they reluctantly accepted it (Emmott 2019).

¹⁴ According to Human Rights Watch (2017), the Congolese government recruited former rebels to repress street protests violently. The non-governmental organization estimated that security forces killed at least 62 people and arrested hundreds of others during the protests.

Formally, the DRC has a semi-presidential political regime whereby the president of the republic and the prime minister share executive power. In practice, the president would wield considerable and ultimate power, but the December 2018 elections may have – for the first time in Congolese politics – swung the real balance of executive power towards the prime minister. Currently, the pro-Kabila coalition Common Front for the Congo (*Front Commun pour le Congo* - FCC) controls the parliament, the government and the provincial assemblies. President Tshisekedi will have very little room for manoeuvre on most issues if he disagrees with the FCC coalition.

The bicameral Congolese parliament consists of the Senate and the National Assembly. In theory, the Senate stands for the 26 provinces and the National Assembly for the Congolese people. When the Senate and the National Assembly act collectively, they are referred to as the “Congress”, and they can – as Congress – institute legal action against the president of the republic and/or the prime minister before the Constitutional Court for high treason. The National Assembly or the Senate may also act against ministers through no-confidence votes.

The judiciary comprises all courts and tribunals of the country. It consists of three jurisdictional hierarchies: the constitutional hierarchy headed by the Constitutional Court, the administrative hierarchy headed by the Council of State, and the ordinary judicial hierarchy headed by the Court of Cassation. To support these institutions of the republic, the Constitution set up a few other constitutional bodies. These include the Economic and Social Council, the Independent Electoral Commission, and the Media and Communication Council.¹⁵

The Constitution protects political parties and holds “sacred” the rights of people to organize politically.¹⁶ It creates the position of “spokesperson of the political opposition” – a position that the main opposition party Union for Democracy and Social Progress (*Union pour la Démocratie et le Progrès Social* - UDPS) had never filled because the UDPS did not recognize the legitimacy of the institutions emerging from the different presidential and legislative elections held since 2006. This situation may change now that Tshisekedi’s UDPS leads the coalition that clinched the presidency after the December 2018 elections.

¹⁵ The Economic and Social Council gives advice on economic and social questions raised by the president, the National Assembly, the Senate, or the government. The Independent Electoral Commission organizes elections and referenda in the Congo, and the Media and Communication Council is the regulator of communications in the country.

¹⁶ Article 8 of the 2006 Constitution.

“Political regionalism” at the level of provinces and administrative decentralization at the level of decentralized territorial entities (i.e. local governments) characterize decentralization in the DRC (Kumbu ki Ngimbi 2010). With a view to consolidating national unity and creating local centers of development, the 2006 Constitution sub-divides the Congolese territory from the 11 former provinces to 25 provinces and the capital city Kinshasa, which enjoys the status of a province.¹⁷

Territorial autonomy in the Congo is embedded in a regionalized state structure. The Congo is neither a unitary nor a federal state. As the 2006 Constitution prescribed a highly decentralized state, ultimately the DRC comes closer to a federation than a unitary state.

3. Establishment and Implementation of Autonomy

Historically, the debate on decentralization in the Democratic Republic of the Congo (“DRC” or “the Congo”) pitted two camps against each other: Those who pushed for a unitary state and those who fought for a federal state. Two earlier constitutions even provided for a federal state, to wit: the country’s first constitutional text, the Fundamental Law (*Loi Fondamentale*), adopted in 1960¹⁸ and the Luluabourg Constitution chosen by the Congolese people in 1964.¹⁹ Article 5 of the 1964 Constitution reads as follows: “The [21] provinces are autonomous within the borders fixed by this Constitution.” Nevertheless, in hindsight, the unitary state model dominated the Congo’s constitutional history.

3.1. The Colonial Period

The history of decentralization in the DRC unveils alternating bouts of centralist and decentralist fever.²⁰ The question of decentralization has come up in debates about the form of the state since the days of Belgian colonization. During the colonial period (1908-1960), settlers assumed some level of decentralization in a centralized system of power. The Belgian Congo was a relatively

¹⁷ Article 2 of the 2006 Constitution.

¹⁸ Articles 8, 15-18, and 106-179, 208-222 of the 1960 Constitution. That Constitution created six provinces: Équateur, Kasai, Katanga, Kivu, Léopoldville, and Orientale.

¹⁹ Articles 4, 5, 47-52, 100-121, and 137-138 of the 1964 Constitution.

²⁰ For a general history of the Congo, see Nzongola-Ntalaja, Georges (2002) and for a brief constitutional history of the Congo, see Zongwe, Butedi and Phebe (2015).

decentralized unitary state ruled by a general governor (*gouverneur-général*). The Belgian king Leopold II passed a royal decree that re-organized the 22 districts of the country into four provinces, each ruled by a vice-governor. Despite the centralization of power, the first administrators of the provinces were anxious to defend their province against the orders of the central administration based in Boma, which served then as the capital of the Belgian colony.

Worried by this tendency, which became manifest in the wake of First World War, Belgium decided to further centralize administrative powers. A royal decree of 29 June 1933 reorganized the colonial administration in order to strengthen the powers of the central government and curtail those of provincial governments. The colony thus morphed into a highly centralized unitary state. The significance of the 1933 royal decree is that it built the overall structure of the Congo's territorial organization, which persists to this day (ADB/ADF 2009, 7-8). The decree divided the colony into six provinces, which were further divided into districts, themselves split into territories.²¹

3.2. The Post-Colonial Period

Upon the birth of the DRC as an independent state on 30 June 1960, the country's first constitutional text, the Fundamental Law (*Loi fondamentale*), provided for a federal state, a representative system, a liberal democracy, and a parliamentary regime. The six provinces that the newly independent Congo inherited gained the status of federated states.

Unfortunately, this first experiment with federalism did not overcome dire political and security crises. First, a severe institutional crisis emerged when the president of the republic, Joseph Kasa-Vubu, dismissed the prime minister, Patrice Emery Lumumba, who in turn dismissed the president (Doyle and Sambanis 2006, 175). The 1960 Constitution enabled a scenario whereby the two could remove each other from office.²² This tense situation in the country was

²¹ Subsequently, a decree of 10 May 1957 divided the territory into indigenous constituencies, namely centers, sectors and chiefdoms (*chefferies*). For details see ADB/ADF (2009, 7-8).

²² Article 22 of the 1960 Constitution expressly empowered the head of state to remove the prime minister from office. Articles 35 and 36 of the 1960 Constitution expressly empowered the prime minister to run the government and "politics of the state".

aggravated by two unrecognized secessions that broke out in 1960 in Katanga and Sud-Kasaï. Admittedly, Lumumba opposed the idea of splitting the country into smaller states.²³

Led by Moïse Tshombe, the Katanga broke away from the rest of the country. Tshombe and his followers, with the support of Belgian business interests and soldiers, claimed they wanted autonomy to avoid the chaos prevailing in the country at the time. The secession survived until January 1963 when general Mobutu, with the help of the United Nations and the United States, forced the Katanga back into the national fold.²⁴

Unlike the 1960 Fundamental Law, the 1964 Luluabourg Constitution was not adopted by the parliament. It was adopted by popular referendum – for the first time in the country’s history. The Luluabourg Constitution instituted a federal state and split the territory into 21 provinces. However, on 24 November 1965, Mobutu staged a coup d’état and rolled back all the decentralist reforms that made the country a federal state. He decreased the number of provinces from 21 to 9 (including the city of Kinshasa, which acquired the status of province) and reduced their autonomy. In 1982, the parliament embarked on a series of reforms aimed at administrative decentralization.²⁵ These reforms produced three legal texts that dealt with the following issues: territorial, political and administrative organization of the Congo;²⁶ legislative, local and municipal elections;²⁷ and the status of the city of Kinshasa.²⁸ However, the government never implemented those reforms.

The provisions of the 2006 Congolese Constitution on decentralization were written against a backdrop of successive political and security crises in the DRC, notably two bloody civil wars. The early 1990s witnessed efforts to democratize the political landscape in the Congo. Soon those efforts came to a dead end. By 1996, a rebellion rose up in arms against the regime of Mobutu Sese Seko in eastern Congo and the First Congo War broke out. That rebel group, the Alliance of Democratic Forces for the Liberation of the Congo, was backed up by several

²³ In 1959, Lumumba made a speech during the closing session of an international seminar held at the University of Ibadan (Nigeria). He declared: “All our fellow countrymen should know that they will not serve the interest of the country by dividing the country or by promoting divisions or the balkanization of our country into smaller and weaker states. Once the national territory is balkanized, it will be hard to restore national unity.” (Author’s own translation. The original text in French reads: “Tous nos compatriotes doivent savoir qu’ils ne serviront pas l’intérêt général du pays dans des divisions ou en favorisant celles-ci, ni non plus dans la balkanisation de nos pays en de petits états faibles. Une fois le territoire national balkanisé, il serait difficile de réinstaurer l’unité nationale.”)

²⁴ For information on how the US and Belgian interests got involved in the DRC, see also (Devlin 2008).

²⁵ For more information on these reforms, see Utshudi (2009, 289).

²⁶ Ordinance-Law No. 82-006 of 25 February 1982.

²⁷ Ordinance-Law No. 82-007 of 25 February 1982.

²⁸ Ordinance-Law No. 82-008 of 25 February 1982.

countries, namely Angola, Rwanda, Uganda, and Burundi. Laurent Désiré Kabila, who led that rebellion, toppled Mobutu and took over power from him in 1997.

One year after he overthrew Mobutu's regime, president Laurent Kabila embarked on a host of reforms that defined a strategy on decentralization. That strategy cut down decentralized entities from 10 to 4 (the province, the city, the communes of the city of Kinshasa, and the territory) and created advisory councils (*conseils consultatifs*). Like the 1982 laws on decentralization, Kabila's reforms were not implemented.

In 1998, the Second Congo War erupted when Laurent Kabila asked his Rwandan and Ugandan allies to leave the DRC. This time around, Angola, Zimbabwe, and Namibia joined or sided with the Congolese government. The armed conflict tore the country into three parts, with the government, Rwandan-backed rebels and Ugandan-backed rebels each controlling a different part of the territory. While rebels could plausibly say that the pursuit of democracy and better governance primarily motivated their revolt and the First Congo War (1996-1998), the reasons for the Second Congo War (1998-2003) are hard to disentangle. The second conflict seemed fuelled by internal politics, the fragility of the state, territorial ambitions of neighbouring countries, control of strategic minerals and, to some extent, ethnicity (Zongwe 2012). Sometimes dubbed "Africa's World War", the Second Congo War claimed the lives of no less than 5 million people.²⁹

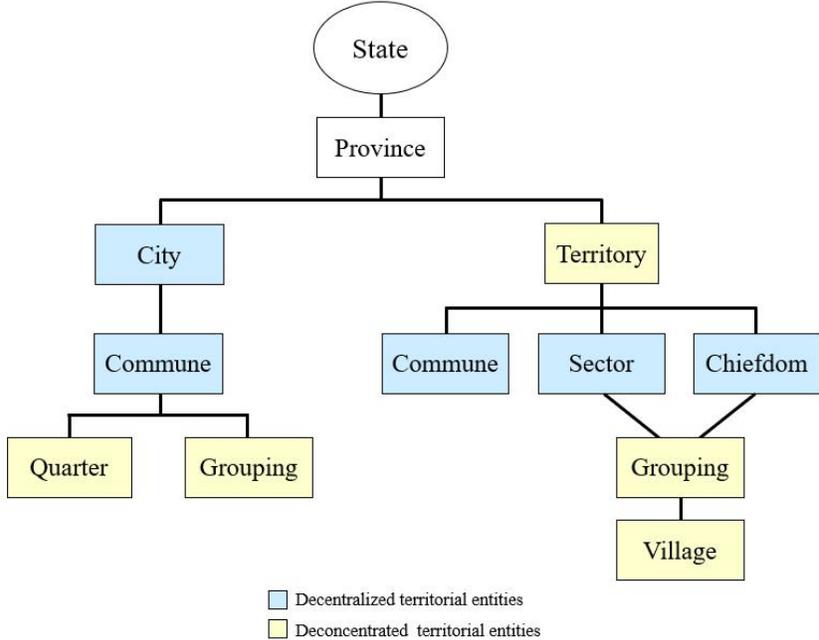
In 2001, Laurent Kabila was murdered by one of his bodyguards. Laurent Kabila's son, Joseph Kabila, became president of the republic and started peace negotiations with the different parties to the conflict. At the end of the peace negotiations, the belligerents signed the 2002 Global and Inclusive Accord (*Accord Global et Inclusif*), which laid the foundation for the 2003 Transition Constitution.

The Accord and the Transition Constitution tasked the Senate with the drafting of the new fundamental law. The Senate held consultations in the provinces and produced a draft of the Constitution which benefited from the input of several foreign and Congolese legal experts. The Constitution was adopted in December 2005 by popular referendum and president Joseph Kabila promulgated it in February 2006. The legitimacy of autonomy arrangements in the DRC is bolstered by the constituent assembly that drafted the constitutional text, the public consultations held in the provinces, and the adoption of the Constitution by popular referendum.

²⁹ For good historical accounts of the Second Congo War, see Prunier (2009) and Stearns (2012).

The 2006 Congolese Constitution and the 2008 organic law on the territorial-administrative organization of the state distinguish between three categories of territorial entities: provinces, decentralized territorial entities (*entités territoriales décentralisées*) and deconcentrated territorial entities (*entités territoriales déconcentrées*).³⁰ Decentralized territorial entities fall under the provinces and consist of cities, communes, sectors, and chiefdoms (*chefferies*). The Congolese law defines the chiefdom as a group of homogenous traditional communities organized and led according to customary laws. The central government recognizes and vests the leader of a chiefdom.³¹ In contrast to the decentralized territorial entities, the deconcentrated territorial entities have no legal personality. These intra-provincial entities comprise territories,³² quarters (*quartiers*), groupings (*groupements*) and villages. Figure 1 visually represents the complex territorial and administrative organization of the DRC.

Figure 1. Territorial and administrative organization of the DRC³³



³⁰ Article 2 and 3 of the 2006 Constitution and Article 3-5 of the Organic Law no. 08/016 of 7 October 2008 on the composition, organization and functioning of the decentralized territorial entities and their relations with the state and the provinces [*Loi organique n° 08/016 du 7 octobre 2008 portant composition, organisation et fonctionnement des Entités Territoriales Décentralisées et leurs rapports avec l'Etat et les Provinces*]. Hereinafter “Law on decentralized territorial entities”.

³¹ Article 67 of the Law on decentralized territorial entities.

³² This technical term, denoting a decentralized territorial entity, differs from the general meaning of “territory”, which refers to the entire and vast geographical space occupied by the political and legal entity recognized by the international community as the Congolese state.

³³ Figure 1 is adapted from ADB/ADF (2009, 8).

The DRC marked a clean break from the past regarding the management of its provinces since the Constitution and decentralization laws have expressly made the principles of a highly decentralized state a golden thread in the administration of institutions.

The aims of decentralization in the Congo are manifold. As the *exposé des motifs* of the 2006 Constitution proclaims, “[i]n a bid to consolidate national unity, eroded by successive wars, and to create impetus and development centers at the grassroots, the Constituent Assembly structured the Congolese state into 25 administrative provinces, in addition to the City of Kinshasa, endowed with legal personality and having proximity jurisdiction as stipulated in the present Constitution.”³⁴

First, it must be said that the Constitution does not expressly mention constitutionalism in the liberal-democratic sense as a reason for decentralization in the Congo, although it explicitly points out the transformative, developmental understanding of constitutionalism as one of the objectives of decentralization. However, in its workings, decentralization can effectively restrain government powers and catalyse both democracy and the rule of law (Steytler 2016).

Second, the makers of the 2006 Constitution intended to bring administrators closer to their constituencies and vice versa in order to identify the real problems faced by the population and to find speedy and adequate solutions (Yav 2009, 8). The Constitution translates “the resolve of the Congolese people to make decentralization a concrete reality” and their quest for a “new national balance and consensus which provides for more consensual resource sharing, while preserving the country’s territorial integrity” (ADB/ADF 2009, 1). Moreover, in going for decentralization, the framers of the 2006 Constitution intended to put the country on a path to sustained growth and economic prosperity. In fact, abject poverty in the Congo has intensified over the past three decades and affected in 2009 more than 70% of the population (*Ibid.*, ii).

Third, the Congolese people embraced decentralization in the 2006 Constitution as a mechanism to consolidate national unity and to end recurrent civil strife as well as political and military conflicts which resulted in millions of deaths and refugees. The Constitution bears the fruit of the national peace and reconciliation process that brought about the 2002 Global and Inclusive

³⁴ Author’s translation. The original text in French reads: “Dans le but d’une part, de consolider l’unité nationale mise à mal par des guerres successives et, d’autre part, de créer des centres d’impulsion et de développement à la base, le constituant a structuré administrativement l’Etat congolais en 25 provinces plus la ville de Kinshasa dotées de la personnalité juridique et exerçant des compétences de proximité énumérées dans la présente Constitution.”

Accord. Therefore, the Congolese decentralization must be seen as one of the tools to prevent and manage conflicts.

While international actors such as foreign donors and international organizations exerted pressure on the different governments since the times of Mobutu to free up political space and engage in democratic reform, the real momentum behind decentralization in the Congo appears to come from internal actors which have campaigned for the devolution of power even before formal independence in 1960. The Congolese population in general and internal actors such as political parties, political movements and political activists have witnessed and experienced first-hand the excesses that accompanied the centralization of power by previous regimes.

3.3. Implementation of Autonomy

The system of checks and balances inserted in the 2006 Constitution has worked poorly as a restraint on government powers. Nonetheless, of the projects contemplated by the 2006 Constitution, decentralization remains among those the state enforces the most.

In 2010, the central government failed to meet the deadline for the establishment of new provinces. By that date, the government had still not passed legislation establishing the new provinces. The government argued that the exercise would cost a few billion US dollars and promised to establish the new provinces later. In January 2011, the parliament amended the Constitution to enable the president, subject to certain conditions, to remove a provincial governor and/or dissolve a provincial parliament when internal standoffs paralyze it.³⁵ The parliament also mandated itself to set a timetable for the establishment of the 26 provinces envisaged by the Constitution. In July 2015, the government reorganized the territory of the country into 26 provinces. Only 21 of these provinces were new because the partition affected only six of the old 11 provinces: Bandundu, Équateur, Kasai-Occidental, Kasai-Oriental, Katanga and Province Orientale. Several districts of these six provinces have been elevated to the status of province. This process of territorial-administrative reorganization did not take

³⁵ Articles 197 and 198 of the 2006 Constitution, as amended.

ethnicity into account but only considered former administrative divisions (Kapya Kabesa. 2010, 5).³⁶

The Congolese reacted to the effective partition of provinces with mixed feelings. While most welcomed the move, the sub-division of existing provinces triggered protests in some parts of the country. It is not yet certain the extent to which the protests expressed genuine concerns and how far they reflected vested or sectional interests, especially the personal and tribal interests of local elites.³⁷

In September 2015, the Constitutional Court ruled that the electoral commission faced a case of *force majeure* (i.e. the commission could not organize the gubernatorial elections in time) and that the central government had to provide the electoral commission with the means necessary to maintain order in the provinces. In response to the Constitutional Court's ruling, the president appointed special commissioners pending the election of new governors for the 21 new provinces. The five provinces that the government did not split kept their former governors pending the gubernatorial elections. Finally, the provincial assemblies elected their governors in March 2016.

The record on the practical implementation of decentralization in the provinces is mixed. On the one hand, the government succeeded in establishing the different provincial institutions as mandated by the 2006 Constitution. The government returns part of national taxes back to the provinces – a process referred to as “retrocession” (*rétrocession*). On the other hand, the government failed in applying the long-planned decentralization in several respects. First, it failed to establish provinces according to the initial timeline contained in the Constitution while the actual timing seemed to be dictated more by political calculations than by a plan of systematic execution (International Crisis Group. 2016.). Second, the effective establishment of the new provinces had been marred by poor planning and administration, which further delayed national and local elections. Third, between 2007 and 2013, the central government gave back to provinces only 6-7% of taxes instead of the 40% prescribed by the Constitution (*Ibid.*). Fourth,

³⁶ See also International Crisis Group (2016), which argues that the decentralization process in the Congo is influenced by ethnic politics, using the former Katanga province as a case study. However, this report overplays the importance of ethnicity in the implementation of decentralization and, more particularly, it gives the wrong impression that Katanga refers to a particular ethnicity or tribe. As a matter of fact, several tribes co-existed in the former Katanga, as well as in the newer provinces of the DRC. The International Crisis Group's report was, therefore, inaccurate because it presented people hailing from the same province as sharing the same ethnicity.

³⁷ Yav (2009, 9-14) argues that complaints in the former province of Katanga reflected mostly the interests of local elites as well as ethnic and tribal sentiments. See also International Crisis Group (2016).

the government has not yet properly constituted decentralized territorial entities. The legal framework for the practical implementation of the decentralized territorial entities is incomplete and the government did not manage to organize local elections since the entry into force of the 2006 Constitution.

4. Legal Basis of Autonomy

As mentioned above, Congolese decision-makers had long confronted the choice between a unitary and a federal state. The 2006 Constitution represents “a skilful blend, a clever compromise between two approaches through the establishment of political regionalism sanctioned by the creation of new provinces, and decentralization within the provinces” (ADB/ADF 2009, 5). The Congo is neither a unitary state nor a federation. The Constitution is silent as to the actual form of the state. It simply states that: “The Democratic Republic of the Congo is... a state based on the rule of law, [it is] independent, sovereign, united, indivisible, social, democratic, and secular.”³⁸ The word “united” cannot be taken to mean unitary state, as the word even appears in federal constitutions.

The 2006 Constitution bears several hallmarks of federalism, such as the establishment of at least two levels of government; the division of powers between the center and the constituent units; the participation of those units in the national parliament through a second chamber (i.e. the Senate); a system of intergovernmental relations; all of which are captured in a supreme constitution enforced by an independent judiciary (Watts 2008 7ff). In other words, the 2006 Constitution displays elements of self-rule and shared rule. The 2006 Constitution is unique in the sense that it marks the first time in Congolese history that decentralization has a constitutional basis. In the past, decentralization was laid down in acts of parliament only, not in the constitution itself. The constitutional basis of decentralization sets the DRC apart from most African nations as this is something of a rarity on the continent.³⁹

The 2006 Constitution empowers the state to enact organic laws on national, provincial, and decentralized entities.⁴⁰ In Congolese law, there are two types of acts of parliament: the ordinary legislation and the organic legislation. Parliament passes and amends ordinary legislation

³⁸ Preamble of the 2006 Constitution.

³⁹ Another African state whose decentralization has an express constitutional basis is Ethiopia.

⁴⁰ Articles 3 and 194 of the 2006 Constitution.

through normal legislative procedures whereas it passes and amends organic laws by following a special, more restrictive procedure. Organic laws are directly mandated by express provisions in the Constitution. They thus enjoy a superior status to ordinary legislation. Most acts of parliament dealing with decentralization are organic laws.

The legal basis and framework for decentralization in the Democratic Republic of the Congo (“DRC” or “the Congo”) comprise the 2006 Constitution and five acts of parliament which deal with: principles of the free administration of provinces;⁴¹ the Conference of provincial governors;⁴² practical establishment of the new provinces;⁴³ creation of territorial entities within provinces;⁴⁴ and decentralized territorial entities.⁴⁵

From the legislative framework, four crucial aspects of decentralization stand out. First, the paramount principle is the free administration of provinces, which implies autonomy (Kumbu ki Ngimbi 2010). Second, for the provinces to preserve autonomy, they need to enjoy legal personality (*Ibid.*). Third, legal personality manifests through organic independence (*indépendance organique*) of institutions at provincial and local level. Fourth, the organic independence is strengthened by elections and the fact that the provinces and decentralized territorial entities enjoy exclusive powers. It is further consolidated by transfers of financial resources⁴⁶ – which ensure the financial autonomy of provinces and decentralized territorial entities – and by transfers of competences.⁴⁷

Article 220 of the Constitution stipulates that “[a]ny constitutional amendment having as its objective or consequence the reduction of fundamental rights and freedoms or the reduction of the prerogatives of provinces and decentralized territorial entities is formally prohibited.”

⁴¹ Law no. 08/012 of 31 July 2008 on fundamental principles relating to the free administration of the provinces [*Loi n°08/012 du 31 juillet 2008 portant principes fondamentaux relatifs à la libre administration des provinces*]. Hereinafter “Law on fundamental principles”.

⁴² Organic Law no. 08/015 of 7 October 2008 on the organization and functioning of the Conference of provincial governors [*Loi organique n° 08/015 du 7 octobre 2008 portant modalités d’organisation et de fonctionnement de la Conférence des Gouverneurs de Province*].

⁴³ Law no. 15/004 of 28 February 2015 determining the conditions for establishment of new provinces [*Loi de programmation n°15/004 du 28 février 2015 déterminant les modalités d’installation de nouvelles provinces*].

⁴⁴ Organic Law no. 10/011 of 18 May 2010 regarding the territorial subdivisions within the provinces [*Loi organique n° 10/011 du 18 mai 2010 portant fixation des subdivisions territoriales à l’intérieur des provinces*].

⁴⁵ Law on decentralized territorial entities.

⁴⁶ See Article 175 and Article 181 of the 2006 Constitution. While the former provides that provinces may keep 40% of national taxes collected at the provincial level, the latter establishes an equalization fund to even out economic discrepancies among provinces.

⁴⁷ See Article 205 of the 2006 Constitution, which provides that the National Assembly and the Senate may empower, through an act of parliament, a provincial assembly to legislate on matters that are exclusive to the national government.

However, nothing stops the Congolese parliament from amending Article 220, which would in turn make it possible and easier for any ruling government to amend the decentralization provisions of the Constitution. Moreover, the parliament could replace the 2006 Constitution with a new one containing different or no provisions on decentralization.

5. Autonomous Institutions

The 2006 Constitution established a three-tier governance system: president, parliament and government at national level; provincial assemblies and governments; and local councils and governments. The decentralization has led to a complex system of appointing (as opposed to electing) various office holders at national, provincial and local levels.

5.1. The Provincial Assembly

The provincial assembly (*assemblée provinciale*) debates matters that fall within its competence and controls the provincial government as well as local and provincial public services. Members of provincial assemblies (MPAs), formally known as provincial deputies (*députés provinciaux*) are elected by universal, direct and secret suffrage or co-opted⁴⁸ for a renewable term of five years. The number of the co-opted MPAs may not exceed a tenth of the members of the provincial assembly.⁴⁹

The 2006 Constitution did not provide for the dissolution of provincial assemblies, but the 2011 constitutional amendment empowered the president to dissolve a provincial assembly in case of a serious deadlock.

5.2. The Provincial Government

The provincial government (*gouvernement provincial*) comprises a governor, a vice-governor and a number of provincial ministers, not exceeding 10. The provincial assembly elects the

⁴⁸ The co-opted provincial deputies are appointed among traditional or village chiefs.

⁴⁹ Article 197 of the 2006 Constitution and Article 7 of the Law on fundamental principles.

governor, the vice-governor, and the ministers for a once-renewable term of five years. After they are elected, they are vested by order of the president of the republic.⁵⁰

The provincial governor acts in two capacities: as head of the provincial executive and as a representative of the central government.⁵¹ In the Congolese context, this dual role means that, as representative of the central government in the province, the governor is responsible for the implementation of national laws – especially for looking after the national interest, order and safety – in the province under the supervision of the central government.⁵² For that function, the governor answers to the central government, which may cancel or modify the governor's decisions or take over the functions of the provincial government.⁵³ This situation has the unfortunate consequence that the governor does not have much autonomy vis-à-vis the central government, which works against constitutionalism. Following the 2011 constitutional amendments, the central government has the power to remove a governor from office when severe and persistent crises weaken provincial institutions.⁵⁴

As head of the provincial executive, the governor exercises exclusive powers expressly listed in the Constitution. The governor appoints provincial ministers and removes them from office. All provincial and national public services in the provinces are placed under his authority. Provincial governors act as trustees vis-à-vis local governments. They control the acts of local governments before and after the local governments perform those acts.⁵⁵

5.3. The Local Government

At the local level, the head of the executive is the mayor (*maire*), burgomaster (*bourgmestre*), head of sector (*chef de secteur*), and head of chiefdom (*chef de chefferie*), depending on the territorial entity they lead: cities, communes, sectors and chiefdoms, respectively. Members of the local executive are appointed by members of the local legislative council⁵⁶ and vested by the

⁵⁰ Article 23 of the Law on fundamental principles.

⁵¹ Articles 28 and 63 of the Law on fundamental principles

⁵² Article 63 of the Law on fundamental principles.

⁵³ Article 65 and 66 of the Law on fundamental principles.

⁵⁴ Article 198 of the 2006 Constitution as amended in 2011.

⁵⁵ Article 28 of the Law on fundamental principles.

⁵⁶ The council is referred to as *conseil urbain* in cities, as *conseil communal* in communes, as *conseil de secteur* in sectors and as *conseil de chefferie* in chiefdoms. See Article 7, 47 and 69 of the Law on decentralized territorial entities.

minister in charge of decentralization in the case of cities and by the governor of the province where the local authority is located in the case of communes. Heads of sector and heads of chiefdom are appointed in terms of the applicable customary laws.⁵⁷

6. Autonomous Powers

The Democratic Republic of the Congo (“DRC” or “the Congo”) is a quasi-federal state. If judicial powers also devolved to provinces, the DRC would qualify as a federation (Kumbu ki Ngimbi 2010). Instead, only legislative and executive powers have been devolved to the provincial and local levels.

The national parliament debates and passes ordinary and organic laws that apply all across the national territory. The exclusive powers of the central government include *inter alia* foreign affairs; security and defence; national police; the establishment of income taxes, company taxes and personal taxes; custom duties; mail and telecommunications; and maritime, air and railways transport.⁵⁸

The provincial assemblies debate and pass edicts (*édits*) on matters falling under their jurisdiction.⁵⁹ Matters covered by the exclusive powers of provinces include *inter alia* provincial planning, inter-provincial cooperation, provincial and local public administration, provincial and local taxes, primary and secondary education, public works, elaboration of mining and energy programs of provincial interest, tourism and historical heritage, urban and rural housing, road administration and the application of customary laws.⁶⁰ In addition, provincial assemblies have the exclusive power to remove from office provincial ministers individually or collectively following a censure motion (*motion de censure*) or a no-confidence vote (*vote de défiance*).⁶¹

The National Assembly or the Senate may authorize a provincial assembly to legislate on matters falling within the exclusive competence of the central government. Similarly, a provincial assembly may authorize the national parliament to legislate on matters which fall within the exclusive competence of the province.⁶² Two or more provinces may, by joint agreement, create

⁵⁷ Article 29, 30, 55, 56, 66 and 67 of the Law on decentralized territorial entities.

⁵⁸ Article 202 of the 2006 Constitution.

⁵⁹ Article 197 of the 2006 Constitution and Article 7 of the Law on fundamental principles.

⁶⁰ Article 204 of the 2006 Constitution.

⁶¹ Article 23 of the Law on fundamental principles.

⁶² Article 205 of the 2006 Constitution and Article 61 of the Law on fundamental principles.

a framework for the harmonization and coordination of their respective policies and manage jointly certain services concerning matters which fall within their competence.⁶³

Concurring powers of provincial and central authorities include *inter alia* the implementation of mechanisms for protecting fundamental human rights enshrined in the Constitution; the establishment of taxes; the administration of courts and tribunals; public health, protection of the environment; land and mining rights; homeland security; the establishment of primary, secondary and tertiary education institutions; and road traffic and the maintenance of national roads.⁶⁴ On the matters falling within the concurring competence of the central government and the provinces, any provincial law which is incompatible with the national laws is automatically void or abolished, to the extent that an incompatibility exists.⁶⁵

The 2006 Constitution recognizes the customary authority (*autorité coutumière*) of traditional chiefs and devolves it to the local level according to local custom, provided that the latter does not conflict with the Constitution, the law, public order and morality.⁶⁶

7. Financial Arrangements

The 2006 Congolese Constitution empowers provinces, concurrently with the central government, to establish taxes, including excise and consumer taxes.⁶⁷ However, provinces may not establish taxes that duplicate national taxes. The provinces have exclusive power to regulate provincial and local taxes and duties, in particular property tax, local income and motor vehicle tax.⁶⁸

The three levels of government have spending autonomy and must keep their budgets separate and distinct.⁶⁹ Here again, however, practice leaves much to be desired. The budgets of provinces and decentralized territorial entities are typically meagre and inadequate in view of the significant needs of provincial and local authorities.

⁶³ Article 199 of the 2006 Constitution.

⁶⁴ Article 203 of the 2006 Constitution.

⁶⁵ Article 205 of the 2006 Constitution.

⁶⁶ Article 207 of the 2006 Constitution.

⁶⁷ Article 203 of the 2006 Constitution.

⁶⁸ Article 204 of the 2006 Constitution.

⁶⁹ Article 171 of the Constitution; Article 43 of the the Law on fundamental principles and Article 104 of the Law on decentralized territorial entities.

The revenue-sharing formula and financial transfers from the central government work as follows: the central government keeps 50% of national tax revenue, transfers 40% of that revenue directly to the provinces and allocates the remaining 10% of national tax revenue to the equalization fund (see ADB/ADF 2009, 7).⁷⁰ The equalization fund (*la caisse de péréquation*) is administered by the Central Bank of the Congo and aims to even out economic disparities between provinces. In 2015, the Constitutional Court sent back to the parliament for revision the initial text of the organic law establishing the equalization fund (Radio Okapi 2015). In 2016, the Congolese parliament approved a revised bill on the equalization fund and the president signed it into law.⁷¹

In practice, the government has hardly, if ever, implemented the provision that 40% of national taxes must stay in the provinces. Instead, the government orders provinces to send to the center all the national taxes collected on its behalf. Then it sends back to provinces a certain percentage of those taxes, almost always lower than 40% of the taxes collected, in a process that it calls “retrocession” – a term not found in the 2006 Constitution. In 2008, some delegates from three (former) provinces (Katanga, Kinshasa, and Bas-Congo) argued that the practice of retrocession violates the fundamental law. However, the government has rejected such interpretation and has stuck to that practice since the 2006 Constitution has come into force.

8. Intergovernmental Relations

The Senate formally represents the provinces in the national parliament. It may, at any time, consult with presidents of provincial assemblies. The National Assembly and the Senate may dispatch a parliamentary delegation to a province on an *ad hoc* basis.⁷²

The provincial governor represents the central government in the province. He is accountable to the central-government minister in charge of decentralization.

In cases of gross misconduct by a provincial governor in the exercise of deconcentrated powers,⁷³ the central government has three options: to approach the relevant provincial assembly

⁷⁰ Articles 175 and 181 of the 2006 Constitution and Article 54 of the Law on fundamental principles.

⁷¹ Organic Law no. 16/028 of 8 November 2016 regarding the national equalization fund [*Loi organique n° 16/028 du 8 novembre 2016 portant organisation et fonctionnement de la Caisse nationale de péréquation*].

⁷² Article 61 of the Law on fundamental principles.

⁷³ ‘Deconcentration’ refers to a form of administrative decentralization in terms of which the national government shifts some of its powers to make decisions and manage finances to different levels of government, such as

to initiate a censure motion; in criminal matters, to bring the accused governor to the Court of Cassation; or refer the administrative acts and decisions of the governor to the Administrative Court of Appeal.⁷⁴ These provisions of the 2008 Law on fundamental principles seem to contravene the principle of free administration of provinces, as stipulated in the same law and in the 2006 Constitution, which both assert the autonomy of provinces. By placing deconcentrated public services (*services déconcentrés*) in provinces under the authority of the governors, the Congolese legislation makes the governors liable before the central government for those services (Kumbu ki Ngimbi 2010).

The conference of provincial governors is a consultative body that meets twice a year, each time in a different province on a rotation basis. It consists of the president of the republic, the minister responsible for decentralization, and all the provincial governors. The conference may invite any other member of the government to a specific meeting.⁷⁵ The conference primarily advises the government on policies and legislation concerning decentralization in the DRC. Constitutional drafters set up the conference to tackle the intricacy of the rules and mechanisms governing (1) the relationships between the central and provincial governments, and (2) the relationships among the provinces. For instance, the conference is expected to advise the central government on the rules applying to the levying of provincial taxes.⁷⁶

The Constitutional Court settles disputes between the central government and the provinces, disputes between provinces, and disputes between provinces and decentralized territorial entities.⁷⁷ Before the Constitutional Court became operational in 2015, the former Supreme Court carried out that dispute-resolution function.⁷⁸ In any event, despite these legal provisions, nothing prevents the central government from solving issues related to decentralization through informal processes and mechanisms.

provinces. For example, deconcentration can involve the national government taking away some decision-making powers of a senior officer at the national education ministry's head office and giving those powers to another officer at an education ministry's provincial office.

⁷⁴ Articles 65 and 67 of the Law on fundamental principles.

⁷⁵ Article 200 of the 2006 Constitution.

⁷⁶ Article 51 of the Law on fundamental principles.

⁷⁷ See Article 161 of the 2006 Constitution. See also Articles 61-64 of the Organic Law no. 13/026 of 15 October 2013 on the organization and functioning of the Constitutional Court [*Loi organique n° 13/026 du 15 octobre 2013 portant organisation et fonctionnement de la Cour Constitutionnelle*].

⁷⁸ According to the judicial reform outlined in the 2006 Constitution, the former Supreme Court was replaced by three separate courts: the Constitutional Court (2013), the Court of Cassation (2018), and the Council of State (2018).

The former Supreme Court did not contribute much to the implementation of decentralization. The Court's contribution consisted mainly in interpreting the term "legislative act" (*acte législatif*) so liberally as to make the Court competent to decide cases involving censure motion and no-confidence votes in provincial parliaments (Kahombo 2014). In particular, the Supreme Court intervened on the basis of that contested interpretation of the Constitution to bring back governors and deputy governors removed from office by their respective provincial assemblies.⁷⁹ Established in 2013, the Constitutional Court – though a young jurisdiction – has received a disproportionate number of cases. A difficult 2015 case pertained to decentralization, more precisely to the constitutionality of appointing special commissioners (*commissaires spéciaux*) as interim governors while waiting for provincial assemblies to elect governors. In a controversial judgment, the Court held that the government had the right to appoint special commissioners as provincial governors pending the election of governors in accordance with the provisions of the Constitution.⁸⁰ Pointing out that the Constitution does not make provisions for special commissioners, scholars criticized the judgment, arguing that the court relied on principles of administrative law, rather than constitutional law (Kumbu ki Ngimbi 2010).

9. Inter-group Relations within Autonomous Entities

The division of the territory into 26 smaller provinces did not take account of the ethnic make-up of the different territorial-administrative units: It is therefore through sheer chance that certain ethnic groups appear to dominate a few provinces (Lutumbue 2016, 20).⁸¹ While most Congolese welcomed the establishment of new provinces, especially in the Ituri province, some people resisted those changes in the former provinces of Bandundu, Kasai and Katanga (*Ibid.*, 18ff).

Although decentralization was inspired by a desire to draw government closer to the grassroots and allow the various local communities to have a say in how the government administers their territory and resources, the available evidence does not show that decentralization has resulted in

⁷⁹ For example, Deputy Governor of the Mongala province, Aimé Bokungu, was dismissed by the provincial assembly in January 2017. Later on, the Constitutional Court re-instated him in his position, although Bokungu never resumed his duties as Deputy Governor after his re-instatement.

⁸⁰ Constitutional Court of the DRC, Judgment R.Const.0089/2015 of 8 September 2015.

⁸¹ Few new provinces, such as Kabinda Sankuru and Kasai Central are dominated by certain ethnic groups, such as the Batetela, and the Lulua, respectively.

the inclusion of different groups, especially marginalized groups such as the Pygmies, in provincial or local institutions.

Tribalism and clan-based politics remain problematic in the DRC and inter-community conflicts over land and fishing resources flare up occasionally. A case in point is the eminently tribal uprising in the former and greater Kasai province. After the traditional chief Kamwina Nsapu⁸² was killed by government forces in 2016, the uprising that ensued engulfed the Kasai region and caused the death of thousands of people, civilians and security forces alike. Seemingly, a growing perception that the government politicized the recognition of traditional leaders in Kasai-Central ignited the showdown between Kamwina Nsapu and the central government (Hoebeke 2017). Kamwina Nsapu's rebellion against the government clearly took on a political and ethnic character. Three Kamwina Nsapu rebel leaders surrendered in January 2019 expressing support for newly elected president Tshisekedi, who originally comes from that region.

10. Membership, “Quasi-citizenship” and Special Rights

11. General Assessment and Outlook

Countless problems attend the implementation of decentralization and autonomy arrangements in the Democratic Republic of the Congo (“DRC” or “the Congo”). Notably, these include inconsistent application of the law, weak institutional capacity, corruption, and political instability.

A major challenge of decentralization in the DRC is the fact that the legal framework for decentralization is unfinished. Even though Congolese legislation contains several acts of parliament aiming to implement the decentralization contemplated in the 2006 Constitution, the government still has a long way to go before it can achieve a complete and comprehensive legal framework.⁸³ In spite of the decentralization provisions of the Constitution and various applicable laws, the reality on the ground seems to have evolved in the opposite direction in

⁸² “Kamwina” is also spelt “Kamuina”.

⁸³ Notably, the laws on provincial and local finances and the establishment of the equalization fund are yet to be enacted. In particular, the laws on provincial and local finances are crucial from the perspective of decentralization as they are to provide for local revenue classification and distribution.

several instances. Administrative structures are still centralized to a large degree (Hamann 2012, 44).

Another difficult aspect of decentralization in the DRC is that much of the debate about the contours of decentralist reforms does not involve the general population. The active and informed participation of the population is hampered by the high poverty and illiteracy rates in the country.

Making the state apparatus more legitimate may require enlisting traditional leaders in running the political and administrative institutions at all levels of government. Hamann (2012, 44) believes that incorporating traditional elements might help build up effective structures from the bottom up. This would, nonetheless, not sanitize those structures, as traditional leaders have been and are sometimes instrumentalized for political reasons (Boshab 2007). In fact, Congolese constitutional law has already expressly incorporated traditional authorities in the administrative system as decentralized territorial entities, albeit at the lowest level of the system.

The preamble to the 2006 Constitution acknowledges that one of the root causes of the recurrent political upheavals that the DRC has weathered relates to the crisis of legitimacy afflicting political institutions and their leaders. This crisis also plagues provincial and decentralized institutions which do not perform as effectively as envisaged in the Constitution.

In fact, from the time when the government established political institutions in 2007 to date, virtually all provincial assemblies have been marred by deadlocks and internal political wrangling that ended in the removal or resignation of many of the provincial governors. These tense situations, in part due to inexperience, graft and incompetence, among others, prompted the central government to amend the Constitution in 2011 to empower the president to dismiss a provincial governor⁸⁴ or dissolve provincial assemblies where severe and persistent tensions undermine the stability of provincial institutions.⁸⁵ But the situation did not improve much after the 2011 constitutional amendment and the establishment of new provinces in 2015. Since then, at least eight governors⁸⁶ have been dismissed by their own provincial assemblies while four

⁸⁴ Article 198 of the 2006 Constitution, as amended.

⁸⁵ Article 197 of the 2006 Constitution, as amended. However, Article 197 requires the central government to consult the Senate and the National Assembly before it can proceed to dissolve a provincial assembly.

⁸⁶ Tony Bolamba (Équateur province), Bienvenu Esimba (Mongala province), Alex Mupompa Kande (Kasaï-Central province), Jean-Claude Kazembe (Haut-Katanga province), Cyprien Lomboto (Tshuapa province), Jacques Mbadu (Kongo-Central province), Célestin Mbuyu (Haut-Lomami province), and Jean Ilongo Tokole (Tshopo province).

others⁸⁷ faced censure motions. The Constitutional Court jumped into the fray and reinstated two governors⁸⁸ and two deputy governors⁸⁹ for reasons contested by observers (Radio Okapi. 2017b). The tensions reached a pitch where the central government ended up inviting provincial parliamentarians to a workshop in May 2017 in Kinshasa – a workshop that dealt with harmonious and peaceful cohabitation between provincial government and parliament (Radio Okapi. 2017a).

The fact that the law does not specify what amounts to a “serious and persistent political crisis” increases the odds that the central government will manipulate and politicize the removal of provincial governors and the dissolution of provincial assemblies. This risk is real despite the constitutional safeguard that the central government must consult the Senate and the National Assembly before it can dissolve a provincial assembly.

The rolling-out of the decentralization policy has proved incredibly hard. Although the government has respected its obligation to establish new provinces, the reform process completed five years later than the initial due date was overshadowed by poor planning, administration and execution. Widespread suspicions arose that, by so dividing provinces, the ruling government plotted to reduce the political influence of large and powerful provinces and governors (e.g. Katanga province and its governor Moïse Katumbi), thus eliminating any potential strong contender for presidential elections (International Crisis Group 2017). Moreover, the government has never managed to return tax revenue to the provinces at the rates prescribed in the 2006 Constitution; hence question marks hang over the economic viability of provinces (Lutumbue. 2016, 18ff), not to mention local governments. No elections for the local authorities have been held since the 2006 Constitution entered into force, and this failure raises doubts as to the willingness of the central government to see through the decentralization project (Hamann 2012, 45).

The DRC grapples with formidable capacity limitations. The country suffers from weak institutional capacity, which directly and adversely affects its capacity to put its various policies and laws into action. The semi-continental size of the country aggravates these capacity

⁸⁷ Adballah Pene Mbaka (Ituri province), Marie-Thérèse Gerengbo (Nord-Ubangi province), Larousse Mavula Kabula (Kwango province), and Pascal Salumu Tutu (Maniema province).

⁸⁸ Jean-Claude Kazembe (Haut-Katanga province) and Cyprien Lomboto (Tshuapa province). Although he never resigned, Kazembe was eventually replaced by a newly elected governor

⁸⁹ Jeannine Ntombi (Equateur province) and Aimé Bokungu (Mongala province).

constraints. The DRC lacks the material, human, and economic resources necessary to carry through its decentralization policy effectively across the national territory.⁹⁰

Corruption plays a huge part in the defective application of the decentralization policy. The Congo ranks as one of the globe's most corrupt countries (Transparency International 2017). The institutionalized nature of corruption extends to the area of decentralization. Implementing decentralization has created perceptions that the process decentralized corruption as it appears to oil the wheels of opportunism and greed among local elites.

Over the years, the DRC has struggled with its own (re)definition. The dilemma revolved around the question whether the country should be organized as a unitary or federal state. This question arises against a historical and political context of upheavals and civil wars. In the end, the drafters of the 2006 Constitution opted for a highly decentralized state.

However, in practice, the Congo has decentralized power only partially. One may argue that the DRC is decentralized in the text of the Constitution yet rather centralized in actual practice. And, to the extent that it has not resulted in limited government, the rule of law and democracy, decentralization has not lived up to the ideals of constitutionalism, nor has it lived up to what the makers of the 2006 Congolese Constitution had hoped.

Going forward, the fortunes of the decentralization process will depend on the country's politics. The current scenario – whereby a sitting president cohabits with a prime minister from a political coalition (i.e. FCC) much stronger than the president's (i.e. CACH) – is unheard of in the Congo. In this situation, experts and scholars will find it hard to predict how FCC-dominated provinces will interact with president Tshisekedi. A lot of uncertainty exists as to how this cohabitation will play out in the next five years.

Nevertheless, decentralization and the division of the Congo in 26 provinces actively help the country in spurring development at the grassroots level and in creating new centers of development. Put another way, though decentralization has not strengthened constitutionalism in the liberal-democratic sense, it has made some contribution to the establishment of constitutionalism in its transformative and developmental dimensions.

⁹⁰ To illustrate the stiff economic challenges of decentralization in the DRC, a look at the sheer size of decentralized structures is apposite. It is estimated that, following the establishment of the new provinces, the state encompasses 1,433 decentralized territorial entities, including 97 cities, 366 urban towns, 267 rural towns, 474 sectors, and 259 chiefdoms (Lutumbue 2016, 14). Maintaining such a complicated and heavy setup as well as the personnel that administers it necessitates enormous financial resources.

In any event, it would not be judicious to dismiss the decentralization project as totally ineffective. The DRC is painfully striving towards its goal of fulfilling the decentralization provided for in its fundamental law. But there is no doubt that the journey is far from over.

Bibliography

ADB/ADF - African Development Bank and African Development Fund. 2009. *Democratic Republic of Congo: Economic and Sector Work: Regional Economic Development in Bas Congo in the Context of Decentralization in the Democratic Republic of Congo (DRC)*. Country Operations Department Centre Region (ORCE).

Boshab, Evariste. 2007. *Pouvoir et Droit Coutumier à l'Épreuve du Temps*. Louvain-la-Neuve: Academia-Bruylan.

Burke, Jason. 2016. "DRC Parties Reach Deal Denying Third Term for President Kabila." *The Guardian*. Available online at <https://www.theguardian.com/world/2016/dec/31/drc-close-to-deal-for-president-joseph-kabila-to-step-down-after-2017-elections> (accessed on 12 February 2019).

CIA - Central Intelligence Agency. 2018. "World Factbook: Democratic Republic of the Congo". Available online at <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (accessed on 12 February 2019),

Devlin, Lawrence. 2008. *Chief of Station, Congo: Fighting the Cold War in a Hot Zone*. New York: Public Affairs.

Doyle, Michael W., and Nicholas Sambanis. 2006. "Chapter 4: Making War". In *Making War and Building Peace: United Nations Peace Operations*, edited by Michael W. Doyle. Princeton University Press.

Emmott, Robin. 2019. "EU, AU Signal Support, But No Acclaim, for Congo President-Elect." *Reuters*. Available online at <https://www.reuters.com/article/us-congo-election-eu/eu-au-signal-support-but-no-acclaim-for-congo-president-elect-idUSKCN1PG1JW> (accessed on 12 February 2019).

Grill, Bartholomäus and Susanne Koelbl. 2017. "I'm Not Going to Commit Suicide." *Der Spiegel Online*. Interview with Congo President Joseph Kabila. Available online at <http://www.spiegel.de/international/world/spiegel-interview-with-congo-president-joseph-kabila-a-1150521-amp.html> (accessed on 12 February 2019).

Hamann, H. 2012. "Can Decentralization Contribute to Promoting Rule-of-Law Structures? The Democratic Republic of Congo, Rwanda and Burundi as Examples." *15 Potchefstroom Electronic Law Journal* 33.

Hochschild, Adam. 1998. *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*. New York: Houghton Mifflin.

Hoebeke, Hans. 2017. "Kamuina Nsapu Insurgency Adds to Dangers in DR Congo." *Crisis Group Commentary*. March 21, 2017.

Human Rights Watch. 2017. 'Special Mission': *Recruitment of M23 Rebels to Suppress Protests in the Democratic Republic of Congo*. New York: Human Rights Watch.

Ilango Banga, Jean-Pierre Lotoy. 2013. "La Décentralisation Territoriale et le Développement des Entités Locales en République Démocratique du Congo (RDC)". In *Les Réformes du Secteur Public en République Démocratique du Congo: Rétrospectives et Perspectives*, edited by Camille Welepele Elatre and Hubert Ntumba Lukunga. Dakar: Codesria.

International Crisis Group. 2016. *Katanga: Tensions in DRC's Mineral Heartland*. Brussels: International Crisis Group.

Kahombo, Balingene. 2014. “Le contentieux de la décentralisation: chronique de la jurisprudence constitutionnelle de la CSJ (année 2006-2011)”. In *La Décentralisation Territoriale en République Démocratique du Congo sous le Régime de la Constitution du 18 Février 2006: Bilan et perspective*, edited by J.M. Kumbu ki Ngimbi, 161-188. Kinshasa: Editions de la Campagne pour les Droits de l’Homme au Congo.

Kapya Kabesa, Jean Salem Israël Marcel. 2010. “A Propos de la Répartition des Recettes à Caractère National Entre le Pouvoir Central et les Provinces en République Démocratique du Congo: Modalités et Contraintes.” *Librairie d’Études Juridiques Africaines*.

Kumbu ki Ngimbi, Jean-Michel. 2010. “Le statut juridique des provinces dans la constitution congolaise du 18 février 2006 - des entités 'régionalisées' dans un État uni(taire)?”. *Recht in Afrika*. Volume 13, Issue 2. Köln: Rüdiger Köppe Verlag, 183-197.

Lutumbue, Michel. 2016. “RDC: Les Enjeux du Redécoupage Territorial: Décentralisation, Équilibres des Pouvoirs, Calculs Electoraux et Risques Sécuritaires.” *Les Rapports du GRIP*: 2016/10.

Montejano, Andrés Zaragoza. 2013. *In Search of Clean Water: Human Rights and the Mining Industry in Katanga, DRC*. Antwerp: IPIS.

Netherlands Institute for Southern Africa. 2006. *The State v The People: Governance, Mining and the Transnational Regime in the Democratic Republic of Congo*. Amsterdam: Netherlands Institute for Southern Africa.

Nzongola-Ntalaja, Georges. 2002. *The Congo From Leopold to Kabila: A People’s History*. New York: Zed Books 2002.

Prunier, Gérard. 2009. *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*. Oxford: Oxford University Press.

Radio Okapi. 2015. “La Cour Constitutionnelle Renvoie Pour Correction la Loi sur la Caisse Nationale de Perequation”. Available online at <http://www.radiokapi.net/2015/08/20/actualite/justice/la-cour-constitutionnelle-renvoie-pour-correction-la-loi-sur-la-caisse> (accessed on 12 February 2019).

Radio Okapi. 2017a. “RDC: 3 Gouverneurs Déchus et 4 Autres Visés Par des Motions de Défiance”. Available online at <http://www.radiokapi.net/2017/05/15/actualite/politique/rdc-3-gouverneurs-dechus-et-4-autres-vises-par-des-motions-de> (accessed on 12 February 2019).

Radio Okapi. 2017b. “Réhabilitation des Gouverneurs Déchus: Une “Hérésie” Juridique, Selon André Mbata”. Available online at <http://www.radiokapi.net/2017/06/05/actualite/politique/rehabilitation-des-gouverneurs-dechus-une-heresie-juridique-selon> (accessed on 12 February 2019).

Radio Okapi. 2017c. “RDC: L'Élection Présidentielle Fixée au 23 Décembre 2018”. Available online at <https://www.radiokapi.net/2017/11/06/actualite/politique/rdc-lelection-presidentielle-fixee-au-23-decembre-2018> (accessed on 12 February 2019).

Shaban, Abdur Rahman Alfa. 2016. “DRC postpones elections till July 2017 citing lack of funds and register”, *Africanews*. Available online at <http://www.africanews.com/2016/08/20/drc-postpones-elections-till-july-2017-citing-lack-of-funds-and-register/> (accessed on 12 February 2019).

Simons, Gary F., and Charles D. Fennig. 2017. *Ethnologue: Languages of the World*, Twentieth edition. Dallas: SIL International.

Stearns, Jason K.. 2012. *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa*. New York: PublicAffairs.

Steytler, Nico. 2016. “Decentralisation and Constitutionalism in Africa: Concepts, Conflicts and Challenges.” [Paper presented at the Fourth Stellenbosch Annual Seminar on African Constitutionalism (SASCA) in Stellenbosch, South Africa, in September 2016] [on file with the author].

Transparency International. 2017. “Corruption Perceptions Index”. Available online at https://www.transparency.org/news/feature/corruption_perceptions_index_2017 accessed on 12 February 2019).

Utshudi, Innocent Ona. 2009. “La Décentralisation en RDC: Opportunité Pour une Gestion Foncière Décentralisée?” *L’Afrique des Grands Lacs, Annuaire 2008-2009*. Paris: L'Harmattan.

United Nations Environment Programme. 2011. *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment Synthesis for Policy Makers*. Nairobi: United Nations.

Wilson, Tom, David Blood, and David Pilling. 2019. “Martin Fayulu Has Reason to Thank Congo Voting Machines He Once Feared.” *Financial Times*. Available online at <https://www.ft.com/content/78bf0af4-18e8-11e9-9e64-d150b3105d21> (accessed on 12 February 2019).

Watts, Ronald. 2008. *Comparing Federal Systems*. Montreal: McGill-Queen's University Press.

Yav, Joseph Katshung. 2009. “La ‘Décentralisation-Découpage’ en RDC: Une Tour de Babel?” *Contrôle Citoyen*.

Zongwe, Dunia P., François Butedi, and Phebe Mavungu Clément. 2015. “Update: The Legal System of the Democratic Republic of the Congo (DRC): Overview and Research.” *GlobalLex*. Hauser Global Law School Program, New York University School of Law. Available online at

http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html (accessed on 12 February 2019).

Zongwe, Dunia P. 2012. “The New Sexual Violence Legislation in the Congo: Dressing Indelible Scars on Human Dignity.” *African Studies Review* 55: 37-57.

List of abbreviations

ADB - African Development Bank

ADF - African Development Fund

DRC - Democratic Republic of the Congo

CACH - *Cap pour le Changement* (Towards the Change)

FCC - *Front Commun pour le Congo* (Common Front for the Congo)

UDPS - *Union pour la Démocratie et le Progrès Social* (Union for Democracy and Social Progress)