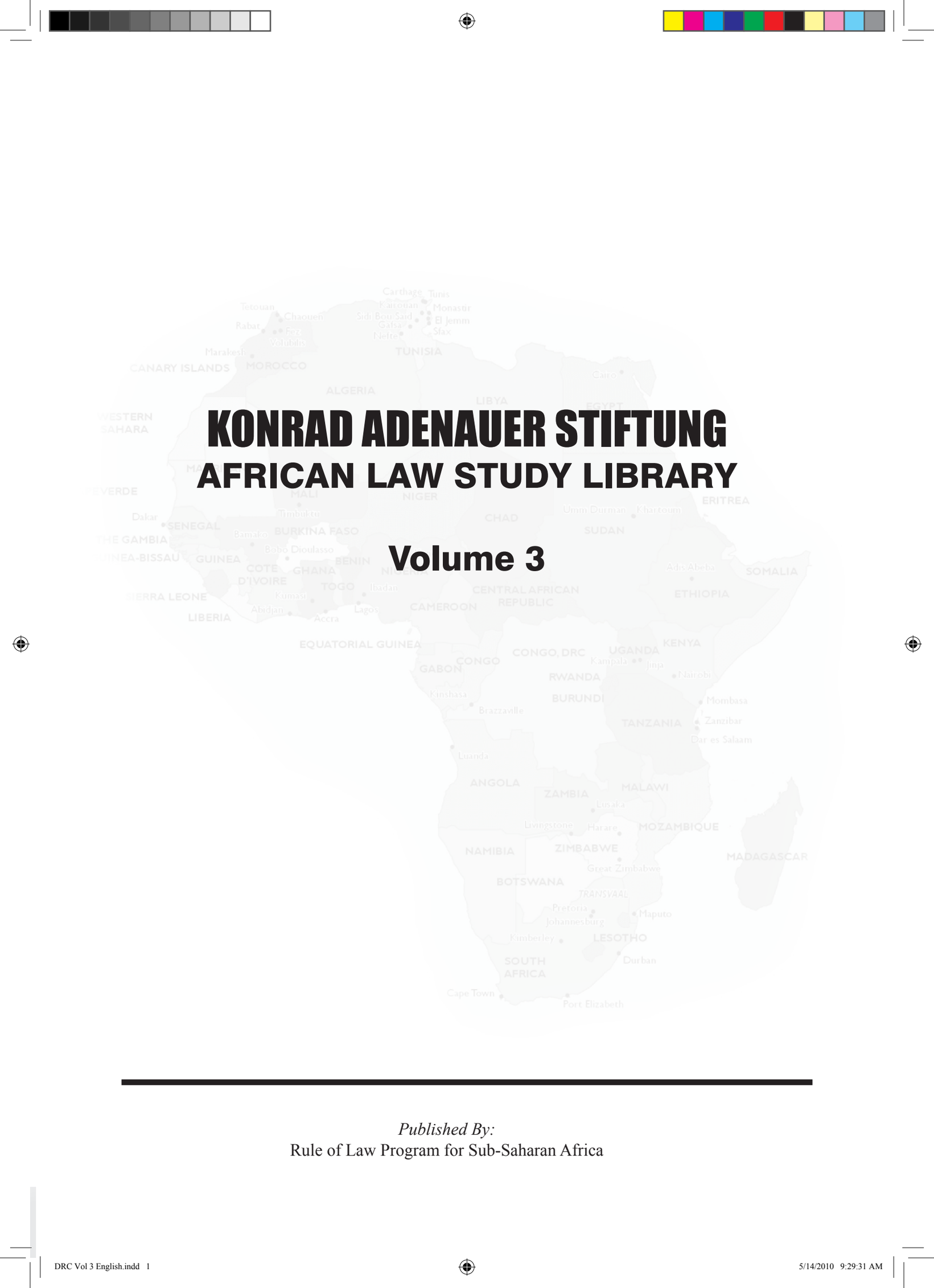

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Foreword

The rule of law is the basis of any kind of sustainable development in a country. It is an institutionalized system where public authorities perform their duties in accordance with pre-established legal systems. It relates to national standards, the respect of the principle of separation of power and respect of fundamental rights. The judiciary plays a primary role therein by guaranteeing respect for basic rights and freedoms of its citizens in order to protect them against arbitrary forms of power - thus the expression, "No one is above the law".

A guarantee of legal security for nationals and foreigners alike ensures personal and collective growth, development of business and the general socio-economic growth of the country.

The constitution of the Democratic Republic of Congo (DRC) of 18th February 2006 states unequivocally that our country is governed by the rule of law. For example, article 1 of this constitution reads as follows: "The Democratic Republic of Congo, covering the territories established on 30th June, 1960, is an independent, sovereign, united and indivisible, social, democratic and secular constitutional state"[1]

The development of a constitutional state is gradual. Politicians, business people, journalists, labourers, students, soldiers, policemen and policewomen, and scholars, among others, must all in their various capacities, contribute a stone towards the construction of this edifice.

It is in view of this that the Faculty of Law of the Catholic University of Bukavu, in collaboration with the University of Berlin, through Professor Hartmut Hamann, is organizing a series of legal seminars on the subject: "The Rule of Law in the Democratic Republic of Congo"

These parties have been assigned two objectives by the seminar conveners: One, to get the members of the afore-mentioned faculty to reflect on "The rule of law in the DRC" and two, to introduce young researchers of this faculty to applied research. The themes of the first seminar, which are the subject of this publication are thus rooted in conditions specific to the South Kivu Province, focusing on her interests or better still, her needs.

Out of the topics discussed, the following were chosen for this first seminar:

- The right to a fair trial in the rural areas of South Kivu;
- Legal protection of foreign investors by the new DRC mining code: The case of Kamituga area;
- The application of legal practices relating to the export of agricultural produce from South Kivu to foreign countries; and

[1] Constitution of the DRC, official gazette of the Democratic Republic of Congo, year 47, special edition, Kinshasa 2006

- The Congolese judge and the principle of equality: The state of women's rights in the jurisprudence of the High Court of Bukavu

They look at the concrete application of some fundamental rights upheld by the international legal machinery as well as by the current constitution, within the context of South Kivu. We wish to mention that the views expressed in these studies are the sole responsibility of their authors.

We wish to thank the Catholic University of Bukavu for facilitating this initiative and for offering the venue for these seminars and the Konrad Adenauer Foundation for their interest in this study as well as their financial support. We continue to count on the Foundation for the follow-up of these activities with the aim of participating in enhancing the rule of law in the DRC.

We also wish to thank the members of the academic and scientific fraternity of the Faculty of Law for their significant participation in these seminars.

Prof. Dr. Hartmut Hamann

Prof. Dr Jean Claude Mubalama Zibona,
Dean of the Faculty of Law
C.U.B

Prof. Murhega Mashanda

THE RIGHT TO A FAIR TRIAL IN THE RURAL AREAS OF SOUTH KIVU

By

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Assistant at the Faculty of Law
Catholic University of Bukavu.

Abreviations and Acronyms Used

JSC	:	Justice Supreme Court
SCJ	:	Senior Council of Judges
Ed.	:	Edition
Et alli	:	And others
Ibidem	:	Same publication, same page
Idem	:	Same publication, different page
NGO	:	Non Governmental Organizations
P.	:	Page
DRC	:	Democratic Republic of Congo
C.U.B	:	Catholic University of Bukavu

INTRODUCTION

All modern states consider the right to a fair trial a fundamental right. This right appears to be a crucial ingredient for the establishment of the rule of law. The Democratic Republic of Congo is no different. The right to a fair trial has been enshrined in its constitution of 18th February 2006 in the following terms: "Every individual has the right to have his or her case heard without unreasonable delay and before a competent judge"[2]

In an expression of her willingness to enforce the right to a fair trial, the Congolese State has ratified a number of international human rights declarations which uphold the said right[3].

It is with the aim of enforcing the right to a fair trial that the Congolese government intends to establish Peace Tribunals in all the regions and communes of the country[4]. These (peace) tribunals will replace traditional courts[5] which constitute the bulk of legal structures existing in the rural areas of South Kivu.

2 Article 19 of the constitution of 18th February 2006

3 The declarations referred to are as follows: The universal declaration of the rights of man of 10th December 1948, article 10; International pact on civil and political rights of 16th December 1966,article 14 and the African charter of human and national rights of October 1986, article 7

4 Act nº82-020 of 31st March on the Code of legal structure and authority, article 22 paragraph 1.

5 *Idem,* article 163.

With the exception of Uvira, Mwenga and Kalehe regions, the Peace Tribunals passed by law have to-date not been established in the rural areas of South Kivu. It is important to note that these rural areas are spread over eight regions as follows: Kalehe, Idjwi, Kabare, Walungu, Shabunda, Mwenga, Fizi and Uvira. Furthermore, the entire South Kivu Province (rural) has only one High Court with three subsidiary courts. The main court is based in Uvira while the three subsidiary courts are based at Kavumu, Shabunda and Kamituga respectively. Considering the large size of the rural population[6], the number of courts established in the rural areas of South Kivu province remains inadequate. The result is that access to justice is an acute problem. Lack of adequate court facilities lead to a situation where citizens have to travel long distances to find a competent judge. This problem is further compounded by the dilapidated state of the road network. One can conclude that justice under statute law is undoubtedly out of reach for the rural residents of South Kivu.

As a result of the aforementioned difficulties, traditional courts are becoming increasingly important as they are the easiest way to access justice. Traditional judges are however not above reproach. Often, they act contrary to the written legislation and international declarations signed by the Democratic Republic of Congo. It follows therefore that certain procedural and fundamental regulations as well as rights are violated.

The implementation of the right to a fair trial in the rural areas of South Kivu is further aggravated by a lack of correlation between court fees and the incomes of the rural populations. The latter are largely very poor. Their inability to pay court fees leads them to seek justice either in traditional courts or from private judges (arbitrators, traditional chiefs and church leaders among others). The following is a list of fees that a person facing trial is expected to pay in the course of his or her court case:

Recording fees: 10 US $
Equipment fees: 10 US $
Registration fees: 5 US $
Signing of ruling: 10 US $
Drafting of ruling: 50 US $
Drafting of papers for the audience: 10 US $
Percentage charge: 15% of amount allocated for damages and interest.

It is worth noting that apart from recording fees, equipment fees and percentage charge, the court clerks often charge other fees depending on the financial status of the person facing trial. The total fees to be paid by the person facing trial excluding the percentage charge amount to 95 US $ while the average monthly income of the villager is about 28 US $[7].
Faced with this situation, very few citizens can afford the luxury of presenting their cases before courts of statute law.

The vast majority of the residents of the rural parts of South Kivu are ignorant of the law, mainly due to their low level of education. Many of them are unaware that the right to a fair trial is a fundamental right of every person. The level of illiteracy is higher among women

6 According to the project "innovation, security and improvement of living conditions of the rural people of South Kivu" undertaken by the Catholic University of Bukavu, the rural population of Bukavu is estimated at 70% of the total population of the province. However, according to the Provincial Division of South Kivu, the rural population constitutes up to 87.5% of the total population of the province; translating into 4,017,592 inhabitants out of 4,590,070 inhabitants that live in South Kivu province. These figures emanate from the population census of 2007.

7 N. MATABARO and B. NALUNJA, *Molding of peasant income into the agricultural system of South Kivu,* Thesis, Faculty of Economics and Management, C.U.B, unedited, 1996-1997, p.68.

than men standing at 44% against 19% of the entire rural population[8]. These two figures, combined, produce an illiteracy rate of 31.5% of the entire rural population.

Nevertheless, the small minority of the population that has access to courts of statute law is not satisfied with the manner in which justice is dispensed. On the one hand, magistrates are immersed in corruption, thus manipulating justice in favour of the highest bidder. On the other hand, the judicial process is very slow. These two factors have highly discredited the justice system to the point where the vast majority of the rural population does not present its cases before the courts of statute law.

In light of the difficulties encountered in the implementation of the right to a fair trial in the rural parts of South Kivu, one question arises: What should be done to improve the implementation of the right to a fair trial in the rural areas of South Kivu? This question leads us to draw the following concurrent hypotheses:

- The establishment of courts of statute law in all regions is likely to enhance greater access to justice
- A reduction of court fees is likely to encourage the rural people to present their cases before courts of statute law. This reduction of cost should be accompanied by a more efficient application of the procedures for obtaining a destitution certificate. The local destitution certificate allows residents to be exempted from paying court charges when they bring a case before the court.

Focusing on the low level of implementation of the right to a fair trial in the rural areas, this reflection involves listing of all courts of statute law existing in the rural areas. This approach will make it possible to examine the legal plans to establish courts in the rural areas against the reality on the ground. This study seeks to confirm whether the legal institutional framework matches reality. More precisely, it attempts to establish whether or not the Congolese government has established Peace Tribunals in the rural areas, divided into regions. In this respect, we wish to confirm whether the wish of the law to improve access to justice through the establishment of Peace Tribunals in the rural areas has been respected.

The practice of the rule of law also depends on the people exercising judicial functions, in this case, the magistrates. It therefore becomes important to analyze the legal provisions guiding their appointment and dismissal. Such an approach is necessary as it gives an idea of their independence and impartiality.

To understand why the rule of law is not fully implemented in the rural parts of South Kivu, it will be appropriate to identify the major obstacles hindering this right before courts of statute law. This approach also makes it possible to suggest possible solutions.

As far as traditional courts are concerned, we will examine their effect in relation to access to justice. More precisely, this involves identifying the merits of these courts that have enabled them to take advantage of the weaknesses of courts of statute law. In addition, the weaknesses and shortcomings of traditional courts will also be highlighted. This will be mainly in relation to the non-conformity to statute law of most of their rulings.

8 C. MUNYERENKANA, *Determinants of the demand for education in the rural areas. The case of adult literacy in Walungu region,* Thesis, Faculty of Economics and Management, C.U.B., Unedited. 2005-2006, p.18.

Finally, we shall attempt to offer solutions to problems confronting the application of the rule of law in the rural parts of South Kivu. Considering the complex nature of the problems, the proposed solutions will adopt a multi-dimensional structure touching on legal, social and economic aspects.

I. ACCESS TO COURTS OF STATUTE LAW BY RURAL POPULATIONS OF SOUTH KIVU

Access to law courts is a concrete measure of the fundamental right to a fair trial. According to CABRILLAC & alii[9], the right to justice allows every individual with a legitimate interest and who meets the required criteria to access a court of law and have his or her case judged.

The right to a fair trial is one of the essential criteria for the rule of law which every lover of justice aspires to. The State plays an important role in the implementation of the right to a fair trial. It has the double responsibility of establishing law courts as well as enabling access to the same.

In the context of this study, we shall first present the law courts established in the rural areas of South Kivu; we will then identify the key obstacles that hinder inhabitants of rural areas from accessing fair trial and, lastly, we shall highlight the efforts made towards improving access to fair trial.

I.1. COURTS OF STATUTE LAW ESTABLISHED IN RURAL PARTS OF SOUTH KIVU

It is necessary to examine the legal framework governing courts of statute law before analyzing nomination and dismissal procedures of judges presiding over them.

I.1.*A*. The legal framework

The reference text is found in Order No. 82-020 of 31st March 1982 on the code of legal structure and authority. Article 22 of this text stipulates the following: *"There are one or several Peace Tribunals in each region and in each town. Nonetheless, a single Peace Tribunal may be established to serve several regions or towns"*.

Currently, out of the eight regions of South Kivu, only Uvira, Mwenga and Kalehe have a Peace Tribunal. Incidentally, these three were only established recently. As a matter of fact, the Peace Tribunal at Uvira which is the oldest was established in 2007. The Peace Tribunals at Mwenga and Kalehe on the other hand, were established in 2009. The authority of these courts is therefore limited to their respective areas of jurisdiction.

In matters arising from the rulings of the Peace Tribunals, the rural residents of the seven other regions have to go to the High Court at Uvira[10] which has three subsidiary courts based at Kavuma, Shabunda and Kamituga respectively. In this context therefore, those facing trial exercise their rights either at the main court in Uvira or at any one of the subsidiary courts, depending mainly on their proximity.

9 R.CABRILLAC and alii, "Theory of freedoms and fundamental rights, Dalloz, Paris, 1999, p. 439.

10 According to article 162 on the code of legal structure and authority, the High Courts are qualified to hear at the first level, disputes arising from cases handled by the Peace Tribunal

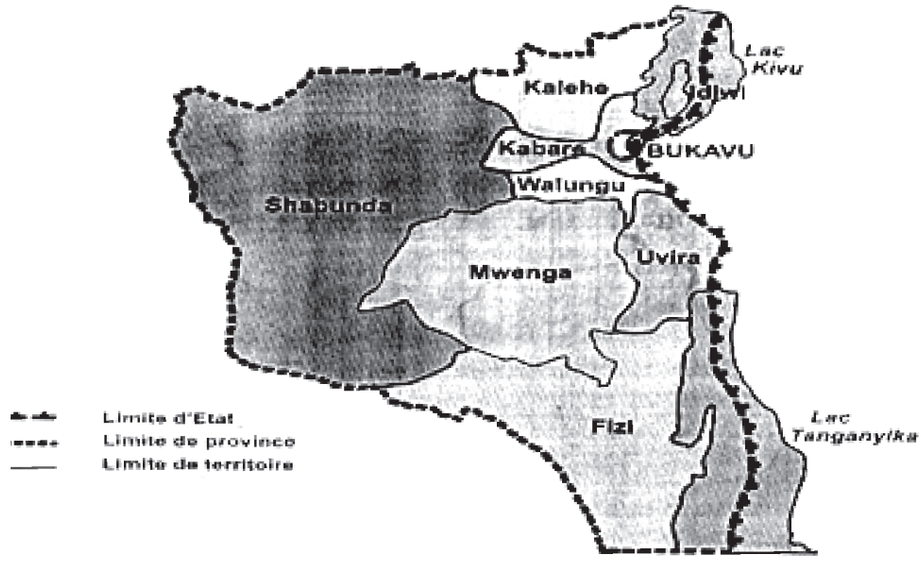
The three subsidiary courts have helped to decongest the main court at Uvira. In addition, they have, to a certain extent, brought justice closer to the citizens, allowing some measure of access to justice for inhabitants of these areas.

However, the problem of access to justice persists. The three subsidiary courts have only been established in three regions. The four other regions (Uvira is exempted as it houses the main court) have none. The residents of these other regions are forced to travel long distances to Uvira, Kavumu, Shabunda or Kamituga. This problem is further aggravated by the bad state of the roads, which are in a bad state of disrepair. At river crossings, the bridges have either collapsed or are on the verge of collapse.

In view of the afore-mentioned scenario, there is an urgent need to establish a Peace Tribunal and at least a subsidiary of the High Court in each region. Such a move would not only allow access to first level of justice but also to an appeals court.

The afore-cited text may be criticized because it envisages the possibility of establishing a single Peace Tribunal for several towns or regions[11]. This structure does not take into consideration the fact that regions in the Democratic Republic of Congo in general and in South Kivu in particular cover vast geographical areas and the road infrastructure connecting them is practically unusable due to its poor state; thereby making it difficult to move from one place to another.

The Map of the province of South Kivu below illustrates the administrative set-up of the regions.



Source: Internal Division of the South Kivu province

According to the cited text, only subordinate courts, Peace Tribunals to be precise, should be established in the regions of the republic[12]. It follows therefore that to appeal against rulings made by these courts; residents of rural areas have to present their cases before High Courts which are located in the cities, in accordance with article 31 of the text under consideration.

It is true that the situation in the rural parts of South Kivu is slightly unique. There is in fact,

11 Code of legal structure and authority, article 22, paragraph 2
12 Ibidem, article 22, paragraph 1

a High Court in Uvira region. This court has three subsidiary courts located at Kavumu (Kabare region), at Shabunda (in Shabunda region) and at Kamituga (Mwenga region). This uniqueness stems from the fact that High Courts should be established in a city or a district[13] in accordance with the law[14]. However, Uvira has not yet acquired the status of a city. It is necessary to go back to the period before 1989 to find a justification for this situation. During that period, the township of Uvira was the capital of the South Kivu sub-region. In accordance with the law cited, a High Court was established at Uvira. In 1988, the province of South Kivu was split into three provinces. Each of the three sub-regions became a province. The rights acquired by the Uvira Township could not be withdrawn, although it had now become a region.

This uniqueness notwithstanding, access to High Courts for appeal purposes remains difficult. In the rural parts of South Kivu, very few people can find the means to travel to Uvira, Kavumu, Shabunda or Kamituga. Despite having a legitimate basis to contest rulings made at the subordinate courts, most of them give up lodging an appeal mainly because of poverty. It therefore becomes absolutely necessary to have jurisdictions for appeal, more precisely High Courts in these areas. This would allow citizens dissatisfied with rulings of the subordinate courts to improve their chances of having their cases reviewed by a superior court.

It is necessary to analyze the appointment and dismissal procedures of judges. This helps to understand the principles of impartiality and independence: Two principles that should under-guard the functions of magistrates. Issues pertaining to promotion will also be tackled.

I.1.B. Appointment, dismissal and promotion of judges

Procedures for the appointment, dismissal and promotion of judges affect all judges in the republic, that is, those operating in the rural and in urban areas.
According to law[15], judges are appointed, promoted and dismissed by the President of the Republic on recommendation of the Senior Council of the Judges. In reality, the President of the Republic makes appointments without soliciting the opinion of the SCJ. This practice not only violates the principle of separation of powers but also affects the principles of the independence and impartiality of magistrates. In this respect, when the late President Laurent-Désiré KABILA came to power in 1997, 315 judges were dismissed without consultation with the SCJ. More recently, in 2008, President Joseph KABILA retired 95 Judges. Moreover, he promoted two judges to the position of First President of the Supreme Court and that of Chief Government Prosecutor to the same court. In both cases, the President did not seek the opinion of the SCJ. It is true that at the time of the last two presidential actions, the SCJ had not been established. However, let us note that in the absence of the SCJ, the president should have consulted with the 1st President of the Supreme Court and the Chief Government prosecutor over the appointment, dismissal and promotion of judges in the prosecutor's office and those on the bench. Concerning the recent promotions and retirement, the President did not consult any of these judicial authorities or at the very least the senior judges occupying the offices of the First President of the Supreme Court and that of the Chief Government Prosecutor at the SCJ.

13 Since the advent to power of Laurent-Désire Kabila in 1997, the term "District" has been restored in place of "sub-region"

14 Code of legal structure and jurisdiction, article 31 1st paragraph: *"There is one or several High Courts in every town and every district"*.

15 Order n°88-056 of 26th September 1988 on the status of magistrates, article 10 paragraph 3 and article 42-Order on organization of the Judicature of 21 May 1993 article 11.

It emerges from the above that the Executive interferes a lot with the judiciary. In such a situation, the independence and impartiality of the judiciary can only be reduced when it comes to handling cases involving the government. Fear of being suspended, dismissed or transferred will push the judges to make decisions in favour of the ruling class.

Once established, it is important that the SCJ effectively plays its role as mandated by the Congolese Constitution namely the appointment, promotion and dismissal of judges.
The said constitution actually states the following: "The SCJ is the body charged with running the judiciary. It makes recommendations for the appointment, promotion and dismissal of judges".[16]

To improve the right to access justice under statute law by the rural residents of South Kivu, it is important to identify before hand, the obstacles faced by the people in question.

I.2 FACTORS HINDERING ACCESS TO JUSTICE UNDER STATUTE LAW IN THE RURAL PARTS OF SOUTH KIVU

For the majority of people living in the rural areas of South Kivu, access to justice under statute law is a luxury. This situation is the result of a number of obstacles. It is appropriate to first outline the major ones before analyzing them more critically. The obstacles are as follows:

- Insufficient number of Peace Tribunals and High Courts;
- The long distance between the residence of people facing trial and a competent court;
- The poverty of rural residents;
- Ignorance of rights;
- Slow pace of the judicial process;
- Corrupt magistrates.

I.2.*A.* Insufficient number of Peace Tribunals and High Courts

As mentioned above, only the regions of Uvira, Mwenga and Kalehe have Peace Tribunals, twenty seven years after the pronouncement of a text establishing this type of legal structure. The five other regions do not have any. Each of these regions covers a large geographical area. For example, the region of Shabunda, situated 340 kilometers from the city of Bukavu, has an area almost equal to that of the Republic of Rwanda.

In addition, the bulk of the inhabitants of South Kivu live in these regions. The few courts of statute law that exist are located in Uvira, Mwenga, Kabare (Kavumu) and Shabunda. In the last two regions, the problem has not been completely resolved since the courts in question are High Courts that can in principle[17] only handle cases at the first level as appeals have to be lodged before the appeals court in Bukavu. It is because of the absence of Peace Tribunals in these regions that one has to travel to Bukavu for appeals. If there were Peace Tribunals in these regions, then appeals would be heard before the High Courts.

In view of the above-mentioned situation, a large part of the rural population of South Kivu encounters enormous difficulty in accessing courts of statute law. Consequently, many cases settled under statute law are not heard before courts of statute law. This situation is prejudicial to the person who would have won the case. In this context, the rule of law

16 Constitution of 18th February 2006, article 152 paragraphs 1 and 3.
17 Exceptionally, High Courts can rule at the first and last level of justice when handling cases arising from rulings of the Peace Tribunals.

appears to be a myth when a person facing trial cannot have his or her rights restored under written law for the sole mistake of living in the rural areas.

The situation described above is a perfect example of what we call "the legal divide"[18] in relation to the 30% or 12.5%[19] of urban residents who have at their disposal, a variety of legal structures. This legal divide jeopardizes the right to access a court which means the right that a physical or moral person possesses to access justice and to exercise his or her rights before a court of law."[20]

I.2.B. Distance between the residence of the person facing trial and a competent court.

This situation is a natural consequence of inadequate courts of statute law. People facing trial are forced to travel long distances to reach either the courts based at Uvira or the three subsidiaries of the High Court situated at Kavumu, Shabunda and Kamituga respectively. Even after accessing these courts, accused persons dissatisfied with rulings at the first level have to travel to Bukavu to lodge an appeal at the appeals court of Bukavu. Let us take note of the fact that the High Court of Bukavu has its jurisdiction limited to the city of Bukavu.

The state of the roads renders the above situation even more difficult. Under such conditions, moving from one area to another or leaving one area to go to Bukavu, even in a vehicle is extremely difficult. To get to its destination, a vehicle can take two weeks, or even more. The poor state of the roads has promoted the use of air transport to connect on the one hand, certain rural areas of South Kivu to one another and on the other hand, the rural areas to the city of Bukavu. Here again, only a tiny fragment of the rural population can afford such a luxury.

The problem of distance leads many citizens to give up their pursuit for justice before courts of statute law.

I.2.*C.* The poverty of rural residents

The residents of the rural parts of South Kivu are for the most part very poor. There are hardly any jobs in their area and unemployment is very high. The youth dream only of leaving their homes to seek employment in the towns.

The cost of justice and legal action that these rural residents are subjected to are similar to those charged to urban residents. These fees thus reveal the lack of harmony with incomes of rural residents. We had mentioned earlier that the total fees chargeable amount to 95 US $ while the average monthly income of rural residents is about 28 US$. In this respect, most rural residents consider the legal process expensive and therefore beyond their reach.

Commenting on the fees, a court clerk declared: "The cost of justice and legal action are too

18 The legal divide in this context describes the disparity which exists between legal structures located in urban areas and those in rural areas. It implies a strong accessibility to those structures for urban dwellers on the one hand and poor accessibility for rural dwellers on the other hand.

19 We recollect that according to the study "Innovation, security and improvement of living condition of rural populations of South Kivu" conducted by the Catholic University of South Kivu, the Urban population of South Kivu is estimated at 30%. On the other hand, according to the Provincial Interior Division of South Kivu, the urban population was put at 12.5% in 2007.

20 S. Guinchard and M. Brandac, Procedural law, common law and comparative procedural law, 3rd ed, Dalloz, Paris, 2005, P. 382

high in relation to the incomes of the accused. This explains to a large extent the infrequent attendance of our court by the accused. It even happens sometimes that the person who has won the case is incapable of paying the different fees charged. Consequently, the decision is either not executed or is delayed. As though that is not enough, magistrates charge illegal fees in addition to the legal fees"[21].

The problem arising from a lack of harmony between fees and incomes is certainly lessened by the issuing of certificates of destitution. This is a certificate issued by the governor of the region, in which the latter acknowledges the state of destitution of the person facing trial. This certified state of destitution frees the accused person from the obligation of paying for justice and legal action.

It is worth noting that the regional authority is not very eager to issue these certificates to people who consider themselves destitute. This attitude can be explained in part by the fact that most applicants make the request only after initiating legal action. Once they become aware of the financial demands of the legal process, even the few who are financially capable will run to the governor to ask for a certificate of destitution. This leads the governor to think that the alleged destitution may not be genuine. It is true that investigations are meant to be conducted before the certificate of destitution is issued. But here again another problem arises, that of the integrity of the investigators. Often, the latter are corrupted by the applicants so that they may convince the authorities to issue them with the certificate of destitution.

I.2.D. Ignorance of rights

The rights under discussion here are individual rights. The ignorance of these rights is mainly due to illiteracy and lack of knowledge of the law. Note that the rate of illiteracy in South Kivu stands at 31.5% of the entire rural population.

In the rural parts of South Kivu, most people are ignorant of their rights, even the most basic such as the right to a fair trial. In such a context, seeking justice before a judge is a rarity while rights remain violated.

The Congolese state should develop a policy on the fight against illiteracy and on spreading information about the law. Such a policy would enable the rural residents to know their rights and to exercise them before a judge when they are violated.

I.2.E. The slow pace of the judicial process

The duration of cases differ depending on whether they are civil or criminal. Under normal circumstances, a civil case should not go beyond two months[22]. As far as criminal cases are concerned, it is impossible to determine the legal duration except in cases of sexual violence and blatant and deliberate offences. In these two situations, the legal process is either accelerated or shortened. All in all, when it comes to criminal cases, the principle applied is that of the shortest time possible. This is a principle that is abstract and ambiguous and whose interpretation is left at the sole discretion of the judges. In practice, the judicial process is as slow in the urban areas as it is in the rural areas. We have noticed that certain

21 Interview with Mr. ELOCO WILONDJA, clerk at the Peace Tribunal of Uvira, 29th December, 2008

22 The two months are obtained by counting three legal adjournments, each lasting fifteen days. Added to that are the eight days accorded to the legal officer to publish his notice and eight days for the deliberations. The total comes to 61 days, that is two months

cases can last five years, or even more. This slowness of the judicial process has contributed significantly to the negative view of justice especially in rural areas. Some rulings are made when the people on trial are already demotivated and are no longer interested in the case. Such situations discourage others from presenting their cases before courts of statute law.

I.2.F. Corrupt Magistrates

Corruption poisons the office of judges in Congo, whether in rural or urban areas. In South Kivu, residents of the rural areas know that they cannot have their cases judged objectively without corrupting the judge. In most cases, only the few, who are ready to bribe present their cases before judges. On the other hand, the majority, some of whom may have legitimate rights to exercise, give them up for lack of money for bribery or simple because they do not want to bribe. It is not unusual for judges to sometimes prolong the judicial process so as to obtain as much money as possible from the person on trial.

I.3. EFFORTS TOWARDS IMPROVEMENT OF RIGHT OF ACCESS TO STATUTE LAW IN RURAL AREAS OF SOUTH KIVU

These efforts can be summarized as follows:

- Free legal assistance
- External hearings.

Free legal assistance enables urban and rural residents who have proven their inability to pay for legal services, to exercise their rights before a court of statute law. They are normally assisted by advocates either provided by the Bar, or by an NGO involved in the protection of human rights. The latter play an important role in promoting the right to a fair trial by organizing free legal assistance. Some of these such as ASF (Advocates without Borders), APRODEPED[23] (Association for the Protection and Defense of Marginalized People) and Inheritors of Justice have established feelers in the rural parts of South Kivu. These feelers receive complaints which are then set and defended before a court of statute law. However, we note that due to financial constraints, these NGOs cannot extend their services to cover all rural areas. Consequently, they cannot meet all the needs for free legal assistance.

External hearings on the other hand imply a situation where a court can have a sitting at a venue outside its normal sitting. Their purpose is to bring justice closer to the citizens. When these hearings take place in rural areas of South Kivu, they make it possible for the residents to have their cases heard by courts of statute law. At the operational level, judges sitting at these external hearings are presented with numerous files which they have to examine and handle within a relatively short period so that they can go back to the normal court seating. The result is that a court may be forced to pass a ruling sometimes on 20 cases in a day. The efficiency of such work, done in such a hurry is questionable. Likewise, the chances of having the rules of fairness respected are reduced.

As we shall see in the next few pages, general corruption in the magistrate's office is

23 Under its program "Legal assistance for prisoners, detainees, victims of human rights violations and the poor facing legal problems in South Kivu province", this association gave legal assistance to 787 people living in the rural parts of South Kivu. In addition 361 cases were brought before the courts thanks to the legal assistance provided by APRODEPED. Some of the parties with stakes in these cases were from South Kivu.

partially responsible for the success of traditional courts in rural parts of South Kivu.

II. TRADITIONAL COURTS AND THE RIGHT TO A FAIR TRIAL IN RURAL PARTS OF SOUTH KIVU

In the Democratic Republic of Congo, the integration of traditional courts into the legal system was instituted through the decree of 15th April 1926. This decree has creating new legal authorities to serve indigenous communities living outside extra customary centres[24]

This type of legal structure termed "indigenous" was organized to run parallel to the normal legal structure; the only connection between the two being the supervisory authority conferred upon public legal officers.

Currently the existence of traditional courts is on a temporary basis as these should cease to exist once a Peace Tribunal is established. This arrangement is based on the code of legal structure and authority which clearly states that: "traditional structures will exist until the establishment of Peace Tribunals"[25].

In rural parts of South Kivu, three Peace Tribunals have so far been established. These are the Peace Tribunals of Uvira, Mwenga and Kalehe. From a legal perspective, these structures have replaced the traditional courts operating in these regions.

In Uvira region, only two traditional courts have been dissolved. These are the township court and the regional court. On the other hand, traditional courts based at Kabindula, Kiliba, Luvungi, Runingu, Makobola, and Kamanyola continue to function, despite interdictions issued by the government prosecutor based at the High Court at Uvira. Notice that in the other two regions (Mwenga and Kalehe), all traditional courts are still functioning.

Asked why attendance to traditional courts persisted despite the establishment of Peace Tribunals, a former traditional judge responded as follows: "The procedure in traditional courts is quick. This speed in the judicial processes leads some people to withdraw their cases from the High Court and Peace Tribunals, to bring them before traditional courts. There, cases take 3 to 5 years or more while in traditional courts, they take one to two weeks. Most of those facing trial like the use of mediation to reconcile people as adopted by traditional judges. Moreover, corruption, which is common in courts of statute law is non-existent. As for the cost of the legal process, traditional justice is less costly than justice under statute law which impoverishes the people"[26].

Traditional courts are varied and spread into all regions of the South Kivu province.
It is appropriate to outline their structure before analyzing their role in accessing justice.

II.1. TRADITIONAL COURTS ESTABLISHED IN RURAL PARTS OF SOUTH KIVU

The following traditional courts operate in rural areas of South Kivu:

- Regional courts
- Township courts

24 A. Rubbens, *The Congolese judiciary: Legal Power, organization and authority,* T1, Larcier, Bruxelles, 1970, p.166.
25 Code of legal structure and authority, article 163.
26 Interview with Mr. BISANDE KYUBATI, former vice president of the township court of Uvira on 27th December 2008.

- Village courts
- Community courts
- Section courts

II.I. A. Regional courts

These are the highest ranking courts in the category of traditional courts. According to the coordinated decrees on traditional courts[27], there is a regional court in every region. Before the establishment of Peace Tribunals in Uvira, Mwenga and Kalehe regions, there were eight regional courts in Kivu province. Currently, there remains five; those of the above-mentioned regions having been dissolved following the establishment of Peace Tribunals in the regions.

A defense counsel[28] at the High Court in Uvira noted that dissolving regional courts has not been easy. The public prosecutor has in fact met with resistance from traditional judges. Likewise, persons facing trial do not show much enthusiasm with regard to courts of statute law. This attitude can be explained by their attachment to their customs. Moreover, as cited earlier by the traditional judge, people facing trial value mediation as it is this method that best preserves social order. The procedures before traditional courts are largely concerned with seeking reconciliation between the parties. René David echoes the same sentiment and declares: "*The role of justice is to produce an amicable settlement between the parties rather than to sanction rights. We are not seeking to attribute each person his or her dues. In the African setting, what is considered right is primarily that which will ensure cohesion of the group and restore harmony and good understanding between members. Traditional justice presents itself more as a peace-keeping organ rather that an institution for the strict application of the law. It aims at reconciling the parties and restoring harmony in the community*".[29]

II. B. Township Courts

The coordinated decrees on traditional courts, which organize their structure, do not specify whether every township should have one. In the Democratic Republic of Congo, the term township designates a sizeable collection of settlements within a rural setting.

In South Kivu, three such settlements qualify to be called townships. These are Uvira, Shabunda and Kamituga. Township courts have been established in those areas. However, the township courts of Uvira and Kamituga do not exist, legally speaking because of the existence of Peace Tribunals in those areas. In reality, the two township courts are operating illegally. In Uvira, there was a stronger resistance than that presented by traditional judges of regional courts.

II.1.C. Village courts

There exists a village court in every village[30]. There are twenty three villages in South Kivu province and each has a village court. Under the Congolese administrative structure, the term village designates a rural entity under the authority of a traditional chief. Currently the term village is merged with the term "chiefdom". We therefore talk of village-chiefdoms to

27 Coordinated decrees on traditional courts, article 1.

28 A defense counsel, like an advocate is a justice auxiliary who has a limited power of representation. He cannot represent a client outside the High Court. The office was instituted by law because of the inadequate number of advocates in the Republic.

29 R. David, The Great systems of modern law, Dalloz, Paris, 1982, p. 566.

30 Coordinated decrees on traditional courts, article 1

emphasize the predominantly traditional nature of the rural entity.
As a result, the merger of the two terms has given rise to the term village-chiefdom courts.

Concerning the village-chiefdoms of Bavira and Bafuliro (situated in the region of Uvira) as well as those in Mwenga and Kalehe, note that their respective courts should have ceased to exist at the establishment of Peace Tribunals in these regions. The legal order was completely ignored by traditional chiefs of the pre-stated villages who also preside over the courts in their respective villages. Incidentally, the village-chiefdom court of Bavira is situated right next to the Peace Tribunal of Uvira, in the Kabindula area and operates in full view and with full knowledge of public authorities who supposedly respect the law.

According to the clerk at the Peace Tribunal at Uvira, efforts have been made to end this structural dualism in the region but to no avail. He reported the following: "All the efforts made by the public prosecutor based at the High Court in Uvira have ended in failure. Three times, this legal authority has issued notices of closure to traditional courts operating in the region. These notifications have been consigned to the non-received status, notably by the presidents of the said authorities, more precisely the traditional chiefs of Bavira and Bafuliro village-chiefdoms. The prosecutor had simultaneously suggested a remedy to the gap that could result from the dissolution of traditional courts. The prosecutor proposed the organization of external sittings of Peace Tribunals in areas where traditional courts are based. The traditional chiefs and their judges rejected this offer as well"[31]

The lack of respect for the law displayed mainly by the traditional chiefs is as a result of conservatism and the fear of losing jurisdiction powers which allow them to exercise authority over their subjects. The economic and financial dimension can also not be ignored as justice is a source of income for traditional chiefs and the judges who work with them.

II.1.D. Community courts

From the outset, it is important to note that communities are administrative divisions that make up a village. Consequently, community courts may be considered as subsidiary courts to village courts so long as traditional legal authorities exist within the said communities[32]. In South Kivu, all traditional communities, totaling 184, each have a community court. In Uvira, Mwenga and Kalehe which all have Peace Tribunals, community courts continue to operate. The same applies to Uvira region where community courts of Sange, Kiliba, Runingu, Luvingu, Luberizi, Kamanyola and Makobola 1 and 2 are still operational.

II.1.E. Sector Courts

In the rural setting, the sector is the lowest administrative division. In principle, each sector has a sector court.

In South Kivu, the majority of sectors have a sector court presided over by heads of sector.

To avoid conflict over jurisdiction, the coordinated decrees on traditional courts have fixed the authority of these courts. It is important to look at these jurisdictions.

31 Interview with Mr. ELOCO WILONDJA, clerk at the Peace Tribunal of Uvira, 29th December 2008.
32 Coordinated decrees on traditional courts, article 1

III.2. AUTHORITY OF TRADITIONAL COURTS[33]

Traditional courts handle disputes between citizens of the Democratic Republic of Congo or neighbouring countries under the following conditions:

1. That the disputes must not be under the jurisdiction of statute law.
2. That the defendant is within the area of jurisdiction of the court.

In relation to citizens of the Democratic Republic of Congo, traditional courts handle acts which do not provide sufficient grounds for a case between two private individuals but which are forbidden by customs or by a statute which expressly places it within the jurisdiction of traditional courts.

The authority of traditional courts is subject to two conditions as stated below:

1. That the act was committed within the area of jurisdiction of the court
2. That the defendant is found in this area.

The regional or township court, at the exclusion of any other court, handles cases in which:

1. A soldier in the course of duty, a representative of the administration, of the judiciary or the police force, a judge, an administrative officer or a holder of a public merit card is the defendant.
2. A judge, an authority of an administrative division or a holder of a public merit card is the plaintiff.

In reality, traditional courts often handle cases which are not within their areas of jurisdiction. This situation is the reason for the quashing of many rulings made by the said courts. Out of the 21 rulings contested before the High Court at Kavumu and Uvira, 14 were quashed on grounds of wrong jurisdiction. In this paper, only three cases will be analyzed. The three cases represent a sample of the main traditional courts established in South Kivu. Each of those cases raises a specific problem, different from the common one of violation of regulations pertaining to matters of authority. The cases are as follows:

- CHIBINDA MAPENZI versus MWALALIRWA HABESHI[34]
- LUBUNDO KAMO versus NTABUGI KAHIRIRHA[35]
- BUKURU RUGOHEZA versus MAHERUKA KAGOMBE[36]

II.2.A. CHIBINDA MAPENZI VERSUS MWALALIRWA HABESHI

In this case, MAPENZI, a widow, is accused before the regional court at its subsidiary at Banyankiri by Mr. MWALALIRWA HABESHI, brother of CHIBINDA HABESHI, late husband to MAPENZI.

MAPENZI is accused of having forcefully entered the house left by her late husband and taken property left by her late husband despite having requested to leave the home before her mother in law and her own family with the intent of marrying another man. She had signed a document to this effect which she had left with her mother in law.

33 Decrees on traditional courts, chapter II

34 CHIBINDA MAPENZI versus MWALALIRWA HABESHI, Subsidiary High Court of Kavumu,, nullification list, 18th April 2007, Unedited.

35 LUBUNDO KAMO versus NTABUGI KAHIRIRHA, Subsidiary High Court of Kavumu, nullification list, 1st March 2002, unedited.

36 BUKURU RUGOHEZA versus MAHERUKA KAGOMBE, High Court of Uvira, nullification list, 29th May 2001, Unedited.

The widow MAPENZI is condemned to a fine of 20 US $ by the traditional court or 20 days of labour in default. At the same time, the court also decided that MWALAWIRA HABESHI is the heir to the property left by his late brother CHIBINDA HABESHI which he should manage on behalf of the child AKILIMALI HABESHI (less than 18 years of age until he attains adulthood. AKILIMALI is the only son borne of the union between CHIBINDA and MAPENZI.

The judges were ignorant of the fact that succession matters are governed by statute law, more precisely, family law. That being the case, succession matters are within the jurisdiction of courts of statute law such as Peace Tribunals and in the absence of such, a High Court. On request by the widow, MAPENZI, the public ministry presented a request before the High Court at Kavumu to have the ruling by the traditional court quashed. This court quashed the ruling on grounds of wrong jurisdiction.

Apart from the problem of lack of respect of authority by traditional judges, another problem deserves to be highlighted: This concerns the violation of women's rights. Judges do not consider that a woman could have rights over property left by her husband following the dissolution of a marriage. Likewise, despite the fact that the Congolese succession law recognizes a married woman as a second category heir[37], traditional judges only recognize the children as heirs. Consequently, only the children have the right over the property left by their father.

Evidently, these traditional regulations are against the law, and more precisely, against the principle of gender equality enshrined in the law in matters pertaining to succession.

II.2.B. LUBUNDO KAMO versus Madam NTABUGI KAHIRIRHA

In this case, Madam NTABUGI KAHIRIRHA had taken LUBUNDO KAMO before the village court of Ntambuka on allegations that the latter had invaded her farm, bequeathed to her by her deceased father and that he continues to cultivate it illegally. The village court ruled in favour of Madam NTABUGI and ordered LUBUNDO to restitute the disputed farm. Mr. LUBUNDO presented a request for nullification before the subsidiary High Court at Kavumu. He highlighted the fact that the traditional court had ruled on a land case which is under the jurisdiction of the High Court, in the absence of a Peace Tribunal; in accordance with article 162 of the Code of legal structures and authority which stipulates that matters governed by statute law are beyond the jurisdiction of traditional courts. The ruling by the village- chiefdom court was quashed on grounds of wrong jurisdiction.

It is very rare for traditional courts to assess in advance the question of authority. In most cases, they receive and judge all cases presented to them. This kind of practice increases the likelihood of having rulings made in those courts nullified.

II.2.C BUKURU RUGOHEKA versus MAHERUKA KAGOMBE

In this case, Mr. BUKURU RUGOHEKA is accused by Mr. MAHERUKA KAGOMBE before the township court of Uvira, at its subsidiary sitting at Kavinvira, of having misappropriated money that he had given him for the purchase of a vehicle in Bujumbura. Mr. BUKURU

37 Family code, article 758 litera b.

loses the case which demands that he reimburses the plaintiff the full amount received (700,000 Burundian francs) within 60 days as well as pay a fine.

Mr. BUKURU contested the judgment, putting forward a request for nullification before the public prosecutor's officer based the High Court in Uvira. After examining the case, the court nullified the ruling on grounds of wrong jurisdiction by the traditional court.
In his ruling, the High Court at Uvira stated that the township at Uvira had ruled on the crime of fraud rather than breach of confidence.
It is not unusual as seen in this case, for traditional judges, in ignorance of their authority, to wrongly assess cases. This doubtlessly raises the question of their level of training.

II.3. TRAINING OF TRADITIONAL JUDGES

The Congolese law is silent on the training of traditional judges. There is therefore no training required of these judges. All that is necessary is for one to be considered "wise", which implies that the person should be fairly advanced in age. In this regard, it is assumed that a long experience as a traditional judge means that the person has adequately mastered the local customs, and can therefore competently handle his tasks. It is for this reason that there are no young people functioning as judges in the traditional court system. Young people are thus considered inexperienced and as having insufficient knowledge of local traditional customs.

This "traditional" concept of training is restrictive. It is does not recognize the fact that traditional justice is an integral part of the Congolese legal system and that that being the case, there is a connection between customary law and statute law; a connection that is sealed notably by the Code of legal structures and authority. The knowledge of traditional judges should therefore be complemented by a short training on statute law. This kind of training has been necessitated by the high number of rulings by traditional judges which are nullified over wrong jurisdiction. The training would also help the traditional judges to avoid making mistakes pertaining to their authority. The authority vested with the power of nomination and revocation should henceforth take into consideration such training. The same applies to the credibility of the training.

II.4. APPOINTMENT AND DISMISSAL OF TRADITIONAL JUDGES

First we shall look at how the appointments are made and secondly, we shall look at dismissal.

II.4.A. Appointment

According to the terms of articles 4 to 6 of the decree of 16th September, 1959, judges of village tribunals are appointed by the District Commissioner or the Town Commissioner, as the case may be, from among eminent people in the village. Heads of communities incorporated into the village are by law, members of the court. Judges of township courts are appointed by the District Commissioner or the Town Commissioner, as the case may be.

The governor of a region or whoever is mandated as such is by law the President of the regional court. The assistant governor of the region or whoever is mandated as such is by law is the vice President. The District Commissioner may through a notice of the public affairs ministry, appoint one or two additional vice Presidents to the regional court.

From the above scenario, it emerges that political authorities, particularly the District Commissioner and Town Commissioner wield great power in the nomination of judges of the main traditional courts. One can therefore question the degree of independence and partiality vis-à-vis the appointing authorities when the interests of the latter are threatened. It is also appalling to note that the law does not provide these officers with any criteria to guide them on the appointment process, except for the village courts whose judges must be appointed from among eminent persons. Even in this case, one can point out that there are no fixed criteria do determine who is an eminent person. In this respect, the decision on who is eminent has been left at the discretion of political authorities.

The law cited above remains silent on the appointment of judges to community and sector courts. In practice, these judges are appointed by governors of regions who are also political authorities.

II.4.B. Dismissal

Concerning dismissal, the law is silent. By virtue of the principle of parallelism of structures and authority, which claims that the appointing authority should be the dismissing authority, the District Commissioners and the Town Commissioners have the power to dismiss traditional judges. Such power doubtlessly brings back the fear of the judges losing their independence vis-à-vis the political authorities which have power to dismiss them.

It is appropriate at this moment to examine the composition of the bench in traditional courts.

III.5. COMPOSITION OF THE BENCH

According to articles 4 to 6 of the decree of 16th September, 1959, the sitting of the main village court will be considered valid if half of the members, or at least five of them including the president are present. The composition of the subsidiary village courts are determined by customs.

Township courts sit with one or two judges. In the latter case, one of them is appointed chair person. The regional court is composed of one president and two or several assessors, chosen by the president from among the judges of the courts in the area.

It is important to note that the law is silent on the composition of the bench in community and sector courts. In that case, the composition of the bench can only be determined by the local customs.

For the traditional courts where the composition of the bench is determined by law, it happens that the legal composition cannot be respected. The result is that rulings made under such circumstances are likely to be nullified before courts of statute law. In the following cases, for example, the rulings were nullified because of irregular composition of the bench:

MIRINDI GANYWAMULUME versus BALAGIZI RWESI[38]
BAGALWA SHABIHANGO versus NAMANTU BARHAYIGA[39]

38 The case of MIRINDI GANYWAMULUME versus BALAGIZI RWESI, Subsidiary court of the Kavumu High Court, nullification list, 29th March, 2007, unedited.

39 The case of BAGALWA SHABIHANGO versus NAMANTU BARHAYIGA, subsidiary court of the High Court in Kavumu, nullification list, 28th December 2007, Unedited.

II.5.A. MIRINDI GANYWAMULUME versus BALAGIZI RWESI

In this case, the main village-chiefdom court of Kalonge, composed of 4 judges, had issued a ruling against Mr. MIRINDI. The latter contested the ruling of the traditional court on grounds that it had violated the provisions of article 4 of the coordinated decrees on traditional courts on the composition of the bench. According to article 4 of the above-mentioned decree, the main village-chiefdom court may legally sit if half the members or at least five of them, including the president are present.

Mr. MIRINDI requested for a nullification of the ruling by the traditional court before the prosecutor sitting at the subsidiary court of the High Court of Kavumu. After examining the request, the court ruled that the composition of 4 people was irregular and nullified the ruling. It was even discovered that 2 of the people that sat on the bench were not qualified to be judges.

The even number 4 is considered irregular as it makes it impossible for the judges to reach a decision when a case is debated upon and when after voting, the vote is split in half. Such a situation cannot arise with an odd number of judges (3 or 5).

In this case, the composition of the bench is unique. The bench is not entirely composed of traditional judges. It includes two members who are not judges notably, the administrative secretary of the village. The problem of irregular composition of the bench is compounded by the presence of people who are not qualified to be judges. This practice is highly illegal as nowhere in the coordinated decrees on traditional courts is there provision for a situation where anyone except a judge may be included on the bench.

II.5.B BAGALWA SHABIHANGO versus NAMANTU BARHAYIGA

In this case, Mr. BAGALWA had been found guilty by the main village court of Buhavu. The bench was composed of 4 people, which is irregular. Mr. BAGALWA contested the ruling before a subsidiary of the High Court of Kavumu on grounds of irregular composition. He won the case and the ruling made by the traditional court was quashed.

The irregular composition of the bench can only highlight the ignorance and/or the lack of seriousness manifested by some traditional judges. The composition of the bench is a matter that should be confirmed at the beginning of the process (*in limine litis*). It is appropriate at this point to examine the procedures applied by traditional courts.

II.6. PROCEDURES BEFORE TRADITIONAL COURTS

The procedures that will be examined here are application of rules pertaining to the following: submission, investigation, revision, appeal, execution and duration.

II.6.A. Rules applicable

It is important to distinguish between foundational rules and structural rules.

a. Foundational rules

Traditional courts apply these rules as long as they are not contrary to public order.

Nevertheless, when the aim of the legal or regulatory provisions is to substitute some rules for customs, the traditional courts will apply these provisions[40].

The application of local customs is therefore subject to the condition that they conform to the law, to public order and to good morals. Often traditional judges do not confirm if this condition has been met before applying traditional customs. This laxity partly explains the nullification of rulings made by traditional courts in South Kivu.

b. Structural rules.

The rules governing procedure for the different courts are in principle, the customary laws of the community in a particular area of jurisdiction. Where customs are contrary to universal public order or to the principles of humanity or equity like in the absence of customs, procedure will be applied according to the rules of equity[41].

Like the foundational rules, structural rules are also not respected by traditional judges. Disrespect for these rules results in nullification of rulings on grounds of defective structure.

In the rulings examined above, which were nullified by the High Court for irregular composition, there was a breach of structural rules.

II.6.B. Submission of cases

The coordinated decrees on traditional courts are silent with regard to submission of cases before traditional courts. The rules concerning submission of cases to the courts depend therefore on the customs of the area. As a practice however, submissions are made through verbal or written complaints and on deposit of a certain amount of money. In the township court of Uvira, the plaintiff was required to deposit a sum equivalent to 2 US $ in Congolese francs; at the same time, the defendant or the accused was required to deposit an amount equivalent to 1 US $[42] in Congolese francs.

III.6.C. Investigation

Regardless of the culture, no ruling is made before the parties or their representatives are given a chance to respond to allegations or evidence of the adverse party and to prepare and argue out their cases in complete freedom[43].

This relates to the application of the principle of debate in customary matters. This principle is respected by the traditional judges of South Kivu. In this regard, a former judge expressed the following: "The township court has never made any ruling without hearing the two parties"[44]

During investigation before traditional courts, personal appearance is established in accordance with the rules as "the defendant or the accused who does not appear in person can be issued with an order by the court which is delivered by one of the judges or a court clerk"[45]. It is important to note that this rule only affects the accused party.

40 Coordinated decrees on traditional courts, article 18
41 *Idem,* article 25
42 Interview with Mr. BISANDE KYUBATI, former Vice President of the township court of Uvira, 27th December, 2008
43 Coordinated decrees on traditional courts, article 26
44 Interview with Mr. BISANDE KYUBATI, former Vice President of the township court of Uvira, 28th December, 2008.
45 Coordinated decrees on traditional courts, article 27

The traditional concept of investigation is doubtlessly better placed to ensure social order as the parties in dispute have an opportunity to reconcile with each other. However, this concept can generate a feeling of impunity in the person guilty of reprehensible acts. The knowledge of the fact that judges will concentrate their efforts on reconciliation may lead the guilty person to develop such a feeling. In such a case, the risk of a repeat offence increases to the detriment of the society whose harmony the traditional judges seem obsessed with. In addition, the deterrent effect on potential delinquents is reduced in case of compromise because of the weak dissuading effect of the sentence.

II.6.D. Revision

The power of review is the power given to a superior traditional court to modify part of the pronouncements of a ruling issued by a subordinate court.

The power of revision can only be exercised if the request for revision is officially made not more than three months from the day of the ruling of the case to be reviewed[46]. In all cases, the revision can only be effected after the parties have been heard in debate or have been summoned in due course by the reviewing court. Any of the parties who does not appear before the court may be summoned irrespective of the role he or she played in the case to be reviewed[47].

In as far as the review process is concerned, personal appearance of the defendant or the accused as well as the plaintiff is required. In reality, the three month limit is not respected by many traditional judges in South Kivu. This is mainly due to ignorance of statute law by the said judges.

II.6.E. Appeal[48]

The High Court (Court of statute law) handles appeals on initial rulings issued by regional courts and town courts. The option to appeal is open to:

1. In cases where a sentence has been pronounced:
    - The accused parties
    - The person publicly and customarily responsible
    - The aggrieved party only in relation to his civil interests.
    - The public affairs minister.

2. In other cases, the appeal option is open to the parties or in default, their representatives.

In the rural areas, only rulings made by regional courts may be susceptible to appeal before a court of statute law, more precisely, the High Court. Rulings from other courts established in the region can only be revised by a similar but higher court. The public affairs ministry or the parties are required to lodge an appeal within three months of the pronouncement of judgment, through a written declaration made to the clerk of the court that issued the ruling or the clerk of the court where the appeal is to be heard.

In practice, even if the parties fail to respect the legal period for lodging an appeal, greedy court clerks still receive the request and proceed to change the date to make it appear to fall

46 *Ibidem,* article 27
47 *Ibidem,* article 33
48 *Idem,* article 36

within the legally acceptable period. They then collect bribes from the interested parties.

II.6.F. Execution

The rulings of traditional courts are effective from the day when they are made or if made in absentia, then they are effective from the day of their signing, unless the execution of the ruling has been suspended. The governor of the territory or one occupying the said office whichever the case, participates as much as possible in their execution[49]. Access to justice can only make sense once a ruling is made. However, this ruling can only exist in a concrete manner when it is executed. The means of execution in themselves are therefore the logical goals of fundamental rights as they are the ultimate manifestation of rights[50]. In practice, the rulings are executed only after a period of time is accorded to the loser to settle his or her financial obligations to the state, fines and court charges. The amount of time accorded to the loser varies from court to court.

The ruling made by the township court of Uvira was executed after the expiry of the 7 days that had been given to the loser[51].

The coordinated decrees on traditional courts have provisions for incarceration as a way of serving sentence by the accused. They state that "whoever refuses to serve the sentence or who does not comply with an injunction or an interdiction pronounced by the traditional court may, if customs have no provisions for a penalty, be subjected to a prison sentence of not more than 30 days"[52]

In reality, incarceration is hardly used by traditional courts. They instead opt to negotiate with the losing party to get him or her to execute the sentence and avoid incarceration. It is only after this procedure has failed that incarceration is undertaken.

II.6.G. Duration of the court process

The coordinated decrees on traditional courts do not specify the period within which a case should take place. In this matter, it is presumed that the duration of a case depends on local customs. However, generally speaking, the process is quick. This swiftness in the court process partly explains the popularity of traditional courts among citizens. The process may last one to two weeks. To avoid abuse, traditional courts are supervised.

II.7. SUPERVISION OF TRADITIONAL COURTS

The public service ministry supervises the composition and activities of traditional courts within its area of jurisdiction. It issues them directives on good administration of justice. These directives are issued to other courts other than the regional court and the township court through the governor of the region or the mayor of the town. The Ministry of Public affairs has the right to obtain, even from the bench of the court, registers and other court documents. It can demand a copy of any ruling[53]. Rulings made by the traditional courts may, at the request of the Ministry of Public Affairs, be nullified by the High Court[54].

49 Coordinated decrees on traditional courts, article 37.
50 E. PETTITI and alli, *European convention on human rights,* 2nd ed., Economica, Paris, 1999
51 Interview with Mr. BISANDE KYUBATI, former vice president of the township court of Uvira, 28th December 2008
52 Coordinated decrees on traditional courts, article 24.
53 *Idem,* article 10
54 *Idem,* article 35

In reality, the Ministry of Public Affairs rarely exercises her supervisory role. Many years can go by without the ministry ever making a move to supervise the courts. In this matter, the lethargy manifested by the Ministry of Public Affairs is almost total. Whenever the ministry wakes up from its lethargy, it is not to ensure good administration of customary justice but to ask for money from the judges. A former judge denounces this practice in the following terms: "The supervision which took place had nothing to do with the way justice was dispensed. The Public Affairs ministry officials were only concerned with asking for money. Supervision has never been about the content of a case. In such a situation, one cannot talk about directives because no directive or comment was ever issued"[55].

III. PROPOSED SOLUTIONS FOR THE IMPROVEMENT OF THE RIGHT TO FAIR TRIAL IN RURAL AREAS OF SOUTH KIVU

In the face of difficulties related to the right of access in rural parts of South Kivu, the following solutions may be considered:

- Establishment of courts of statute law.
- Harmonization of the cost of justice with the standard of living of residents of rural areas.
- Poverty alleviation
- Rights education for rural residents
- Eradication of corruption

III.1. ESTABLISHMENT OF COURTS OF STATUTE LAW

As mentioned above, there is a severe shortage of courts of statute law in rural parts of South Kivu. At the moment, these rural areas comprising eight regions have only three Peace Tribunals and one High Court with three subsidiary courts.

Considering the limitations[56] manifested by these traditional courts which are incidentally widely established in these areas, there is an urgent need to establish courts of statute law. In this case, each region would have at least one Peace Tribunal. These courts would handle cases at the first level. Each region would also be equipped with one High Court or at least a subsidiary court of the same. The High Court would handle issues arising from rulings made in the Peace Tribunals.

III.2. HARMONIZATION OF THE COST OF JUSTICE WITH THE STANDARDS OF LIVING OF RESIDENTS OF RURAL AREAS

It is a well known fact that the vast majority of residents of rural parts of South Kivu are poor. For the vast majority, the court fees established by law are beyond reach. The natural consequence of this situation is that rural residents do not submit their cases before courts of statute law and instead fall back on either traditional judges or private judges (arbitrators, church leaders, local leaders etc.).

In view of what has been stated above, a harmonization of the cost of justice with the incomes of rural residents is likely to encourage the latter to submit their disputes before courts of statute law. With the average monthly income at around 28 dollars, the total cost of the legal

55 Interview with Mr. BISANDE KYUBATI, former vice president of the township court of Uvira, 28th December, 2008

56 Traditional courts sometimes act in violation of statute law and basic human rights. In this regard, the courts deny the woman in particular, the right to inheritance; a right that is enshrined in the family code. In addition, gender equality and non-discrimination against the woman are concepts that are completely alien to these courts despite the fact that the DRC is party to the United Nations Convention on the Elimination of all forms of Discrimination against Women.

process could be fixed at 10 US dollars. Access to justice will no longer be seen as a luxury reserved for a tiny minority of rural residents.

III.3. POVERTY ALLEVIATION

Economic investment in the rural parts of South Kivu is almost non-existent. There are therefore hardly any jobs and unemployment is quite high. Many people facing trial cannot access justice because of poverty as the process is expensive.

The government should not only create a conducive environment for investment in these areas but it should also direct investors based on the resources of each area. This kind of intervention would reduce unemployment and hence, poverty. It would also increase incomes; a factor that would make it possible for people facing trial to exercise their rights before judges without fear of not being able to bear the cost of the process.

III.4. RIGHTS EDUCATION FOR RURAL RESIDENTS

The vast majority of rural residents are ignorant of the rights enshrined in national and international conventions ratified by the Democratic Republic of Congo. They are ignorant of the fact that the right to a fair trial is a fundamental right provided for in the Congolese constitution and international conventions to which their country is party. Some of the reasons behind this ignorance are illiteracy, low level of education and poor dissemination of information on individual and collective rights in rural parts of South Kivu.

It is therefore imperative that the state and the province get actively involved in the fight against illiteracy and in the promotion of education in these areas. In addition, the dissemination of information on rights, through a variety of media (television, radio, posters etc.) should be intensified.

Non-Governmental Organizations dealing with human rights and local organizations should also contribute towards rights education for the benefit of rural residents.

The synergy thus created (State, NGOs, and local organizations) is likely to sensitize rural residents on their rights and of the need to exercise them in court whenever they felt aggrieved.

III.5. ERADICATION OF CORRUPTION

Corruption is a scourge that makes it difficult to access justice in rural parts of South Kivu. It is true that there are fees established by law for every step of the legal process. However, even after payment of these fees, the steps of the legal process cannot be executed by legal agents unless a bribe has been paid. This practice has discredited the judiciary before the citizens

Corruption should be fought and eradicated as a matter of urgency. This would enable those facing trial, at the very least those who can afford the legal fees, to bring their cases before judges without fear of being held at ransom for each step of the judicial process.

CONCLUSION

This study which was on the right to a fair trial in rural parts of South Kivu has come to an end. It has made an alarming observation about the implementation of this fundamental right; the right to a fair trial in the rural parts of South Kivu. Notwithstanding the fact that it is enshrined in the constitution, this right faces a number of obstacles. The few efforts made by the Congolese State towards the implementation of this right consisted of the creation of three Peace Tribunals and one main High Court with three subsidiary courts.

It is important to note that these courts of statute law have been established in five regions (Uvira, Kabare, Shabunda, Mwenga and Kalehe), out of eight regions in the province. Note also that out of out of the regions equipped with courts of statute law, only three (Uvira, Mwenga and Kalehe) have Peace Tribunals. The other two (Shabunda and Kabare) only have subsidiaries of the High Court.

The three remaining regions (Fizi, Idjwi and Walungu) have neither Peace Tribunal nor High Court. To exercise their rights, residents of these regions have to travel long distances; an expensive and dangerous venture.

We have also noticed a discord between cost of justice and incomes of rural residents. This situation leads the rural residents to consider access to justice under statute law a luxury. In this respect, they fear the cost of legal procedure, a fact that is prejudicial to their rights.

In the face of the difficulties confronting the right to a fair trial in the rural parts of South Kivu, we sought to know what could be done to improve the said right in the areas in question. We suggested that the establishment of courts of statute law in all rural areas of South Kivu would enhance access to justice. As a result, each region would have at least one Peace Tribunal and one High Court. This would enable those people dissatisfied with decisions made at the subordinate court to have them reexamined by a superior court, without having to travel to Bukavu. We also recommended the harmonization of court fees with incomes of rural residents. These suggestions would encourage rural residents to participate in the judicial process. This harmonization would also change the idea that justice is only accessible to a few.
Concerning the dualism of legal authority that prevails in rural parts of South Kivu, our research has shown us that it is not easy to resolve it as provided for in the law; by eliminating traditional courts once Peace Tribunals which are courts of statute law are established. In actual fact, in the three regions where Peace Tribunals have been established (Uvira, Mwenga and Kalehe), traditional chiefs have resisted the elimination of traditional courts. These courts continue to function illegally. Likewise, the rural residents generally prefer the maintenance of these courts.

Our wish is that future research would help establish the pre-conditions for eliminating traditional courts as required by law. This would help avoid the negative effects that could result from a sudden elimination of the said courts. You are reminded that in the three regions equipped with courts of statute law, traditional courts are still functional. Such research could also define the strategies to employ to persuade rural residents of South Kivu of the necessity of replacing traditional courts with courts of statute law.

Finally, we urge all actors in the legal arena (State, human rights NGOs, advocates, magistrates, etc.) to each contribute, in their respective capacities, to the improvement of the right to a fair trial in these areas of South Kivu. The rule of law, that every person facing trial aspires for, is well worth it.

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LEGAL PROTECTION OF FOREIGN INVESTORS BY THE NEW MINING CODE OF THE DRC: CASE OF THE MINING CENTER OF KAMITUGA

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INTRODUCTION

The paradox of the Democratic Republic of Congo is best summarized in the fact that in spite of being incredibly rich in minerals and natural resources, majority of the population wallows in poverty. In fact this country, said to be potentially rich and whose mining industry constitutes one of the factors making up its economic prosperity, is today classified among the poorest countries on this planet. There is an acute lack of proper physical and social infrastructure. The many precious raw minerals that are found underneath the Congolese earth surface remained unexploited to the detriment of the assortment of the judicial laws already in existence. The under exploitation of this sector has for a long time been tied to many factors such as lack of investors, unhealthy political climate characterized by cumbersome measures taken during the period of Zairianisation[57] and radicalization in the 1970s, of the judicial laws that were neither investor friendly nor offering incentives.

All these elements together eventually lead this sector to total collapse rendering it of less value to national life. Previously, it could be noted that as is still the case today, investors in this field were beneficiaries of one-sided contracts which enabled them to overexploit the Congolese mineral resources, much as one could notice the risks that these investors took in their activities in the absence of a legal framework to protect them from abuse by agents in public office.

Indeed, by the decree of 16th December 1910, modified and completed by the decree of 16th April, 1919, the Belgian Congo Government had streamlined research and mineral mining only in Katanga. This legislation was later repealed and replaced by the decree of 24th September, 1937 for the entire national territory. This decree remained in operation until 1967 upon the promulgation of Independent Congo's first mining legislation by the edict No. 67/231 of 3/05/1967 bearing general legislation on mines and hydrocarbons.

The latter in turn was repealed by edict No. 81-013 of 2nd April 1981 bearing general legislation on mines and hydrocarbons. The 1981 repeal did not bring about any significant changes to the 1967 edict.

It goes without saying then that the legislations promulgated after Democratic Republic

57 Zairinaisation is a measure undertaken by President Mobutu in the 70s by which all properties and companies belonging to foreigners were seized and given to nationals.

of Congo's independence, which is to say since 1967, did not attract investors but rather impacted negatively on the country's mineral production. The mining, tax, customs and change systems that had been in place offered no incentives. Apart from a few exceptions, statistics from studies carried out, showed that investment volume and mining production were higher in the period running from 1937 to 1936 compared with 1967 to 1996 because of the mining law of 1981[58]. It follows that 48 mining companies were operational during the 1937 to 1966 period as opposed to only 38 between 1967 and 1996 and 7 in the period after 1997.

Thus, the less judicial security existing, the more difficult it became to attract foreign investors. For long, this sector remained abandoned in the hands of a few audacious investors, a factor which made it difficult for any form of lasting investment in this country. The Democratic Republic of Congo rapidly found herself in a situation necessitating that she urgently make a choice: *to develop or to perish*. The choice towards development was quickly implemented. Amongst the fundamental pillars of development, the mining sector could not stay ignored; hence the urgent need to undertake reforms.

During the 90s, the World Bank progressively got involved in the development of this sector in the Democratic Republic of Congo. Certain documents testify about the suggestions made by the World Bank to the Government of Zaire encouraging it to redouble its efforts to privatize certain branches of this sector.[59] The war that plagued the country from 1995 did not make easy the implementation of these reforms hence the failure to easily attract investors.

In 2001, International Financing Organizations made a come back. With a fervent need to attract and retain them in the country, the Government will undertake a series of reforms. This transformation ordered by the Breton Wood Institutions involves converting the Democratic Republic of Congo into an attractive investor destination. Amongst the multiple reforms carried out in the different sectors are the New Investment Code, the New Forestry Code and the New Mining Code.

Concerning this observation, a fundamental question arises as to whether the Congolese legislator has succeeded through these reforms in attracting the foreign investor.

As a hypothesis, we can say that the new mining code encouraged investors to and invest overwhelmingly in the mining sector which offers many advantages in different sectors notably customs, taxation and facilitating the procedures granting mining and quarry rights. With the objective of facilitating benefits of the privileged customs system, the new code provides to the holder of the mining rights, a list of categories of goods benefiting from this system such as: the exportation of samples destined for analysis and industrial trials are exempted from any customs duty whatsoever, or any other form of taxation whatsoever. Household effects belonging to mining expatriate personnel are imported tax free.

Provision is equally provided for temporarily duty free importation for a period of up to 18 months. The preferential rates of entry rights are modeled in an increasing manner following whether it is about the research phase, of construction and development of the mine or of the mining phase. With the aim of reducing the pressure on taxation at the entry

58 Exposé des motifs du nouveau code minier de la République Démocratique du Congo.

59 Jean-Philippe MARCOUX and Mari MAZALTO, *Analyse Comparative du nouveau Code minier de la République Démocratique du Congo*, 2004, Unedited.

and exit points, it goes against the principle of non exoneration in line with the exit rights, the taxation on the turn-over at exportation and importation. The same goes for taxes on remuneration at customs at the entry and exit points.

The legislation made provision for a system through which the mining investor could benefit from tax and custom settlement likely to contribute to his/her profitability of the mining investment. It allowed in the New Mining Law, the exoneration of exit rights, of taxation on the turn-over at importation, as well as statistics rights and the administrative fees that are remuneration taxes attracted by custom services, etc

This study will essentially be carried out on the mining town of Kamituga in the Kivu-South Province. It will not be possible to touch on all the issues pertaining to legal protection of foreign investors in the Democratic Republic of Congo. The interest that we have shown in the mining town of Kamituga is best summarized by the fact that this town has for a long time been the headquarters of the Mining and Industrial Company of Kivu. (Société Minière et Industrielle du Kivu (SOMINKI)). As a result of this position, it has experienced intensive mining activities over several decades.

In order to find a solution to this complex problem, this paper proposes the following steps:

- Determine procedures proposed by the New Congolese Mining Code in order to attract more foreign investors to the Democratic Republic of Congo and more precisely at Kamituga. To this end, we will equally pick out the aspects tied to decentralization provided for by the New Mining Code and its relationship with the outcome of real Rule of Law in the Democratic Republic of Congo.
- Pick out the protective dispositions of foreign investors as provided for by the New Mining Code.
- Explain foreign investors' obligations vis-à-vis the local communities as laid down in the New Mining Code.

We will carry out methodically an analysis of law no. 007-2002 of 11 July, 2002 bearing the New Mining Code in the Democratic Republic of Congo. We will then confront it with the day to day realities on the ground at Kamituga in order to see its effectiveness. We will also use the method of interviewing with the former workers of SOMINKI in Kamituga.

1. Procedure to be followed by foreign investors in regard to the New Mining Code

Four years after its promulgation, the New Mining Code gave a new face to the mining environment in the Democratic Republic of Congo. With this reform, the Democratic Republic of Congo finds herself currently at the centre of major geostrategic interests. This position arises from the immensity of the country's natural resources both on the ground and underneath. All manner of investors are flocking here. For a harmonious management of this sector, the New Congolese Mining Legislation has a number of supporting structures, the most important of them all being the Mining Registry whose key functions include the management of procedures for granting, declining and cancellation of mining rights throughout the Democratic Republic of Congo. By implementing this New Mining Legislation, the Congolese legislator demonstrated his willingness to create a climate conducive to investment.

This done, the legislator had banned all forms of discrimination in this sector opting for equal eligibility for the nationals as well as for foreigners in the granting of mining rights. The New Mining Code maintains the same eligibility conditions as had been laid down in the

Mining Law of 1981. Nevertheless, it stipulates that foreign nationals of physical maturity and of sound mind may be eligible for mining or quarry rights, on condition they choose to take up residence after a mandate in mines and quarries and to act via an intermediary. It follows then that the new Mining Code puts both the nationals and foreigners on the same pedestal as far as eligibility to mining rights is concerned. This option that the legislator has highlighted constitutes a vibrant call to investors. It is true that the legislator's desire to open up to the outside world is manifest through this clause, but on the other hand, it is necessary to question ourselves on the manifestation of this desire to open up through the other clauses of the current Mining Code relative to this procedure.

Notwithstanding the full eligibility that the Congolese legislator accords him, the foreign investor must follow the laid down procedure to enable him to succeed in his request or else this request will be rejected. In order to ensure that there is transparence, objectivity, efficiency and rapidity in the reception process, instructions, decisions and notifications relative to the requests for granting of mining or quarry rights as well as of the issuance of granting titles pertaining to, the Congolese legislator has consecrated 18 articles to the procedure targeting the granting of the same rights.

For a candidate to invest in the Democratic Republic of Congo, he must proceed in the following manner: A foreign investor should right from the onset apply for his mining[60] or quarry[61] rights on a form obtained from the Mining Registry as is laid down in article 34 of the New Mining Code. This form must bear the identity, nationality, physical address and the contacts of the applicant and/or of his representative if the request is through the latter. The application form must state the professional and legal status of the applicant and the address of his headquarters, failure to which, the type of mining or quarry right requested for, indication of mineral substances for which the mining or quarry has been solicited for, the geographical location of the perimeter solicited, the square surface area of the mining or quarry right already held by the applicant or his affiliated companies.

It should be pointed out that the procedure laid down by the New Mining Code targets the promotion of transparency in the granting of mining rights to willing investors in this sector. This procedure is applicable through out the national territory. No matter where he may be, the investor in the mining sector must follow the procedure laid down by the New Code. The candidate meeting all the required conditions will be declared eligible. For the promptness of this operation, the Mining Registry is held in regard to article 38 to its second alinea to declare itself, session held at the time of presentation of the file. Once he has deposited his request, the applicant must be informed, with immediate effect, of the success or failure of his application. This is to say that the conditions demanded by the legislator are substantial. They dictate, consequently, the acceptance of the request.

Once accepted, the Mining Registry issues a receipt to the applicant indicating the day, the hour and minute of deposit and registers the request in the corresponding register, mentioning the day and hour of deposit. All these details aim to establish order in the depositing of claims in the Mining Registry which in turn instructs and replies following

60 Mining right refers to all *prerogatives* to carry out research and/or mine mineral substances classified under mines in conformity with the dispositions of the current code. The license to research, mining license, license to mine waste and the license to mine small mines are mining rights. It must be clarified that the mine wastes are the *sterile* or the hardcore coming from mineral mining or any form of solid or liquid residue resulting from mineralogical or metallurgic treatment.

61 Quarry rights refer to all prerogatives to carry out research and/or mine mineral substances classified under quarries in conformity with the clauses of the current code. Authorization of quarry product research, authorization of temporary quarry mining and the authorization of permanent quarry mining are quarry rights.

the order of deposits as prescribed by article 34 of the New Mining Code which states: "… once a request is in place, no other can be made entirely or partially concerning the same area". There is therefore no way a file registered at number hundred can get a reply before one registered at the thirtieth or second position.

The Mining Registry will handle the files according to the registration numbers. At this juncture, we should point out the difficulty involved due to the high volume of files slowing down the efficiency of this clause. The Mining Registry is not represented in such far flung parts of the country as Kamituga. The areas solicited for by both national and foreign investors are lands that over a period of many decades have been occupied by the indigenous populations. Once the investor's request has been approved by the Mining Registry, the neighboring communities are at a loss in understanding the distinction that the legislation makes between the land rights and the mining rights. The inhabitants of such areas are thus forced to vacate the land to go and live elsewhere.

Evidently, the applications of Mining Code Clauses create a new set of problems, notably those related to the rights of the occupants of the land. The indigenous populations are ignorant about the difference between mining and land rights. The absence of Mining Registry representatives in the provinces with tentacles in the mining centers constitutes the main cause. Indeed, the weak vulgarization of the Mining Code gave rise to several possible erroneous interpretations, especially with regard to the supremacy of the mining rights over land rights, the cohabitation of mining rights with the rights of occupants of the lands and the exclusion of the grass root communities from benefits arising from underground products.

As a result of this ignorance, today, one can note the serious hostility in Kamituga from the population towards the investors. Both the national and foreign investors are viewed as predators on the land that they occupy. This confusion has heralded an acute problem of land security in the Democratic Republic of Congo.

To this effect, the regulation of rights to benefits from lands occupied by the local communities poses a question that is equally legal on the nature of the peasant land rights and of the legal system of the said lands. Concerning this, if the doctrine seems to look at the peasant occupation of the lands as neither a right[62], nor constituted in law, but rather a legal[63] tolerance, jurisdiction is not equivocal on the system of linkage of these lands. In fact, the Supreme Court of Justice gave two contradictory writs on the subject. One recognized that awaiting the presidential *ruling*, the rights to the benefits emanating from these lands are governed by customary laws (CSJ, RC1932, 20 January 1988, RJZ, 1988, p.7 issue no3). The other rather *consecrated the land law* as the only point of reference in matters relative to the land occupation (CSJ, RC334, 09 April 1980, RJZ, 1988, p.8 issue no3).

Otherwise, by determining the competences on land question, the law, on purpose, removed traditional authority from the list of managers from their field reserving the management of lands to public administration.[64] However, in the carrying out of land transactions, it is interesting to note that the peasants resort to customary categories, whereas the custom is no longer a formal source of land rights since the unification of the land system. Besides,

62 Law in the context of proper independent land laws as laid down by the land law Séverin MUGANGU MATABARO, *Accès à l'information et sécurisation des droits fonciers ruraux Etudes de cas : Ituri et Nord-Kivu*, Etude commanditée par la FAO, Décembre 2007, p. 5 (inédit)

63 Articles 182 et 183.

64 Innocent UTSHUDI ONA, « La gestion domaniale des terres rurales et des aires protégée au Sud-Kivu: Aspects juridiques et pratiques d'acteurs. « In L'Afrique des grands Lacs, Annuaire 2007-2008, p9.

whereas, they have been striped of their land power by the law of 20 July, 1973, the traditional authorities continue, in reality, to play a significant role in land attribution. This situation is a source of confusion of rights and land insecurity.

This issue of land security is not the subject of our discussion in this article. It enables us, however, to show the origin of the hostilities between the local populations and the investors in the mining sector. Far from taking into consideration that these investors equally have obligations towards them, these indigenous populations prefer hostility as a means of driving them away from their lands. The vulgarization of the New Code and campaigns of awareness for the indigenous populations are true sesames for the effectiveness of the New Mining Code.

After that little digression on the question of land security for the indigenous populations, let us go back to the question relating to the procedure aiming at the granting of mining rights.

The investor in this sector should not content himself with the fact that his request has been approved and registered by the Mining Registry. He should then be patient within the deadline provided for by the law, with a view to allowing the Mining Registry to proceed with the search. This search is multiform in conformity to article 39 of the current mining code. In order to grant mining rights to the prospective investor, the Congolese law demands that the mining registry carry out search in three areas, namely registry, technical and environmental areas.

I.1. Registry Search

Registry refers to all the documents upon which all the demarcations of a territory into properties and crops as well as the names of the plot owners are contained[65]. This search thus will entail determining the geometric configuration of the areas in question. In light of article 40 which governs this search, the Mining Registry undertakes it within a deadline of a maximum of ten working days counting from the day of the request. Thus, by accepting an application, the Mining Registry currently finds itself under a legal deadline as prescribed by the mining search of the accepted file reserve writs of article 34, which is largely based on chronological order by the Mining Registry search into the candidates' files.
During this search the Mining Registry proceeds to verify the following elements:

- The candidate's eligibility for the type of mining or quarry rights solicited.
- Respect for the limit of number of mining of quarry rights, form (shape) and surface area of the requested area.
- The requested area encroaches on an area that is the subject of a mining of quarry right or a request already done at the time of the search. The Congolese legislation has dedicated article 30 exclusively to mining or quarry rights areas.

The mining and quarry right areas as well as the small-scale mining zones are exclusive. When a request for mining rights and/or of quarry search bears on an area whose more than 25% encroaches on another valid mining or quarry area or is introduced when another is under search, this request is rejected. The misinterpretation of this article by Mining Registry magistrates is the origin of several conflicts. At Kamituga, for example, we almost witnessed in June 2007 a battle between those allied to the SOMICO Company and those partisan to the BANRO Company.

65 Dictionnaire Larousse, édition 2008

Both companies were arguing over the areas left behind after the liquidation of the SOMINKI Company. The confusion brought about by the supervisory authority in the title distribution constitutes the origin of this conflict. The two companies were fighting over the same titles. Oddly enough, they both were holders of the same titles validly issued by the supervisory authority. In addition, instead of conforming to law, the Mining Registry magistrates become victim to influences coming from all corners and horizons, revealing that the Mining Registry was not exercising powers as conferred by law to sort out disputes. The investors with much to offer triumphed and walked away with titles that had previously been given to others. These conflicts manifested themselves on the ground. The local populations are used to the advantage of one or any other investor depending on who seems to best suit their interests. The small scale mining zones attributed to certain persons suffer atrociously from the same problems of marginal encroachments. The decretory powers of supervisory authorities substitute themselves in most cases if not always, to the desired competence in the arbitration of encroachments by article 40 of the current code. A rigorous applicant of the this clause by the Mining Registry and reinforced checks by the land magistrates may, little as it seem, solve this fourfold cycle, creator of numerous problems in the mining centre of Kamituga and elsewhere in the mining zones disseminated in the country's hinterland. The Mining Registry magistrates should regularly and physically visit the actual sites so as to point out the geographical configuration of the zone distributed to one or to the other investor. During these visits they can comfortably confirm the demarcations and hence avoid further encroachment conflicts amongst the investors even if the Mining Registry survey map archives allow it already.

It seems quite clear that a candidate's file can not be transferred by the Mining Registry for technical and environmental directive unless only when the registry notices is favorable. The registry notice thus is notably important in this process. As previously said, the mining areas of Kamituga are at the core of disputes between the different companies heir to SOMINIKI. The BANRO Company is about to become owner under the agreement concluded between them and the Congolese Government. In reality, as the article is being written, the mining zones of Kamituga can not today bear another request by virtue of the principle of exclusivity of mining zones under article 30 of the clause in question. After execution of all these operations, the Mining Registry closes the registry search and forwards the candidate's file to the services competent for technical search which constitutes the second step.

I.2. Technical Inspection

Contrary to registry notice, technical search is carried out within a fairly short time. The service certified to carry out the technical search is the Mines Division (Division des Mines). At the dawn of the current code, this division was charged with the search and check of mining activities and quarry works in relation to security, hygiene, work ethics, production, transport, commercialization and social welfare. This Division is the only service certified to check and inspect industrial, small scale and local mining. After these two steps, the New Mining Code foresees one last step which is environmental search.

I.3. Environmental Audit

From the first step towards getting clearance, it clearly comes out that the Congolese legislation has added big innovations. The New Mining Code integrated clauses dedicated

essentially to environmental measures demanded as preamble to the realization of any mining activity. The environmental dimension was absent from the Old Mining Code. These measures represent incontestably a significant step forward in the search for sufficient necessary guarantees to transform mining activity into an activity that plays a sensitive role in the sustainable development of the Democratic Republic of Congo.

In effect, under the new mining system, "all mining operation must undertake a study on the project's environmental impact and an environmental management plan previously established and approved with the dawn of article 401 of the Mining Regulations." According to this article, these studies must be presented at the same time of request for mining rights. In this way, the New Mining Code holds the title holders responsible for environmental damage which is not beforehand written in their approved environmental plan.

It should be noted that in the subject of the title holder's environmental responsibility relative to mining and quarry rights, the holder is not responsible for damages caused to the environment as a result of his activities unless only in the obvious case where he did not strictly observe the terms of his approved environmental plan including the modifications in the course of the project, or that he violated one of the environmental obligations contained in the current title according to article 405 of the Mining Regulations.

Besides, the code states that in case of transfer[66] of a mining right, the damages responsibility arising from the former works at transfer lean heavily on the former and new holders according to article 280 which deals with the responsibility of soil occupation. This article covers an important aspect in that it brings out the issue of passive environmental heritage and the responsibility of the different actors in the rehabilitation of the ecosystems. The exchange of ideas at the seminar held in Kinshasa under the auspices of the World Bank attest to the numerous worries by the investors towards this article which disadvantages them in connection to former ecological prejudices.[67]

At the conclusion of the audit, the service mandated to carry out environmental audit transmits its environmental opinion to the mining registry within the deadline as provided for each type of mining and/or quarry rights. The audit relevant for the mining or quarry request ends with the notification of the applicants acceptance or with the judge's decision provided for as we will see in article 46 of the current code.

All these procedural decisions of the New Mining Code, shows the willingness of the legislator to effect with promptitude on all operations relating to applications. Transmission of a file to the competent authority by the Mining Registry is done by all means of communication such as by email, telephone, registered post or by messenger services accompanied by an acknowledgement.

The legislator goes further to presuppose that the file should be received at the latest one working day in case of transfer by email or fax and eight working days for the other means of communication.

Incase of failure by the Mining Registry, the legislation provides for registration through legal means by article 46 of the current code. In fact, if the Mining Registry does not proceed

66 Dans le nouveau Code minier à son titre VII portant sur l'amodiation et des mutations : le chapitre II qui est consacré essentiellement à la mutation comprend les cessions (totale ou partielle). L'acte de cession doit contenir l'engagent du cessionnaire à assumer toutes les obligations du titulaire vis-à-vis de l'état découlant du droit minier ou de l'autorisation d'exploitation de carrière permanente concernée. Voir article 182 et les transmissions (contrat de fusion ou cause de décès).

67 Jean-Philippe MARCOUX et Marie MAZALTO, op.cit, p20.

to register the mining or quarry rights as stipulated by alinea 4 of article 43 of the current code within 5 days, the applicant may lodge a written request to the competent area court, with copy and contents of the file to the officer in the Public Ministry nearest in this jurisdiction, obtain a valid mining or quarry title depending on the case. Speed being the key word in the New Code, the President of the Grande Instance in the area, within forty-eight hours of receipt of the request, fixes a hearing at the earliest time possible. The Public Ministry will give its ruling. Unless there is need for deferment the case is called, heard and deliberated to the audience outlined in the hearing notification. The court should give its ruling within 72 hours from the date that the issue at hand was deliberated upon. The judgment obtained by the impetrate is worth in all causes of the law the mining of quarry title. In case of a favorable decision by the court the mining registry will issue to the applicant, subject to all relevant annual payments on rights done, the mining or quarry rights solicited for.

Without prejudice to article 198 which deals with the obligations of annual surface rights payments, par plot, for the first year must be paid within 30 working days from the date the mining rights were granted. Beyond this delay, the given rights become *d'office caduc*. The Congolese legislation goes further to give the detail on figures pertaining to these surface area rights.

It becomes clear that with regard to what proceeds, this acceleration characterizes the New Mining Code, in light of the multiple demands that the legislation foresees. As much as the applicant immerges as the beneficiary following the swift execution of the solicited operations, as much the Congolese Government wins not only by gaining from the superficial rights in the case of decision of granting rights applied for and by conserving the environment of which the protection is part of the preamble to the granting of solicited rights.

The New Mining Code put to the test the decentralization and the advent of rule of law.

If the advantages of this procedure are summarized in speed, the New Mining Code is not without many weaknesses. In fact it is hard to trace any hints of a decentralized system. At the dawn of the Third Constitution of the Republic, the country is decentralized. All the same, the legislator without dwelling too much on it did a good job on decentralization in the subject of finances. In article 242 of the Code in question, the Congolese legislator acted as the *precursor* and spirit of the letter of article 175 alinea 2 of the Constitution of the Third Republic of 18 February, 2006 which states that: "The part of national revenue allocated to the provinces is established at 40%. It is retained at source."

In fact, article 242 the Mining Code disposes that: "mining dues are deposited in the Public Treasury by the holder of the mining title. The latter is in charge of distributing the revenue as per the following distribution formula: 60% will remain with the Central Government, 25% is deposited into an account designated by the Administration of the Province where the project is found and 15% in an account designated by the Town where the mining station is located. The funds resulting from the distribution in question to the alinea preceding the present article, in favor of decentralized administrative entities above, are solely for the realization of the community's infrastructure. The Mining Regulations determine the modalities of tax collection and allocation of the mining dues following the above-mentioned formula as well as which Organ is in charge".

The Congolese legislator did a good job and demonstrated his willingness to ensure the distribution of the mining wealth of the Republic. The Mining Regulations add in the article 526 that the debit note established by the Mines Management or the Mines Service

of the station gives rise to tax collection ordered by the Tax Revenue Authority, acronym DGRAD, which forwards to the mine holder within five working days from the deposit of declaration of origin and of the products sold. After this operation, the title holder credits the mining dues at the sub-account of the general account of the Treasury within the given legal deadline.

The subject of mining dues, distribution between the central government and the provinces and the territories, villages or entities sheltering the mining areas, the Mining Regulation tackles this question in plain language, specifying all the minor details. Article 527 of the Mining Regulation stipulates that "before the fifteenth day of the month following the payment of dues owed by the miner, the Minister of Finance in charge of the country's budget verifies the payments made and authorizes the distribution of revenue as follows: 60% for Public Treasury, 25% to the Province where the project is located and 25% to the town or territory in which the mining takes place."

The question of overlapping of mining areas by the various decentralized administrative entities of the Republic is regulated by the Mining Regulation in article 40 which settles the dispute by allocating the benefits of the tax dues to the entity in whose area the centre of the mining is, or still to the party in whose territory is found the bulk of the mining activities.

Article 242 of the Mining Code clearly shows the willingness of the legislator to proceed in the distribution of the mining wealth, but the effectiveness of this clause polarizes the controversy. Currently, it is difficult to find traces of this clause's effectiveness in Kamituga. Basic community infrastructure does not exist and the poverty of the population living within these lands is now even more evident. Thus, the legislator did pioneer work in the subject of wealth distribution, but supply efforts immensely leave a lot to be desired in order to render this clause effective.

In addition to decentralization in financial matters operated in the New Code, the Congolese legislator must integrate several other aspects of the decentralization in the New Mining Code by effecting some amendments. In fact, in the new Congolese State structure, there exists in the Provinces, Provincial Governments and Provincial Assemblies. The Provinces according to alinea 3 of article 3 of the Third Republic's Constitution enjoy free administration and autonomy in the management of their economic, human, financial and technical resources.

At the moment it is difficult to operate the above-mentioned constitutional dispensation with the New Mining Code. The Provincial mine ministers have no competence in this subject. All the prerogatives remain concentrated, at least in this field, in the hands of the Minister for Mines in the Central Government. The decentralization that is taking shape in this country with the promulgation of the law No. 08/012 of 31 July, 2008 bearing fundamental principles relating to free administration of Congolese Provinces, runs the risk of remaining a pious vow in this area.

It seems obvious that the procedure relating to granting mining rights to both national and foreign investors continues to take place in Kinshasa, while the mineral deposits solicited for are found in the country's interior like at Kamituga. If the mining or quarry rights were to be negotiated at provincial level, the locals would enjoy more benefits than they currently do. The investor negotiates his rights in Kinshasa, and if he is granted the mining rights, he establishes himself on the site without any other form of formalities, without the knowledge of provincial authorities, not even the local chief nor the sector.

Besides, the procedure of implementing the New Mining Code, attractive as it may seem, does not favor the advent of true Rule of Law in as much as it does not integrate already the numerous aspects of decentralization. In fact, Rule of Law is one that takes into consideration the distinctive principle of justice.[68] A nation's wealth is the property of all the citizens, hence equitable distribution is indispensable in life and for the society's harmony. Such a principle does away with injustices, and avoids frustrations and revolts. The constitution of the Third Republic states in its article 58 that: "All Congolese have the right to enjoy the national wealth. It is the State's duty to redistribute it equitably and to guarantee the right to development."

In reality, the Congolese State should invest more to make this constitutional principle on wealth distribution effective. Indeed, this step has been taken into account in article 242 of the New Mining Code, but the State should integrate in the New Mining Code several other aspects of decentralization, notably, more service points in the Provincial governments to give maximum opportunity for the repatriation of revenue generated from mining taxes.

The fact that the New Mining Code grants only one Minister in the central government the prerogative to negotiate the mining contracts, the provincial power finds itself in a bad position for the Provincial Governor in the light of article 11 of the current code, is not competent to issue the negotiation maps for small scale mining and to decide on the opening of quarries for public utility works on the lands in his domain. The Head of Mines Division in the Province, in turn, is limited to issuance of maps for small scale mining and to granting the rights to research quarry products and the permanent or temporary mining of quarries for current construction material.

It emerges that there was a clear and deliberate effort by the legislator to confer all the powers, as done in article 10 of the current code, to the minister within the Central Government, under whose docket the mines fall. The Provinces were transformed into institutions for the execution of granting orders already made by the minister at the national level. The Provinces harboring the mines sites such as the Province of South-Kivu with the mining center of Kamituga should be granted greater powers by the Provincial Ministry of Mines, on the granting or refusal of mining rights to both foreign as well as national investors. This concentration of powers bestowed by the current Code, far from favoring the advent of Rule of Law, prejudices in some sorts also the foreign investors willing to invest, for example, at Kamituga. They, the investors, sooner or later encounter resistance from the local inhabitants who refuse to let foreigners mine their minerals irrespective of the mode used, without them at the end of the day emerging as beneficiaries of some sorts.

The principles of free administration and autonomy of management of the economic resources of the Provinces will only be realized in this sector with the revision of the New Mining Code in certain of its aspects. *De lege ferenda,* the Congolese legislator must in all urgency, revisit the issue of the New Mining Code integrating it with several other aspects of decentralization. Without meandering, it is imperative to remove all regulations in the New Mining Code protective of the foreign investors in this sector.

II. The Legal System within the New Mining Code protective of the foreign investors

Since independence in the 1960s and 1970s, the different African Governments implemented development policies, which were characterized by strong State intervention in the economy. With numerous mining companies being nationalized, the mining sector was no exception.

68 NGOMA-BINDA, « L'indispensable passage a un véritable « Etat de droit », in Congo Afrique, no 399, novembre 2005, pp453-457.

In the Democratic Republic of Congo, this period was marked by "zaïrianisation". Following the debt crisis and the intervention in the 1980s by the International Financial Institutions, the role of the State in the economy underwent a big metamorphosis, notably through the introduction of programs of intervention and adjustments.

Africa is in fact the world's region where the greater number of the programs was introduced. Between 19781 and 2000, whereas 162 structural adjustment programs were carried out in 35 countries in the African Continent[69], only 126 were found elsewhere on the planet[70]. It follows then that these International Financial Institutions which financed the adjustment programs, found it not only necessary but urgent to rethink the role of the State in various sectors of the national life.

It is important to note that, it is in the Democratic Republic of Congo, at that time Zaire, that the structural adjustment policies were initiated, only to be interrupted three years later, at a time when they were being systematically implemented in the majority of the other African countries in the course of the last twenty years. These policies aim at amongst other things, the opening up and the liberalization of national economies. One remembers that since 1989, the economic indicators of the Democratic Republic of Congo were in a state of acute decline in mineral production. The war further contributed to this sector's decline.

Whatever the objective may be, the conversion of the Democratic Republic of Congo into an attractive investor destination, has always been a preoccupation at the heart of the International Financial Donors who targeted the country's natural resources such as mines, forestry and agriculture as a means of her economic take-off. The principal objective of the interventional by the International donors in the mining sector, be it technical assistance or financing of investments, should be to facilitate private investment and to help alleviate, to the private investor, the risks inherent in the country and to the project.[71]

In its efforts to concretize their goals in the Democratic Republic of Congo, the World Bank in 1997 offered technical aid for the elaboration of a long term reconstruction plan. In 1998, this Breton Woods institution made a proposition for the disbursement of about 1.7 billion American dollars for the financing of the program known as the "Economic Stabilization and Recovery Program". This plan aims, among other objectives, to liberalize the mining sector and promote private investment. It targets also the suppression of regulations limiting investment and the transformation of big para-public mining companies into State Holding Companies[72].

The World Bank and the IMF returned to DRC in 2001 for the opening of their representative's offices in Kinshasa. This return, after a ten year absence, it should be noted that at the center of the economic policies promised by the World Bank group partners, figures TAS (SAT) meaning Transitory Aid Strategy, approved in 2001 and renewed in 2004 which implies a program of macroeconomic and structural reforms with an objective to stabilize the economy, guarantee peace and to fight against poverty. It is within these reforms that lays the genesis of the New Mining Code and of the New Investment Code. The following are some of the examples:

- The Minimum Triennial Program Actualized (MTPA) for the years 1999 to 2001. This

69 Hakim Ben Hammouda, L'économie politique du post-ajustement, Karthala, Paris, 1999, p.53

70 United Nations Conference on Trade and Development, UNCTD, report on trade and development, Genève, 1993.

71 World Bank Strategy for African Mining, World Bank Technical Paper No 181, Africa Technical department series, Mining Industry and energy Division, Washington D.C.: the World Bank, 1992.

72 Afrique relance, ONU, Une aide pour le nouveau Congo, La république démocratique présente un plan de relance urgence, 1998, Par Carole J.L. Collins

program was implemented by the government in conjunction with UNDP. In this program, reform in the mining sector is presented as a priority field of action

- The Reinforced Interim Program (RIP) for the years 2001 and 2002. The program was implemented by the Congolese Government in conjunction with the Breton Wood Institutions. It was destined to end with the degradation of the short term macroeconomic framework in order to put back the Congolese economy on a growth path by a policy of liberalization and by opening up to foreign investments.
- The Interim Poverty Reduction Program adapted in 20002 aims to do a promotion of certain measures adapted with the aid of the International Community, such as the one eliminating monopoly on diamond trade. This program also took up as its objective, the promulgation of a New Investments Code and a New Mining Code.[73]
- The Urgent Multi-sector Reconstruction and Rehabilitation Program (UMRRP). This program served as a framework of reference for concerted efforts of a return in cooperation between the Democratic Republic of Congo and the World Bank conformity with the Transitory Aid Strategy for the period going from 2002 to 2005. Gifted with an impressive budget to the tune of 1.7 billion American dollars, the UMRRP is a program that reaffirmed the political goodwill of the government and the donors to bring about significant changes to the general State function and to the management of public affairs.[74]

It should be highlighted that, it is within the framework of this program, baptized funds for a return to cooperation between the DRC, that the Mining Code reform was undertaken in concerted efforts with experts from the World Bank. A World Bank document dated 2001 states that "with support from the World Bank, the government prepared an Investments Code which was approved by Parliament, and a first draft of the Mining Code, which was sent to Parliament for approval (…) With many natural resources, the DRC has a potential which could transform her into one of the richest countries in the continent. In order to access this potential, peace and good governance must be established[75]."

In spite of the fact that this article is essentially based on the New Mining Code, it is not superfluous to mention that the adoption by the Democratic Republic of Congo of all these measures made her eligible for the debt relief program within the PPTE initiative (very poor countries in debt). In fact, from the month of July 2003, this country saw her debt fall from 14 billion American dollars to less than 2 billion American dollars. This move has, without a doubt, boosted the Donors commitment to supporting the economic launch process in this country. These reforms considerably increased the foreign investors' confidence and enthusiasm to come and invest massively in the mining and other sectors.

Seeking to reassure investors, the Director of the Department of World Mining Resources of the World Bank declared the following, at the April 2002 seminar held in Kinshasa in the presence of different actors in the mining sector: "The International Financial Company is very encouraged in its capacity as an investor and lender of funds by the New Mining Code …, it intends to play a decisive role in the first investments in its capacity of share holder as an impartial intermediary who reassures at the same time the partners from the private and public sectors. This will serve as training to the other investors and donors[76]."

73 Interim Poverty Reduction Strategy Paper and Joint IDA-IMF Assessment, Document of The World Bank, For Official Use Only, report No24216, May 24, 2002.

74 PMURR cite par Jean-Philippe MARCOUX et Marie MAZALTO, op.cit, p17

75 Democratic Republic of the Congo emergency Multisector Rehabilitation and reconstruction Project (PMURR) Report no PIDD10904

76 21 Financing Miner's Project in DRC, by James Bond, Director of World Resources Miners Department, World Bank Group, in a report on the seminar on the contribution of the mining sector to the rapid recovery of Congolese economic

This retrospective approach aiming at showing the diverse reforms undertaken in this country inclines to think that economic aid given come with clearly defined objectives. As this reflection bears on the New Mining Code, it suffices to say that reforms relating to the elaboration of a New Mining Code have the advantage of bringing about enough light on a big number of stakeholders and to introduce transparency and acceleration in the granting procedures for mines or quarries.

This new code has equally the advantage of having rethought the role of the State in the economy as that had already been the case at the time of the debt crisis and at the time of intervention by the International Financial Institutions in the 80s. This new code puts in place a structure aiming at "freedom of minimum State action"[77] and attributes, to this effect, to the private investor a status of holder, operator, trader and contributor.

This regulatory role of the State appears clearly in article 8 of the code under examination which states that "the State assures the valorization of mineral substances of which it is the proprietor by appealing notably for private initiative in conformity with the clauses of the present code. Its principle role is to promote and to regulate development of the mining sector through private initiative. All the same, the State may lend itself through specialized organisms created for this effect, to investigation activities of the soil and of the underground with the sole objective of improving the geographical knowledge of the national territory or for scientific ends that do not require getting of mining or quarry rights"

The legislator follows his reasoning up to the end. If the State so wishes, it may lend itself to activities regulated by the present code, with morally upright public figures or special organisms created for this purpose who just like the private persons are subject to the demands of the present code. It goes without saying that if the Congolese State wants to create her own initiative or be associated with private groups to implement a mixed economic society, the enterprise or company will not benefit in any way from public office.

This said, if the Congolese State has as its principal role to promote and to regulate development in this sector, it does not remain less if it retains the quality of *debtor vis-à-vis* both the national and foreign investors concerning investment guarantees placed under her territory. By granting mining or quarry rights to investors in this sector, the Congolese State commits to offering them, a certain number of guarantees.

In article 273, the New Congolese Mining Code the State irons out the investors' guarantees. The State guarantees under reserve of respect for DRC's mining rules and regulations, the legislation and agreements or conventions signed with the partners. It should be noted from the beginning, that this clause has all the intentions to be applied throughout the DRC. At Kamituga, it is difficult to ensure strict application of this legislation as a result of its geographical configuration. This mining center is negatively affected by the noticeable absence of State institutions in control for effective implementation of the current legislation. The creation of local profit-seeking police stations translates to poor police presence. This mining center is located within the larger Uvira jurisdiction, as well as in the Tanganyika District whose police post is based in Uvira, a hundred kilometers to the south.

Criminals operating in this region are transferred either to Uvira or to Kavumu, its secondary headquarter situated more than two hundred kilometers from Kamituga. Besides being denied powers by the New Code, the Provincial Mining Division is poorly represented

activity held at the Grand Hotel, on 22 April 2002, Kinshasa.

77 ibidem

with only a handful of personnel playing the role of overseer, limited to issuing of small scale mining permits and to granting rights to research quarry products and the mining of permanent or temporary quarries for construction material.

This artificial weakness in this division in Provinces may thus testify to its absence, which is prejudicial to the investors working in situ. It is true that this division is not given powers by the code, thus denying an indication of the presence of State authority. It is obvious that Kamituga suffers from the absence of any visible State powers, which constitutes a real Damocles' sword weighing heavily on the existing or prospective investors

.

Investor security is a subject for further discussion. The effectiveness of this new legislation reveals many difficulties and obstacles. The town of Kamituga today finds itself in an environment that is not very secure as is the case with Mwenga, a territory that had the misfortune of harboring numerous battalions of the Rwandese Armed Forces after the 1994 genocide and Interhamwe in Rwanda.[78] Today, these armed groups continue to mine in the areas neighboring Kamituga without the knowledge of the distributing authority. However, these mining areas could be allocated or may already belong to certain investors.

The Congolese State is thus shooting itself in the foot by giving this guarantee to ensure that the mining legislation is adhered to by the investors in this sector. The State is thus consequently responsible for any atrocities that may be committed by these incontrollable bandits on the investors' infrastructures; being held accountable both on the international and local courts for any damages that may result from criminal acts by these armed gangs due to lack of vigilance. The judgment by the International Court of Justice on the American hostages at the American Embassy in Tehran is a good example. The Iranian Government was condemned for failure to be vigilant.

The Congolese Government, by giving assurance to the investors in respect of the legislation, acts as their guarantor for their investments' security. All the same, as it has already been underlined, the town of Kamituga needs more State reinforcement. Rule of Law as that desired by the DRC, is one that rigorously applies the law and executes judgments meted by the courts all over its national territory. It is not enough for a law to exist. It must be effectively and efficiently enforced.

Rule of Law imposes the correct and proportional sanctions against any offence, to all persons, irrespective of their social, political or economic standing. For effective application, the law must be applied to all in conformity with the adage *"dura lex sed lex"*. Rule of Law does not recognize impunity with sanctions without any compliance being one of its essential attributes. With reinforced State authority, these demands of the Rule of Law should henceforth be lived on a daily basis in Kamituga today more than ever before. Beyond the guarantee that the Congolese Government gives the investors, it undertakes to respect all the agreements and conventions signed with the different partners of the sector. It is therefore easy to take the Congolese State to court as per the New Mining Code, for failure or in case of not honoring the current clause bearing on respect for agreements and conventions signed with the partner.

In this sector, in litera b of article 273, the investors get the right to freely dispose of property and to organize their companies as they so desire. Investors, in this sector, are free to give any shape to their companies. It goes without saying, even if the legislator does not say it,

78 Militia made up of Rwandese Hutu extremists, put together by the former Rwandese president Juvenal Habyarimana to prepare for the Tutsi genocide.

that they will organize their companies in conformity with the Congolese law laid by the Decree of the Sovereign Law of 27 February 1887 governing on commercial companies.

This decree states that legally recognized commercial companies in conformity to the present decree will constitute legal individuals distinct from the associates. The different forms of commercial companies organized in Congolese law, are outlined in this text, completed by the decree of 23 June 1960. It is about the company in name collectively, of the company in simple command, of the private company of a limited responsibility, company by limited shares, and of the cooperative society.

The investors are equally given a free hand to employ; but should, all the same, give priority to Congolese personnel whose qualifications and experience are equal to the carrying out of mining operations and under reserve of laying off conditions conforming to the laws in operation. In the same way that they have the freedom to organize their companies as they desire, the legislator confirms here as well, the regulatory role of the State who is called upon to police this sector. The investors are encouraged to promote employment levels in the DRC by giving priority to nationals. Of course the qualifications and experience criteria remain in force. Although investors have a free hand in their activities, they still are bound by the Congolese law in the fields connected to the mining activities that they exercise. The investors, without any distinction, enjoy free access to raw materials within the confines of the mining and/or quarry rights. They enjoy complete freedom in the mining of their areas.

They are free, together with their personnel, to move anywhere within the national territory as long as they conform to the legislation on conditions of stay and of foreigner movement. In order to work and move all over the country freely, foreign personnel must have residence permits. The same applies to their products. The Congolese State, on the basis of the current code, accords the investors by lateral (i) of article 273, the facilities to obtain for their foreign personnel all the documents necessary to access the research or mining places without prejudice whatsoever, of course respecting the legal norms and regulations concerning the policing of foreigners.

The freedom to import goods, services as well as the necessary funds for activities is also guaranteed. All the same, Congolese companies should be given priority in all contracts related to the mining project, in terms equivalent in quantity, quality, price and delivery deadlines and of payment. Once again, the legislator would like to make Congolese Companies and the Congolese themselves, the first beneficiaries of the investments installed in the national territory. The investors have full liberty to dispose of their products in the local market, to export and to dispose on the international market, of course, this should be done within the confines of the clauses of the current code.

By giving freedom of exportation and importation of the mining products to foreigners, the legislator gave himself the homework of consequently instituting a tax and customs system. The tax and customs system applicable to mining activities all over the national territory is the one defined in title IX of the New Mining Code to the exclusion of all other forms of present and future impositions. The Congolese law excludes by this clause the improvisation and multiplicity of taxes in this sector.

There is absolutely no question, in the current code, that the investors be subjected to taxes ulterior exterior to the current code, thus shielding the investors from many headaches. In a mining town such as Kamituga where State authority is not reinforced, tax headaches are numerous. Personnel representative of the revenue authority in this place are not well

versed in the taxation system. They go ahead to tax without knowledge of the system put in place by the law. It is of capital importance that personnel from the revenue authority posted here get educated on the tax system. Since the beginning of the current code in 2003, only the following are applicable: holding shares, custom duty, taxes, dues and other taxes owed to the public treasury as per the modalities outlined in the current code. The owner of the mining rights pays among others, charges on the following: the mining and hydrocarbon surface area, land, estate, professional taxes on benefits, local revenue, salaries, and expatriate salaries etc.

The customs administration imposes entry and consumption of certain products. The mining rights holder is subjected to a special roads tax, surface area and mining revenue taxes. Company owners and their affiliated parties are put under the category of foreign activities to their mining projects, revenue and payment taxes that contribute to running of public administration and personalized public services fees.

The legislator develops it further by giving the investors a derogatory system in this sector. In alinea 3 of article 220[79] of the code in question he states that: In derogation to article 235 to 239[80], 244 to 246, litera a), and b) not inclusive, and 259, alinea 4 are applicable and are applied to the rights holder to the rates and modalities of the common law that were in operation at the time of the promulgation of the current code.

By this clause, the legislator exempts the investors from multiple modifications that may arise after their settling down.

Article 225 of the current code, the customs system, lists goods that benefit from the privileged system. Before he begins works, the mining or quarry rights holder should present a list and value of all his real estate, equipment, vehicles, mineral substances and any others that are covered in the application field of the privileged system as provided for in the current Mining Code.

Properties not listed on this list are put under the customs system of the common law. Samples for analysis and for industrial trials by the holder of rights, within the projects framework, are exempted from all forms of customs or contributions, in whatever manner on exiting the national territory. However, samples exported for commercial purposes are subject to taxes, a good illustration of this, is the huge amount of samples passed off as analysis material.

It is thus necessary to revise all the clauses relative to the custom system provided for by the current code. It only seems reasonable on the other hand to point out that taxation system is of great advantage to foreign investors following the multitude of exemptions systems provided.

79 L'article 221 dispose que sous réserve des dispositions de l'article 222, le régime fiscal et douanier défini dans le présent code, ne peut être modifié que conformément aux dispositions de l'article 276. Cet article porte sur la garantie de stabilité. Selon cette disposition, l'Etat garantit que les dispositions du présent ne peuvent être modifiées que si, et si seulement si, le présent code fait lui-même l'objet d'une modification législative adoptée par le Parlement. Les droits achetés ou découlant d'un permis de recherches ou droit minier d'exploitation octroyé et valide à la date de la promulgation d'une telle modification législative ainsi que les droits attachés ou découlant du droit minier d'exploitation, octroyé postérieurement en vertu d'un tel permis de recherches incluant, entre autres, les régimes fiscal, douanier et de change du présent code, demeurent acquis et intangibles pendant une période de dix ans à compter de la date de l'entrée en vigueur de la modification législative pour les droits miniers d'exploitation valides existant à cette date ; de l'octroi du droit minier d'exploitation octroyé postérieurement en vertu d'un permis de recherches valide existant à la date de l'entrée en vigueur de la modification législative.

80 Les articles 235 à 239 sont consacrés aux droits de consommation et d'Les articles 235 à 239 sont consacrés aux droits de consommation et d'accises, de la contribution sur les véhicules, de la contribution sur la superficie des concessions minières et d'hydrocarbures et en fin de la taxe spéciale de la circulation routière.

This advantageous system is visible equally through the instauration by the current code of a system favoring investors and by the safeguarding of the rights acquired in case of modification of certain clauses of the current code.

It is true to say that one cannot go ahead to say that the Congolese legislator was generous with both the foreign and national investors willing to invest in the Democratic Republic of Congo, but rather that, nevertheless, he put into place means of motivating and encouraging them. Article 236 to article 260, deal exclusively with questions on taxes and revenues resulting from mining activities.

The seminar report on mining sector contribution to the quick take off of Congolese economic activities, held in April 2002 and sponsored by the World Bank, just before the adoption of the new code, teaches us that the code puts into motion a tax system that is said to be equitable without as much being generous. This new unique tax and custom system is first and foremost destined to promote profitability in the mining project. Thus, through this favorable act woo both the foreign and local inventors to come and invest.

The tendency, as in countries like Ghana, Mali and Tanzania, is to align the mining revenues with rates ranging from 0.5% for iron metals and 4% for precious stones. A reduction also for custom duties at entry and elimination of the latter upon exit should be noted. It is in article 234 of the current code that the holder is completely exonerated from custom duties and all other forms of payment upon exit for his exportations associated with the mining project.

Article 232 of the current code provides for preferential systems applicable to different phases of the project. Professor James Otto of the Colorado Mines School evaluates the taxation and custom system of this new code in comparison to other similar systems in certain countries as being in third position in Africa and 10th position world wide in relation to the advantages given to the foreign investors.[81]

This New Mining Code, therefore, places at the disposition of the investors, a system favorable to their activities. If the investors should see the Democratic Republic of Congo as an attractive pole for their investments, they on the other hand, should bear in mind that the same code provides a series of obligations on their part vis-à-vis the local populations who equally must benefit from their activities.

Investors Obligations vis-à-vis the local communities

Once on their operating sites, the mine or quarry holders face certain obligations. They are forced to conduct themselves in a manner as clearly defined by the New Code. They are faced with a certain number of restrictions as found in article 27 of the text in question. It is only with permission from the competent authorities that they can do away with these obligations. In fact, the mining or quarry holder may not occupy land set aside for a cemetery. He may thus not carry out mining activities without the permission of the competent authority.

This gap opened by the Congolese legislator in favor of the authority led to a phenomenal land disaster. We see from time to time abuse of office by the land officials who work on under the system of restrictions; thus corruption found its way here. Cemeteries are desecrated daily leading to the removal of the local populations neighboring these sites. By

81 Rapport du séminaire sur la contribution du secteur a la reprise de l'activité économique congolaise tenu au grand Hôtel du 22 au 23 avril, Kinshasa/mai 2002, inédit.

granting the holders of mining and quarry rights, authority to carry out their operations here, the competent authorities have made no provisions for land exchange or thought about the possible solutions. Respect for these cemeteries is completely disregarded by the land board's management.

The current property speculation in the Province of Kivu-South has resulted in an urban and land disaster without precedent. The plots set aside for cemeteries in the mining town of Kamituga have been allocated to people who hold genuinely acquired title deeds. In fact, the officials in charge of the land management are the first to violate systematically this restriction. They cede these spaces to the highest bidder. Already in the town of Bukavu, this practice goes on unperturbed. In a center like Kamituga, where the organs of public authority are less evident than in the town of Bukavu, the situation appears uncontrollable.

Small scale mining activities do not take into consideration these restrictions. These said roads and results of usage exact a form of payment. In the Shabunda territory, small local mining activities were behind the collapse in 2000 of a general hospital. Without the permission of a competent authority, the quarry or mine holder may not mine on the following: archeological or national monument sites; land on or ninety meters from a dam; or a building belonging to the State; land next to national defense installations; land allocated for airport usage; land set aside for railway construction; land reserved for forest plantation or tree nurseries and land belonging to a national park… (Article 279)

The Kahuzi-Biega National Park, in the Kivu-South Province, is constantly invaded by small scale local mineral mining. Once again, it is this absence of State authority that is at the core of this anarchy. The holder or sub holder is under full law held responsible for damages caused by works executed within the frame work of his mining activities. This is echoed favorably in article 258 of the Congolese Civil Code Booklet III which obliges the one responsible for damages to do the repair work. It then follows that the text protects the people neighboring the mining areas from destructive activities from the mining or quarry operators.

In other words, it should come out clearly that any occupation denying those it should benefit spoils from their soils, any changes leading to the soil being barren for crop growing, translates into the mining or quarry holders being obliged by the former, to pay a fair compensation be it rent or the value of the land upon occupation, increased by half by virtue of article 281 of the current code.

It emerges that the Congolese legislator by these measures, did not want to disadvantage the local inhabitants neighboring the mining centers. In spite of the question of non settlement up to this day, of the land rights to the local communities, the Congolese legislator still confers on them the right to get compensation in case of loss to enjoy full benefits of their lands. The question then arises, whether as a result of this, the legislator does not confer to these communities the right to perpetual concession?

This clause does not fill the gap of the said land law of 20 July, 1973 on the legal nature of lands occupied by the local communities. The legislator specifies that the soil in question in article 281 signifies the soil on which the individuals have always exercised or effectively show some form of on going activity. The holder of mining rights, which remains distinct from the ownership of land or underground land belonging to the State, should in order to establish his activities, amicably settle the question of compensation of the site occupants as

said in alinea 3 of article 281 of the new code.

Whenever the holder of mining or quarry rights occupies a site by evacuating its inhabitants, it is obvious that disputes will arise. The local inhabitants should not be sent away without compensation but more often than not, the holders want to occupy the land by force.

With the advice of the competent service of the Mines Administration, the holder of mining or quarry rights has the right, with authority from the Province Governor, to carry out certain activities within his perimeter: to occupy the lands necessary for his activities and related industries, including the construction of industrial installations, housing and other social amenities.

He also has the right to use underground, non-navigable, non-floatable waters mainly for the establishment, within the framework of waterfall concession, a hydroelectric plant destined to satisfy the mine's energy needs, dig canals; create means of communication and transportation of all kinds.

In the mining center of Kamituga, the following remnants left behind by the Mining and Industrial Company of Kivu are still visible: hydro-electric plants constructed to meet the mine's energy needs, schools built for the laborers' and employees' children, hospitals and several other works of public utility. The State, with regard to the spirit of article 283 of the New Mining code, does not oblige them to carry out works similar to the above-mentioned.

They may be done with the authorization of the Province's Governor. This clause is still to the advantage of the investor who enjoys fully from his rights of execution of activities without being subjected to other social constrains. The company may implement other works of a social nature if it so desires. It is necessary to be reminded that article 242 provides for the redistribution of mining revenue to the territory or village sheltering the project. Land occupation by the mining holder should not be an obstacle to the execution of public works nor to opening of temporary quarries to supply the necessary materials for these works. The holder or his proxies are responsible for reparations of damages caused. As we come to the conclusion of this presentation, it is important to highlight certain observations that have attracted our attention, with regard to the thoughts and ideas so far developed.

CONCLUSION

It is obvious that in total, the Congolese legislator has implemented a series of clauses destined to encourage investors to find in the Democratic Republic of Congo a suitable place for their investments. This reform in the mining sector brought about special acceleration to the procedure dealing with the granting of mining or quarry rights. Thus, with regard to the fundamental question, the backbone of this reflection, which consists of knowing whether the Congolese legislator by these reforms encouraged foreign investors, to come and invest overwhelmingly in the DRC, it is reasonable to affirm that at the dawn of the exegesis of the New Mining Code, he effectively encouraged them. This, in passing, validates the hypothesis of our research.

However, the Congolese State is called upon to make her presence felt throughout her national territory, including the far flung places of the country. State presence is a guarantee of protection and of the effectiveness of all her decisions. This presence reassures the investors on the security of their installations.

All the same, the new code necessitates certain changes concerning the issues of decentralization especially in the procedure of granting of mining and quarry rights. Nagging as it may also seem, the question of the mining revenue distribution that the mining and quarry holders owe to the National Treasury has, apparently, already been resolved in article 242 of the current code; but, curiously, this is not the reality on the ground. The grey areas are on the distribution key of this revenue by the Exchequer, which, it seems to us, does not generally take into consideration the communities' infrastructure that it should exclusively finance, reducing the whole issue into a proper pipe dream in Kamituga.

De lege ferenda, the National Assembly should shine more in its mission to check the executive power so as to force the hand of the Congolese Government to effectively and regularly redistribute this revenue to the provinces especially to the territories or villages sheltering the mining projects. Thus, the redistribution of national wealth to all Congolese as proclaimed by article 58 of the Constitution of the Third Republic will no longer be a visionary leader's dream but a reality.

Besides, rule of law necessitates several aspects, notably the authority's ability to enforce respect of all its decisions throughout the national territory. The application of rule of law constitutes the ultimate objective of a nation which intends to organize itself correctly and in a prosperous manner. The rule of law is a sign of a civilized society whose citizens, once introduced to civil state, abandon the savage state of reciprocal killings, predation, and rapacity – the brutality characteristic of jungle life.

Access to Rule of Law is the signaling of a higher level of development. Effective legal protection of foreign investors may contribute to the emergence of rule of law in the Democratic Republic of Congo. By attracting the maximum number of investors in the mining sector, the Congolese State will have succeeded in bringing economic growth and in raising the level of life for the rule of law, is strong governance which applies distributive justice. It seems to be the opportune moment to ask ourselves the question as to whether the Democratic Republic of Congo is a rule of law from this point of view.

The undeniable fact is that rule of law is one which, even if it does not perfectly manage to meet all the criteria that it demands, aspires to equip itself with the most possible impartial and fair laws and which through all its energies, and with all democratic means endeavors to apply them rigorously, impartially and without complaisance. At this level, another question arises: Does the DRC make enough effort to become a true rule of law? a rule which applies justice for all things in all circumstances and for all people; a rule which compensates and rightfully sanctions its citizens and inhabitants?

To answer this question, it must be said, that if the Democratic Republic of Congo is in transition towards democracy, it is that, precisely, she is not yet a rule of law. A State that does not compensate meritorious acts and/or which does not punish deviances is not a rule of law, even if it has some fair laws. Any rule that understand itself to be law fights with all its might, impunity which seems to be rampant today, not only in Kamituga but also elsewhere all over the national territory. What a guarantee of justice for the investors!

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THE APPLICATION OF LEGAL PRACTICES RELATING TO THE EXPORT OF AGRICULTURAL PRODUCE FROM SOUTH KIVU TO FOREIGN COUNTRIES

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INTRODUCTION

Black gold drains us, green gold will save us[82]. Agriculture is the principal source for the economy; it guarantees the provision of foodstuffs and the necessary financing for export financing[83]. Thus, agricultural development no doubt will be the engine for economic revival, and, viewed from this angle, the legal texts that govern the main activity of the majority of the population of the African continent, concentrated in the rural areas, and to whom agriculture is the mainstay, must be observed.

The Democratic Republic of Congo (DRC) is a huge country focused on agriculture, with a population of almost 80% living in rural settings and dependent on agricultural activity. Agricultural activities have always constituted a way of life, a transition which, since time immemorial, has structured the livelihood of its population and the family. Agricultural peasantry provides 90% of the national production[84]. Nonetheless, it must be noted that modernized agriculture that embraces new technologies is developing alongside subsistence agriculture, which had always been oriented towards export production.

The DRC is one of the few African countries which possess a wide array of assets for its agricultural development with 80 millions hectares of arable land, of which 4 million are irrigable, a diverse climate … and enjoys natural agricultural conditions and soil fertility favorable to agricultural activity. In this case, agricultural development is the engine for economic revival, a weapon in the war against poverty and a useful tool for the actualization of the millennial development goals.

Situated in the East, South-Kivu Province, on which this study is based, is one of the 26 provinces that form the DRC. It offers a wide diversity of economic-climatic zones, namely:

- The high plateaus: Kabare, Walungu, Kalehe, Fizi and Mwenga. These rise to an altitude of between 1500m and 3000m;
- Average altitudes: Idjwi, Buloho in Kalehe where the altitude varies between 1000 and 1500m;
- The lower altitudes: Shabunda, Ruzizi Plain, Tanganyika (FIZI), Wamuzimu in Mwenga where the altitude falls below 1000m.

82 J. AUDIR, *Rural law*, Economica, Paris, 1985, p.4.
83 GOAMA AROUNA NAKOULMA, *Property challenges, agricultural production and nutritional state of rural populations in Central Burkina Faso*, Neuchâtel, Thesis, p.81
84 Ministry of Agriculture, *Insight into the purposes of the law project on the agriculture code,* p.1

The rainy season spans from September to May, while the dry season stretches from June to August.[85] Agriculture is the most important economic activity in South-Kivu Province where 80% of the rural households enjoy natural conditions conducive for agricultural activities. The quality of its soils, the climatic variety, and abundant rainfall…are factors that guarantee diversified cultivation on the same agricultural land.[86]

Export agriculture is the basic material for the food and agriculture industry and needs to be considered on the same footing as mineral extraction, on which the DRC has for long based its economy and its exports, much to the detriment of the agricultural sector which, on its part, has remained rudimentary and subsistence, with agricultural product exports becoming rare or even inexistent. Today, the DRC finds itself in a state of total dependency in terms of food imports: merchant women queuing at the Ruzizi-Ier border post seeking permission to cross the border into Rwanda for food products is sufficient evidence of this extraversion of the Congolese economy and dependence.

For several years, the DRC has recorded major regression of its agricultural performance to a point of complete incapacity to satisfy its internal food requirements. Despite its contribution to the gross national product which stood at 30%, 34%, 52% and 49.5% respectively in 1985, 1990, 1995, and 2005, the agricultural sector finds itself in a deplorable state. It is noteworthy that in 1990 and 1995, agricultural exports accounted for 9.4% and 17%[87] of the country's exports. Agricultural product exports are currently almost non-existent in all the country's provinces. To feed Kinshasa (and the surrounding Bas-Congo) DRC's yearly imports through the port of Matadi include 120,000 tons of frozen fish, 50,000 tons of chicken and frozen meats, 40,000 tons of cereals (wheat and rice); 60,000 tons of palm oil, 10,000 tons of powdered milk… The ships sail back empty and the same case applies to the South-Kivu province.[88]

During the 1980's, the DRC played a leading role in the international markets with a number of products such as coffee, cotton, tea, rubber, palm oil, quinquina, fruits (such as the mango,…), vegetables, which were among the country's key foreign exchange earners. In 1992-1993, coffee exports dropped as a result of fraudulence in the neighboring countries and a minimal quantity harvested in Goma by a few out-growers in Lake Kivu.[89]

Taking into account the poor performance of the agricultural sector currently, DRC's agricultural exports have dwindled to insignificance in international business exchanges. This state of decline arises from the looting sprees witnessed in the DRC in 1991 and 1993, which wiped out the country's industrial fabric as well as the contraction of the mining sector. Added to these are irrational political-economic decisions, multiple so-called liberation wars, rising insecurity in rural areas, rural exodus, feminization of agricultural activities, the absence of legislations that take social changes into account, and the dilapidation of the country's means of production, among others. The DRC is classified among the least developed countries and, thus, has to increase its exports in order to finance its imports and thereby lessen the extroversion of its economy. Food insecurity and undernourishment affect more than 70% of the population, which is further weakened by pandemics such as malaria and HIV/AIDS. This is a worrying situation especially in view of the millennial

85 *Annual report of 1995-1996-1997 of Provincial agriculture, fishing and livestock Inspection,* Bukavu, p.6, unedited
86 *Idem*, p.2, unedited
87 Ministry of Agriculture, *Note de politique agricole,* Avril 2009, p.1.
88 *Idem,*p.9
89 *2007 External Trade Annual report,* Bukavu, p.52,unedited

development goals which consist of reducing the poor and undernourished by half by 2015. Meanwhile, poverty occurrence stands at 70.85% for most of the country, one of the highest in sub-Saharan Africa.[90]

It must be pointed out that in 1977, stable agricultural activity was recorded for the cultivation of certain industrial agricultural products, with the exception of quinquina, whose production had kept growing were it not for the interruption by the national executive council which banned the development of quinquina whose content fell below 4.[91] The DRC, which has major agricultural potential and where currently only 10% of it is exploited through rain fed agriculture organized through peasant smallholders using rudimentary production materials while consuming the input at an insignificant rate.

Nonetheless, owing to favorable climatic and ecological conditions, the area under cultivation and production of basic products such as cassava, groundnuts, beans, maize, and sweet potatoes had increased. South-Kivu offers a diversity of industrial export agriculture items, which are readily available and capable of extraction. These include coffee, tea, quinquina, palm oil, cotton, sugarcane, tobacco as well as fruit trees such the avocado, papaya, guava, pineapple, citrus fruit, mango, plums, date-palm, orange among others.

As a result of fraudulent activities by DRC's neighbors, coffee [and other] exports ceased between 1992 and 1993, with the exception of quinquina, which today is exported by Pharmakina in diverse forms (bark, quinine)[92]. Within the DRC, it is expected that from Article 1 of the constitution of the 3rd Republic will emerge favorable legislations on agricultural and agricultural product export matters in order to attract foreign players to invest in the agricultural sector, which has been long neglected or even rejected or left to the peasant farmer who has no means other than subsistence production and whose only opportunity to export is within the framework of the law.[93]

There are several legal texts available in the DRC touching on agricultural and foreign trade sectors, namely:

- Law project bearing the agriculture Code;
- The Note on agricultural policy;
- The order-rule n°07/018/ of 16th May 2007 laying down characteristics of the ministries;
- The order-rule n°67/97 of 02 March 1967 on the Creation of National Agriculture and Artisan Credit Funds (F.N.C.A.).
- specific regulations geared towards foodstuffs such as maize, rice, coffee, tea and edible oils … ;
- Law n°004/2002 of 21st February 2002 regarding investments;

90 Ministry of Agriculture, *Note de politique agricole,* Avril 2009, p.1.

91 1977 Annual re*port, provincial agricultural fishing and livestock Inspection,* Bukavu, p.9

92 *1992-1993* 1977 Annual re*port provincial agricultural fishing and livestock Inspection,* Bukavu, p.7

93 *Within this framework, a round talk table was organized in Kinshasa from 19th to 20th March 2004 on Agriculture in the DRC, which enabled the country to find a new direction for the agricultural sector, identify and prioritize the shortcomings that hinder agricultural sector expansion activities and to envision strategies for sustainable development in the sector. Thus, the agricultural sector policy note adopted by the Ministry of Agriculture fills the gaps in planning for participation in this sector and also proposes an agriculture law code which was hitherto non-existent. Agricultural policy note is a framework for reference, orientation and planning for kick starting and ensuring sustainable development in the rural agricultural sector, which is the engine of the national economy. It will enable the Congolese government to achieve the first millennium goal by ensuring food security and by reducing poverty among the Congolese population. Through this note, the government aims to improve access to markets and add value to its agricultural products, improve productivity in the agricultural sector, promote decentralized, autonomous financial systems which adapt themselves to the peculiar character of the agricultural sector and lastly, to reinforce the technical and organizational capacities of the public and private agricultural production support institutions.*

- 18th March 1965 Convention for the resolving investment disputes between states and citizens of other states ;
- 11th October 1985 Convention creating the multilateral agency of guarantee of investments, signed in Seoul on 11th October 1985 ;
- Order-rule n°67/272 of 23rd June 1967 giving regulatory powers to the Central Bank of Congo in matters of foreign exchange regulation;
- Order-rule n°78/219 of 5th May 1987 giving public enterprise status to a certain Office Zaïrois de Contrôle, "OZAC" in short;
- Departmental order n°140/0003 of 9th January 1987 setting the conditions for granting import-export licenses;
- Circular n°DENI/CAB/03/0608/89 of 25th September 1989 relating to the list products before export in return for authorization of State representation in the national economy and industry;
- Rule n°80/008 of 18th July 1980 modifying and completing rule n°73/021 of 20th July 1973 relating to the general goods régime, as well as financial, property and guaranty regimes;
- The organic law highlighting the composition, organization and function of decentralized territorial entities and their connection with the State and the provinces;
- The convention on the free movement of persons, goods, services, capital and on the right to establish oneself in the Great lakes Economic Community.

The choice of these texts is guided by the set of themes of our research: throughout this study, we will endeavor to do a synthesis highlighting the necessary elements for promotion of law and order in agriculture, while at the same time laying special emphasis on export, the incentive mechanisms in favor of local and foreign investors as highlighted in the agriculture code project and in the agricultural policy note.

Following the RIVERO model[94], we emphasize that law and order is where the misuse of power finds its limits in the judicial regulation, which it is expected to respect and thus it will answer to the finality that synthesizes itself in the protection of the citizen against the arbitrary. Article 58 of the DRC constitution confers equal rights to all Congolese people to the enjoyment of the national riches and affirms the duty of the State to ensure equitable distribution of the same and to guarantee all the rights to development. Thus, this Article dedicates the right to enjoy the riches of this vast and endowed nation and the same constitution devotes and guarantees ownership of private property both to foreigners and nationals.

We must point out that in terms of economic interactions the DRC cannot change in a vacuum. Regional and sub regional integration and indeed the intensification of international exchanges taking into account the engagements flowing from the regional and international exchange accords such as the Economic community of Central African States, SADEC, CEPGL, etc. remain indispensable in ensuring agricultural development, which is an inevitable element in enabling it to attain social well-being of all and still maintain a strong presence on the international economic scene.

This work analyses legal documents to keep track on the inventory of their implementation and the aspects of creating incentives for investors with a view to repositioning agricultural activities since no one can export, or supply goods in the world market, except if the national production first sufficiently satisfies the internal demand.

94 RIVERO J., *Law and order*, in *Law and order, compilation in honor of Guy Braibant*, Dalloz, Paris, 1996, p.609

Success in production, improving it and making it grow are not results one seeks for their own sake or for the sole purpose of producing. Production makes sense on the economic sphere only if it concluded in exchanges where the product presented respond to standards in force on the quality and quantity to be exchanged.

The legal texts pertinent to agriculture in the DRC date back to the colonial era and are characterized by their coherence and pursue the goal of presenting to the market, first and foremost high quality products, and secondly, to maintain the country's capacity to produce in a balanced manner, export goods and those for domestic consumption.

Thus, on 30th June 1960, Belgian Congo was able to found its hope on action aimed at ensuring that quality product would occupy center stage in the export recipe whether in cash or in fiscal revenues. To illustrate the point, let us note that early 1960, agriculture contributed 41% of all export value, the gross national product stood at 26% and non-commercialized agricultural production at the time had reached 60%.[95]

To understand this issue, we will successively tackle the following double-edged question:

- What are the causes and consequences of the inapplicability of the legal trends in agriculture and export matters in South-Kivu?
- What is the contribution of an agriculture code in reviving the agricultural sector and export of agricultural products from South Kivu?

The role of family agriculture for food security and the fight against poverty cannot be underestimated; its agricultural production guaranteed to the population self-sufficiency in food and monetary revenue necessary to access basic services. Unfortunately, industrial agriculture, which is a key tool of economic expansion, and South Kivu which seemingly had adapted a sustainable agricultural activity, have both faced diverse constraints, just as in the other parts of the country. We illustrate the scenario thus:

1. subsistence agriculture characterizes itself by poor productivity and poorly-developed production technique;
2. decrease in soil fertility and infestation by plant disease and pests;
3. poor state of roads and almost inexistent routes in the agricultural hinterland (defective road infrastructures);
4. exaggerated fiscal pressure (formal and informal);
5. absence of economic actors and investors in this sector and fall of prices of export products;
6. absence of a legal framework that takes into account social changes and the continued use of an outdated laws,
7. persistent insecurity and displacement of populations with its accompanying consequences, unjust laws, etc.

Currently, the same texts are still in use, but their application is ineffective and slow, if not non-existent. This situation brings about consequences of decline in production as well as fraud in agricultural product exports from South Kivu. The same is the case for coffee produced in South Kivu which is fraudulently exported through Lake Kivu towards neighboring countries…

All industrialized countries today had to go through an agricultural development phase which enables them to respond to other economic imperatives. Abundant productivity that satisfies the people's needs with the surplus being offered in the international markets would

95 ANO, Schéma régional d'aménagement du Maniema, Nord-Kivu et Sud-Kivu, p.149

guarantee economic returns to help in creating jobs and increased growth, thus benefiting the Congolese people as well as a greater part of sub-Saharan Africa if not the entire world.

Revival of agriculture is crucial for ensuring the well being of the population and the rebirth in exports at a time when the global financial crisis and the fall of raw materials must be the concern of Congolese leaders to invest in the adoption, the enforcement and the unconditional implementation of the agricultural code which will provide judicial security to local and international investors.

This code, once assorted from the compulsory stages (to date, it is still in project form) aims to be:

- a means to put in place sustainable agriculture which safeguards the environment and adapts cultural systems with the natural climatic functioning and changes;
- a coherent framework of reference available to all actors and a tool of materialization and decentralization;
- a mechanism of reestablishing judicial security for local farmers and creating incentives for investors;
- an element encouraging private investment in rural infrastructure…

For the entire length of this work, legal methodology will enable us to analyze the legal texts to highlight the strong points in support of our research theme. The sociological approach will help us investigate the factors hindering the implementation of agricultural product standards exports from South Kivu; the documentary technique will help us to cover doctrinal considerations and records from the provincial division of agriculture, fisheries and animal husbandry, the Bukavu branch of the Congo Commercial Bank, the Congolese Control Office, the Customs and Excise Office and the Ministry of Agriculture.

Agricultural legislation in the DRC

No serious development whatsoever, even in the agricultural sector, can be expected where stable and sustainable rule of law does not exist. Currently, DRC has become a net importer of more than 50% of foodstuffs and has almost nothing to offer to the world market and rural development, remains largely neglected or even forgotten, yet it is placed on the same footing as mining development, a most indispensable part of the country's economy.

The DRC is called upon to promote the integration within the framework of similar peasant agriculture and animal husbandry, the use of the wheel, (practically unknown to the Congolese farmer), animals for transport, rehabilitation of routes in remote agricultural regions, the use of animal and plant fertilizers/manure, and the implementation of agriculture law.

The Provincial External Trade Division report indicates the remarkable disparity in 2008 between exports and imports as presented in the table below:

	Gross weight/kg	Value in US dollars
Exports	6012185,992	37583239,880
Imports	1225856064,400	3897493587,033
Balance of Trade	-1219843878,408	-3859910347,153

Source: The South-Kivu Provincial External Trade Division report, 2008, unedited.

The exports take place between January and August while imports are between January and October 2008. It is evident from this table that exports are lower than imports and therefore, imports cover the greater part of agricultural consumption in South Kivu. The extortion of the Congolese economy, the neglect of the agricultural sector and the lack of productivity of the province in the sector is clearly translated through the evident disparity on the above table. It turns out that the province can neither cover imports nor provide the necessary finances for its development.

QUALITY, QUANTITY AND VALUE OF PRODUCTS EXPORTED IN YEAR THE 2000

NUMBER	ITEM	QUANTITY/kgs	VALUE FOB
01	Quinquina bark	1023600,00	11195000,0
01	Prunus abri cana bark	20000,00	500000,0
03	Quinine sulphate	23885,00	1225897,5
04	Quinine dichlorhydrate	16800,00	28600000,0
05	Quinine bichlorhydrate	5475,00	324491,0
06	Quinine dihydrochloride	2180,00	140330,0
07	Quinine hydrochloride	1805,04	106470,0
08	Totaquina	21000,00	15101700,0
09	Compressed quinine	1118,00	63495,0
10	Tea	41980,00	8176,2

Source: The South-Kivu Provincial External Trade Division report, 2008, unedited.

It is important to note that these products are exported from South Kivu to Europe, Asia, and Africa. La Pharmakina is a major exporter of local agricultural products, albeit in a very limited. Other cases of exports take place fraudulently. In the course of the year 2000, no market price list had been made available to the specialized services to determine the real value of Congolese agricultural products in foreign countries. Exporter declarations had been deemed sufficient at the risk of product undervaluation.

The financial crisis has brought about the global price of mineral based raw materials, a sector on which the DRC has for long based its economy. Taking into account this alarming situation, and no longer being present on the international market for agricultural products, the DRC will have to concentrate its efforts on the promotion and agricultural investment on the national and international levels in order to enable the country to provide to the people the economic development and to efficiently fight against poverty which impacts the majority of its population. To this end, several elements will be put into consideration in the implementation of this mission.

I.1. Ministry of Agriculture, Agriculture Code Project and Agriculture Policy Note

I.1.A. Ministry of Agriculture

The law and order concept necessitates the respect of the prevailing rule of law. Order n°70/018 of 26th May 2007 defines the missions of the Ministry of Agriculture in these terms:

- Planning the national production goals in the area of agriculture;
- Supervision of agricultural associations;
- Promotion of agriculture cooperatives;

- Promotion of agriculture products - destined not only for domestic consumption and for national industry but also for export;
- Directing and supporting national or foreign financial operators keen to invest in the sectors of agriculture, fisheries and livestock to high potential production sites with a view to minimizing production costs.

The Ministry of agriculture can fulfill these obligations by providing oversight for peasants. By reducing the fiscal and policy constraints which limit trade exchange for agricultural products, this ministry is expected to facilitate the revival of the national market, the initiation of sub-regional integration and the intensification of international exchanges so as to respond to the expectations of the Congolese people.

It ensues from the declaration of the central government contained in the Agricultural policy Note that a 10% increase in agricultural production can translate itself into a 7% decrease in the number of persons living below the poverty line. To achieve this, a overhaul of this sector is necessary and would be based on agricultural high capacity research geared towards innovation, allocation of adequate budgets within the context of decentralization, restructuring of the Ministry of Agriculture, promotion of financial systems adapted to the nature of activities of this sector and the expansion of public infrastructure for purposes of servicing the production sites.

The agricultural sector is restructured in such a way that the reorientation of its key functions would be effective and the materialization of production privatization and other commercial tasks would fall within the province of the private sector. The state thus disengages itself from production and marketing functions so as to foster free enterprise, mutual competition between the actors, and development of basic socio-economic infrastructure and creation of incentives for private investment in this sector.

This is an expression of goodwill for development and if effective materialization of the same follows, we would have a unique agricultural sector in the DRC. If Congolese leaders would stay away from the world of ideals and embrace pragmatism, economic development and equitable sharing of DRC's riches, it would become reality for a people tired of listening to discussions on an empty stomach.

I.1.B. The law project containing the agriculture Code as modified and adopted by the government in August 2009

The Agriculture Code is a new institutional framework that will be a major governance tool and an indispensable element for guaranteeing judicial security for the actors in the agricultural sector on which DRC's economic revival is based. Exportation demands adequate production satisfying the domestic and responding to standards of the international markets. To that end, the Congolese government proposes to the legislators a law supporting an agricultural code whose content is elaborated hereunder in relation to the elements that appertain to our subject. Please note that we make reference to this project *de lege ferenda*.

I.1.B.1. Goals and areas of application

The agriculture code is an instrument in the hands of the leaders to protect farmers and favor their development, equally for the large scale farmer and the family smallholders. To achieve this, the code will pursue the following goals:

- Setting up sustainable agriculture that protects the environment and adapts cultural systems with natural functioning of climate and its disturbances;
- The state of Congo wishes to have clear options and to formulate a development

project for the next 30 years by putting in place and creating incentives and conditions for development, notably refinancing the agricultural economy and infrastructures, continued training in agricultural techniques for the youth;

- Making available to actors a coherent framework of reference and a tool of aid to action particularly by the inter-ministerial commission composed of ministers of domains linked to agriculture, in view of the future coexistence between different land registries notably land ownership, mining, forest and agricultural;
- The promotion and inclusion of the peasant farmer, to reestablish physical security, equity of access and sharing out of land, as well as reducing fiscal and policy pressures that limit trade exchanges for agricultural product;
- Alleviating administrative red tape in creating enterprises in the DRC which discourage investors and denies the country the sources of local currency;
- Creation of a harmonious and creating incentives for context between the agricultural enterprise, peasant associations, non governmental development organizations, training, with the government and its services, with a view to building profitable and sustainable relations between these different structures and the provincial administration;

The decentralized entities will be expected to:

- help the provinces to come to terms with active participation in regional development according to the comparative advantages of each;
- pool together resources in an agriculture perspective respecting environmental standards;
- bring together all the actors of the agricultural sector who participate in the elaboration and application of DRC's agricultural development.

This code stimulates the national market, and also encourages the opening of sub regional integration and intensification of international relations. Article 2 determines the scope of application of this code in the totality of economic and peri-agricultural activities, research, financing, infrastructure, credit and liquidity in the agricultural sector.

After adoption and implementation of this instrument's goals and scope of application, and if application of its different tendencies by the diverse actors proves effective, agriculture will actually become Congo's economic engine. It will increase technology transfer, create a development nucleus and foster repatriation of export earnings. It is a question of time and goodwill from each active participant in the sector to combine efforts to guide their actions and common projects.

I.1.B.2. Content

This code is divided into ten chapters and is composed of 136 articles:

- definitions (Article 1);
- goal and scope of application (Articles 2 and 3);
- lands earmarked for agriculture (articles 4 to 67) ;
- energy (Articles 68 to 78);
- agriculture infrastructures (Article 79 to 86) ;
- agricultural training and research (Articles 87 to 97) ;
- agricultural credit (Articles 98 to 106) ;
- customs, fiscal and Para fiscal regimes (Articles 107 to 122).
- legal tendencies (Articles 123 to 132) and
- transitory and final tendencies (Articles 133 to 136)

I.1.B.3. Creating incentives for and predisposing elements to investments

With agricultural development being the engine for economic revival, it is a must to create incentives for investors without disturbing the peace for those who have already put their lands into use and ensure judicial security for all. In the on-going decentralization process in the DRC, the agriculture code, which is a necessary tool for the establishment of law and order, and, within the provinces, it will help in organizing rural development of the respective localities taking into account each region's specifics. Creating incentives for factors for promoting agricultural investment are analyzed along the following elements:

a. Acquisition of agricultural lands and farms

Planning of rural agricultural space constitutes an essential priority for regional development. The Ministry of Agriculture is carrying out the studies necessary to establish the size of exploitable area, categorizing them either by the region's natural endowments or by the nature of farming activities there. The state determines the land appropriate for agricultural use in each part of the urban or rural territories and thus avoids the anarchy which for long has characterized this sector in the urban and rural settings.

In terms of law number 80/008 of 18th July 1980 modifying and completing law number 73/021 of 20th July 1973 regarding the general regime of goods, funds and property regime and sureties regime in its Article 53 indicate that the soil exclusively, inalienably and imprescriptibly belong to the State. This rule is nuanced by Article 57 which foresees cases where the private domain of the State can become the object of perpetual concession, ordinary concession or of financial constraints and the only real rights recognized by the present law are property, perpetual concession, emphyteotic rights, … the mortgage law may be of interest to the farmer.

Concession is defined as a contract by which the State recognizes a physical or moral person's private or public rights, rights to enjoyment of business within conditions and modalities foreseen by this law. Contrary to financial law, the agriculture code consecrates equality to national and foreign investors in granting that the concession bestowed upon a smallholder may become a perpetual or ordinary concession which can assume one of the forms foreseen by the property law, including: emphyteose, size, usufruct, usage and location.[96] This disposition creates vagueness in the law by failing to clearly specify the form to be assumed by the concession if the beneficiary is a Congolese or a foreigner.

Should it be deduced from the original form of the concession foreseen by the fund law as a key element applying to the distinction as to the nature of the fund vis-à-vis its holder? Congolese nationals exercise right of ordinary or perpetual enjoyment over a fund of private State domain. Foreigners, on the other hand, cannot enjoy the lands in return for an emphytéose contract whose term cannot exceed 25 years - renewable - or if not, have it reviewed to a longer period. The foreign investor will have to acquire farming lands in conformity with dispositions foreseen by the said real estate.

In our opinion, the legislator could rely on this aspect to clear the flaw which later might become a matter of litigation. We think that the purpose of re-launching the agricultural sector ought to be its revival in terms of the consecration of equality of treatment in the acquisition of agricultural lands in the DRC.

Apart from the conditions foreseen by the real estate law, the applicant has to meet the

96 Article36, agriculture code

following conditions:

- Reside or have a home in the DRC.
- Present guarantees of honorability and competence;
- Present proof of registration with the trade department, for those persons carrying out business;
- Justify one's financial capacity to support the costs involved in effecting the concession;
- Prove that the other agricultural concessions held have been put into use[97].

A more methodical approach is necessary for distinguishing the objective conditions from the subjective ones and for defining them in such a manner as to avoid any confusion of terms between them. The legislator needs to indicate the document confirming the latter condition, including the guarantees of honorability that may bring about confusion. Should it be a certificate of good conduct or a police record? Thus, it would be desirable to avoid the usage of concepts that are likely to place the investor in judicial uncertainty. It is hoped that the legislator will scrutinize the issue with a view to bringing this incontestable instrument of great importance within reach of the users.

The code categorizes farming into three types, namely, family smallholding, family type holding and industrial holding.[98] Agricultural holding is subject to the signing of a provisional contract of occupation between the farmer and the Ministry of Agriculture, which cannot exceed five years following its operation in conformity with the terms of their convention.

It is this contract which determines the type of agriculture as well as the minimum production that the farmer is expected to attain per season and per year. The agricultural code recognizes the right to lease one's holding to a third party, who should respect the destination of the holding. All he has to do is to inform the management under which agriculture attributions fall. Moreover it consecrates land ownership rights to local communities who apply them either individually or collectively.

Inclusion of the agricultural authorities (the state, the Province and decentralized Entities) manifest itself through their supervisory role, prevention of major risks and agricultural calamities. Moreover, an agricultural risk and catastrophes management Fund endowed with judicial personality was created by decree of the Primer Minister to assist agricultural holders who fall victims to natural calamities and epidemics. An oversight and crop protection policies are being planned for under this code on a provincial and national level. We emphasize that indemnity of the holder who is obliged to destroy his plantations or his crops in full or in part has been included in the agricultural code.

The State, through its central instruments or local subsidiaries, appears to be the principal actor in real estate strategies, since by virtue of its strength and dynamism, it, of necessity, influences the other actors. In the agricultural domain, land seems to be the international developmental vulgate, and a positive factor of economic and social progress.

The investments Code on its part stipulates that the recognized investments relating to exports of fully or partly finished products… and capable of attracting balance of payments, will benefit from export and tax exemption rights. This exemption runs form the first

97 Article 35 alinéa 2, agriculture code

98 A family holding is one whose staff is composed of the farm holder's immediate family members; A family type holding is one in which the cultivator is assisted by others using an average capacity unit of production; In an industrial holding, the entire extent of farming activity, together with the material and workforce at its disposal all give it a major production potential and is organized with management methods and division of labor.

exportation, with customs documents serving as proof.

Evidently, the government of Congo reserves the right for the consideration and equal treatment of national and foreign investors, as well as physical or moral persons who invest in Congo.[99] The Constitution of the Democratic Republic of Congo recognizes and guarantees the right to individual or collective property acquired by a Congolese or foreign investor.[100] We must point out that despite the fact that the DRC possesses an exceptionally major agronomic potential and an expanse of agricultural lands compared to several other African states, only 10% of its agricultural land has been put into use and the returns cannot enable the DRC to cover its domestic demand and exports. The irony is that South-Kivu Province, which enjoys considerable agricultural potential, is dependent on importation and has not been spared from the trend of general decline in the country's agriculture, as represented by the above tables.

We concur with Patrick Makala Nzengu that access to land and other diverse natural resources constitutes one means to fight poverty and food insecurity. It comes out clearly that even though availability of arable land is not the issue; fertile land is not equitably distributed throughout the country. Also, farmers in certain areas of production are confronted with difficulties in keeping in force the land ownership regime, customary law considerably reduces the space earmarked for farming activities.[101] Hence there is increased necessity to mobilize the population through the adoption and promulgation of the agriculture code.

b. Decentralization of the fund management

The agriculture code intends to put in place a new real estate management method based on agricultural cadastre, the national and provincial consultative council, the agricultural land ownership committee and the agricultural management council.

1) The agricultural cadastre

The agricultural cadastre is a management framework for the appropriate administration of rural lands and the concrete initiation of agricultural concession contracts. Their missions are defined in Article 12 of these terms:

- Issuance of agricultural activity permits;
- Provision of proper administration of land parcels earmarked for agricultural undertaking;
- Monitoring of the usage of agricultural lands ;
- Safe-keeping of cartographic documents relating to land parcels earmarked for agricultural undertaking.

It is created by decree of the Prime Minister who determines it character, its organization and function.

2) The national and provincial consultative council on agriculture

After the model of the agricultural cadastre, the national and provincial consultative council on agriculture is put in place by decree of the Prime Minister both on provincial and national levels and by order of the Provincial governor for representation in the territories and sectors. At the national level, he advises on matters determined by the present law project in its Article14 while at provincial level, Articles 15 and 16 apply.

99 Articles 12, 23 and 24 of the law number 004/2002 of 21st February 2002 regarding the investment code.

100 Article 26 of the Constitution of the DRC

101 P. MAKALA NZENGU, Public policy and management of the agricultural and rural sectors in the Democratic Republic of CONGO, A retrospection on des agricultural policies founded on gathering, expropriation and food dependency on importation, Centre Agronomique et Vétérinaire Tropical de Kinshasa, Kinshasa, s.d., p.111.

3) The agricultural land ownership committee

This committee sets control structure for the transactions surrounding land holding, conciliation and arbitration of land ownerships conflicts before any recourse to jurisdictions of common law. This practice safeguards the farm holder from costs arising from a court process. The tasks of the committee include:

- Rule/decide on the disputes touching on land ownership rights, whether collective or individual, which are not registered within the local communities;
- participate in inquests prior to the concession of rural lands whose procedure is foreseen in Articles 193 to 203 of the said real estate law;
- Do an audit at least once a year, the requisition from the Provincial Governor, the effectiveness of the operation as conceded by the State.

The committee can propose the repossession of lands where there is clear absence or insufficient land use.[102]

4) The rural agricultural management council (CARG)

The rural agricultural management council is a consultative structure that brings together the different actors on the rural scene, executive and legislative; administration, private sector, peasant farmer associations and unions, universities and research centers, religious organizations,… civil society in the larger sense who are directly or indirectly involved in the rural agriculture sector.[103]

CARG plays different roles to ensure that that the goals assigned to it are achieved:

- Facilitate consultation between the different participatory sectors in accordance with the country's decentralization for better development of the territory in terms of agricultural activities;
- Serve as an observatory for all kinds of taxation and harassment issues;
- Spread information on market prices, comparative advantages owned by the province as well as the modules of pilot projects;
- organize small-holder cooperatives and sharecropping for the youth;
- Facilitate the setting up of microfinance structures.

CARG facilitates the operations that work towards agricultural development and rural life by achieving the following goals:

- supervising the organization of small holder structures and facilitating consultation between their organizations;
- defending small holders' interests and providing information and advice for decision-making processes;
- contributing to the promotion of small holder leadership and overseeing the launching, follow-up and evaluation of the agricultural development plan;
- enlightening sponsors about the classification of development actions in the rural and agricultural setting;
- Establishing harmony and synergy in the actions on the ground as well as rebuilding confidence between the public and private sector.

Hence, CARG has been assigned the following tasks to enable it to play its role and achieve its goals:

- With the help of CARG members, disseminate documentation to farmers through

102 Idem, article 19.

103 Ano, report of « l'unité Conseil Agricole Rural de Gestion à la Compréhension facile de la fiche résumée du CARG », in *le journal des CAG*, n°1, Year 1, Kinshasa, July 2009, p.7.

agricultural sector related publications;
- prepare training plans for members and peasant groups;
- create awareness of new innovations among the small holder farmers;
- provide useful advice to the small holder farmers;
- identify non-state partners capable of assisting in rolling out the structure.

From all the above, the investor in the agricultural domain can rejoice and feel secure over the implementation of this new structure, which intends not only to build an administrative structure for the agricultural fraternity, but to bring on board their desiderata.
The structure, hitherto unknown by the Congolese, it is now operational in South-Kivu territories of Uvira, Fizi, Idjwi, Mwenga and Walungu from 19th to 28th May 2009.[104]

c. Water, energy and bio-energy usage in agricultural infrastructures

The agricultural code consecrates 13 legal dispositions (20 to 32) which favor the agricultural holder in the lawful water usage for purposes of irrigation, third party rights as well as the principles of the national water policy. The same code consecrates favorable treatment to the agricultural holder who uses water and electrical energy derived from a public organ by according him a regime of preferential billing. The same rule applies to the acquisition of petroleum products.

If, by reason of distance, electric supply from public providers is impossible, the agricultural holder can acquire a hydroelectric micro-plant or import a generator unit or even use any other form of energy; exemption on the energy production material is granted during importation.

Agricultural holders can turn to bio-energy assuming that renewable energy does not adequately cover the farming needs: the latter has to be accessible to the population at an affordable price in a bid to stimulate its production and local economy while at the same time integrating the principles of agricultural sustainability[105]. There are several advantages tied to bio-energy production which include, among others, setting up potential for replacing carbon-fuels, easier access to bio-energy by the local communities and lowering environmental degradation.

Energy infrastructures are an indispensable element for carrying out agricultural activities given that their advantages are incalculable, hence each agricultural holder is expected to erect and maintain the necessary infrastructures for storage of his agricultural products. Their absence is one of the factors hindering the development of agricultural product trade; exports and even domestic consumption suffer the consequences linked to market inaccessibility. The Governor by order puts in place a commission in-charge of the management and supervision of his infrastructures.

d. Agricultural financing and credit access

In 1967, a national agricultural and artisan credit fund was set up with the objective of creating, improving and transforming agricultural and artisan activities, financing individual or collective small and medium industrial activities and providing financial assistance to liberal professions by providing credits in the long or medium term. The implementation of this fund has never been effected to this day. Agricultural credit, as outlined in Article 98 of the agriculture code, aims to make capital available to farmers for the acquisition, running

104 Idem, p.31
105 Idem, articles 73 to 77

and management of their farming business. Implementation of this goal will be the way out for minimizing cases of distrust in the agricultural sector and triggering farmers' and other investors' interest.

The purpose of the National Agricultural Credit Mutual Fund and the Special Agricultural Credit Fund (Caisse Nationale de Crédit Agricole et le Fond Spécial de Crédit Agricole) is to coordinate and control agricultural credit operations. Additionally, it grants finances to the established mutual aid funds within the provinces to be used for short-, medium- and long-term loans. The loans are accorded to physical or moral persons or farmer on a holding of at least twenty hectares with the following aims:

- acquisition of animals for raising and approved genetic quality seed, the creation of pastures. The diverse bush clearing work, plowing, planting or exploitation of the land parcel;
- renewal of tools;
- establishment or acquisition of buildings and material strictly necessary for the conservation, processing and treatment of farm, fish and livestock products.

As for the Special Agricultural Credit Fund, which is a public establishment, its goals include giving loans to family farm holders endowed with judicial personality. These loans are channeled to farming and livestock development, harvesting, preparation and conservation of agricultural and animal products and the improvement of conditions under which these are carried out.

***e.* Fiscal and customs regimes**

To facilitate marketing and promotion of Congolese agricultural products and for purposes of attracting a maximum number of investors in this sector, the agricultural code project institutes a special customs, fiscal and para-fiscal régime which subjects the farm holders to the sole taxes in the code (cedulary taxes on revenues : Articles 112 to 117 and 119 to 121). This incentive régime revolves around the following parameters:

- importation of machines, tools, materials, animals and poultry for reproduction or income, are subject to a special rate of 2% of the CIF value (cost, insurance and freight) at entry. This rate applies equally to ploughs, harrows, seeders and any other accessory associated with agricultural activity (trucks, trailers, pick-ups, tractors);
- agricultural and fishing products are tax exempt at export. Fees and remuneration for services rendered by the public organizations working at the border post cannot go beyond 0.25% per organization, for their value of exported products recorded at the sole OFIDA desk;
- tax exemption on built-up and non built-up areas effected during farming activity and on buildings reserved for agro-industry activities;
- tax exemption on vehicles and special tax on road movement is applied on vehicles reserved exclusively for farming activity;
- farming activity, exempt from para-fiscal taxes irrespective of the benefiting organization.

Departmental order number 140/87/0001 of 8th January 1987 regarding the implementation measures of order 86/028 of 5th February 1986 fixing the tax on presidential authorization, conditions the exercise of trade activities in Zaire by prior authorization delivered by the President of the Republic if and when the concerned are foreign or physical moral persons. Article 2 of the same order dispenses to the physical or moral persons carrying out an

agricultural or livestock activity to pay the above-mentioned tax irrespective of their nationality.

I.1.C. The agricultural policy note as revised in April 2009

Born from the Kinshasa Round Table discussions on Agriculture held from 19 to 20 May 2004, the Agricultural Policy Note aims to fill the planning gaps observed for a long time in the agricultural and rural sector. Its overall goal is to contribute to the achievement of food security with a view to realizing the first millennium development goal to which the DRC has subscribed.

Its specific objectives can be summed up under the following points:

- improve access to markets and added value of agricultural produce as well as productivity in the agricultural sector: food, horticultural and vegetable production, halieutical and livestock outputs;
- Promote decentralized financial systems adaptable to the nature of the agricultural sector activities;
- Reinforce technical and organizational capacities of public and private agricultural production support institutions.

II. Specific regulation to exports of foodstuffs

II.1. Legislation in force to date

The regulation being referred to here is still in force, on which the Congolese Control Office recourse for the granting of the lot report ready for export and which serves as an analysis bulletin for the exporter, takes into account agricultural products such as rice, banana, groundnuts, maize, coffee, tea and oil that may be produced in South-Kivu for possible exportation.

The table below shows the data on industrial products produced in South-Kivu from 2002 to 2006. It should be noted that several factors have caused a drop in agricultural output, chief among them, wars, rural-urban migration, apathy from and abandonment of the agricultural sector by qualified manpower and non-modernization of tools of production.

Name of product	2002	2003	2004	2005	2006
Arabica coffee	5197	5761	5200	5752	5643
Oil palm	3909	3976	3946	1800	26537
Tobacco	421	353	403	394	388
Tea	-	-	1209	3222	3222
Robusta coffee	94	91	-	-	4192
Sunflower	687	973	824	676	702
Quinquina	9932	10696	9938	9754	35189
Sugar cane	45613	45762	10226	39741	39189
Cotton	-	15	11	11	-
Rice	7460	10520	7469	15933	112624
Sorghum	33684	29893	34919	38428	38314
Maize	89967	1002002	104579	144287	3627
Soya	2270	2791	1968	2251	3627

Peas	384	615	556	139	821
beans	65338	59347	44523	93564	113259
Groundnuts	15685	27059	16717	61385	94175
yam	3434	2901	4816	5418	5380
Colocase	9451	9776	12300	13473	14927
Banana	559451	578877	470124	540277	531336
Potato	112212	17622	11424	32773	27888
Cassava	1388288	1769430	1314701	2762431	3773918
Sweet potato	108309	107353	98003	128221	125610
Zucchini	4195	4117	2876	5020	4952
Market garden produce	18131	10505	21833	51152	39669
Vegetables	-	-	-	53163	41681
Fruit trees	12154	1887	20714	26937	26509

Source : National Agricultural Statistics Service, South-Kivu section, unedited

To export, it is important to produce and offer to the international market a quality product that meets these four conditions:

1. the quality agreed upon with the importer;
2. the quality accepted on the world market and which is in conformity with the provided samples;
3. competitive price;
4. strict respect for deadlines and regularity of delivery.

Let us take note of the rigor with which the colonial administrator put down the agricultural legislation by adapting it to international market and trade relation exigencies. The intrinsic quality of products and their presentation at the time when the market expresses the need are among the determinant factors for promoting the export of agricultural produce.

It must be emphasized that the agricultural code does not specifically determine the standards applicable to every agricultural product in terms of its production, conservation and marketing. Article 135 states that all the dispositions that run contrary to the code are abrogated. We hope that the legal dispositions prior to this code will not occasion any abrogation insofar as they would not contradict it, given that they do not complete from the point of view of specificity and precision on the quality of products on offer in the market despite the necessity of their actualization. The prime motivator in laying down the agricultural legislation is the presentation of quality products and the capacity for the country or the province to carry out a balanced production of goods for export and domestic consumption. Owing to the scarcity of agricultural product exports in South-Kivu and in the whole country at large, we will present these legislations in a succinct manner only, without elaborating them.

A. The decree of 26th July 1910 regarding manufacture and sale of foodstuffs.
This decree regulates the manufacture and marketing of food items, laying down the penalties to be handed to any person who contravenes the specifications of the above.

B. Order no. 52/A.E. regarding quality, conditions and export for bananas.
Banana exportation must adhere to a number of conditions spelt out in Articles 2, 3, 4 and

5 as well as an interdiction on the export of banana bunches with an unhealthy shaft and neatly cut off without tearing or breaking (Article 6).

C. Order 22/A.E regarding regulation shelled groundnuts
South-Kivu is a very fertile region where the investor can produce groundnuts and export them, not forgetting the domestic sales which are certain, and the possibility of setting up a treatment plant for this product rich in protein. The exports of product are covered in Articles 2, 3, 4 and 5 of this order.

D. Order No. 41/89 of 1st March 1958 on trade in maize
South-Kivu Province possesses good land for the production of maize capable of satisfying national consumption and export. Article 2 specifies the conditions for maize marketing in D.R. Congo.

E. Order 41-137 of 29th March 1960 regarding export conditions for cassava flour.
South-Kivu produces cassava in various areas, chief among them, Fizi, Idjwi, Kalehe, Bunyakiri and Sangé. Nonetheless, it imports cassava flour from Rwanda. Industrial production of this food item would considerably reduce cases of flour importation with its production catering for national consumption and export, resulting in growth in exchange returns. Articles 1, 2, 3 and 5 enumerate the treatment and export conditions for cassava flour.

F. Order 57-260 of 27th August 1957 regarding tea marketing.
Article 2 lays down the indicators to be marked on the containers or outer covers containing tea and boldly showing the word "TEA", uniformly and clearly, and the minimum weight of the product.

G. Order-law No. 72/030 of 27th July 1972 on cultivation and marketing of coffee
This order-law spells out conditions for the importation of seeds and plants as outlined by the ministry of Agriculture (Article1). For coffee cultivation, before any agricultural activity, the cultivator must present to the territory's administrator 30 days prior to planting, a declaration indicating the placement and size of his plantation (Article 2 alinéa 1). The task of coffee purchasing from coffee out-growers is reserved for the Congolese Coffee Office (ONC). This exclusive monopoly by the Congolese Coffee Office appears on Article 13 which clearly states that "exportation of coffee produced in the DRC can only be carried out by this Office". We must add that the key cause that may justify fraudulent coffee exports is one: the monopoly reserved for the Congolese Coffee Office. The procedural red tape converges here when in Article 2 it is spelt out that no one can be a coffee buyer if they do not possess a coffee drying and shelling factory as well as a coffee plantation…and purchase points are determined by the ONC. Domestic and foreign investors should be free to carry out purchasing and exportation operations as long as they observe regulations.

Industrial cultivation of coffee is done in South-Kivu. The DRC, in an effort to promote investment at this level, needs to review this legislation and facilitate the task for investors who are susceptible to embrace this domain, notably by reducing to a maximum the procedural red tape and by removing the coffee purchasing and exportation monopoly. This would encourage private initiative as it is spelt out in Article 35 of the constitution of the 3rd Republic which says: "the State guarantees the right to private investment both to nationals and foreigners."

II.2. External trade

External trade, by exports and imports, plays a key role since they foster sustained economic growth, development of production capacities, increase in employment opportunities and the creation of sustainable living standards.[106] Sustained economic growth demands investment and an increase in exports with close linkages between these two variables.

Agricultural sector development must be coupled with scientific research and technology. INERA and other researchers in universities or elsewhere can make available reliable data and information upon which investors can rely for better orientation of their agricultural policy in defining agricultural activities to carry out in the DRC generally and in South-Kivu in particular.

A. Order No. 07/018 of 16th May 2007 spelling out ministerial duties.

According to the terms of this order, the ministry of external trade carries out its mission by, among other things, promoting the sector through:

- studying proposals on the general, sectarian and policy orientation in the field of external trade.
- taking measures that may contribute to restoring Congolese exportable product competitiveness by identifying all the structural, administrative, financial, tariff and human constraints;
- researching into ways and means of obtaining new openings for the national industry through rationalization of the country's participation in trade fairs and other international events, analysis of economic information relating to trade with foreign countries, conventions and usages regulating international trade relations;
- negotiating, controlling and following up trade accords;

These different devolved missions at the ministry of commerce and external trade, if carried out, will serve as a source of information for all investors who will concentrate their efforts in the agricultural products export sector and mutatis mutandis those agricultural products from South-Kivu.

B. Conditions for becoming an exporter in the DRC

1. Registration and import-export number

Departmental Order No. 140/0003 of 9th January 1987 setting the conditions for obtaining an import-export number states that the exercise of import and export trade is dependent on an import and export registration opened at the Central Bank of Congo, which follows approval by the ministry of external trade.

The documents hereunder must be attached to the application for registration addressed to the ministry of external trade:

- copy of registration at the new trade registry;
- copy of national identification card;
- identity card if the applicant is a physical person;
- notary's statutes for moral persons;
- latest bank statement;
- proof of prior annual tax payment on the import-export number;
- valid, current income tax returns;
- a provisional list of products to be imported or exported;

106 CNUCED, 2OO4 Report on least developed countries: international trade and poverty reduction, United Nations, New York and Geneva, 2004, p.2.

- payment of presidential tax for physical persons or moral subject to it.[107]

It is clear from these conditions that to become an exporter in the DRC, it is important to have a business mind. For farmers who do not have sufficient finances to meet the above-mentioned demands, it is imperative for them to sell their produce, either to others who possess sufficient export capacities, or join agricultural cooperative societies through which they can dispose of their produce. However, the government ought to review the regulation to facilitate farmers' easier export for their products since the rigidity of the legal system encourages fraud.

The trade code of 2nd August 1913, in its Article 2, states that any purchase of foodstuffs and goods for resale whether natural, or after being processed constitutes an act of trade. Should the farmer who carries out trade outside the professional scope but occasionally sells off his agricultural products during harvest be considered a trader?

The law is clear with regards to export conditions in that it impresses upon the exporter to adopt a business approach. To export, farmers will have to organize themselves into agricultural cooperatives which will, in our opinion, carry out the above-mentioned trade activity and the responsibility of cooperator associations having to limit themselves to their management. The advantage of this form of cooperative is the capacity to build solidarity and flexibility among agro-pastoral entrepreneurs.

2. Model EB declarations

The Central Bank of Congo circular of 22nd February 2001 regarding regulation of foreign exchange in the Democratic Republic of Congo contains 14 dispositions applicable to goods exportation. Article 9 of this circular puts a condition on all exportation operations prior to presentation at a recognized bank of a foreign exchange document titled "Model Declaration (EB)". The banker must verify if the documents required are provided by the exporter. When presenting Model Declaration EB forms, these should be accompanied by the following: sale agreement and/or receipt, report for the lot to be exported, quality certificate and any other document required in international trade.

The validated Model EB plays several roles including:

- export authorization and obligation to receive the total FOB value of the export realized in the time limit;
- Obligation to be paid by the foreign buyer on the basis of this declaration and repatriation of the payment received through a recognized bank.

The cost of a Model EB in South-Kivu is 6,000 Congolese Francs. To obtain this Model EB or a license, the trader exporter must necessarily have a bank account which issues him the license since through the latter, foreign currency payments will be repatriated. Additionally, the conditions required by Article 9, agricultural product exports necessitate a phytosanitary certificate issued by the provincial division of agriculture, fisheries and livestock, which serves to certify the product's conformity to agricultural exports standards.

3. Documents provided by the Congolese Export Control Office

Order No. 79/219 of 5th May 1979, bearing statutes of a certain public Zairian enterprise control office currently known as the Congolese Control Office (OCC), assigns under Article 3 the task of carry out quality, quantity and conformity controls for all goods, the analyses of

107 *Article 3 of the departmental order cited above.*

all samples and products as well as technical controls of all apparatus. After quality control through laboratory analyses, the OCC delivers an analysis slip with a 60-day validity period to the exporter containing the analysis results. The Control Office proceeds to verify the quantity so as to confirm the goods manifested on the daily check-off report known as "pally" in groups of five as well as by weighing. The price is worked out according to the market price list fixed by the national parity commission which is applied throughout the country, including South-Kivu. An export verification certificate is issued to the exporter and is valid for 3 months after the date of verification.

Finally, the ready export lot report is delivered and serves as validation of model EB license. Apart from the recipient's identity, this report indicates the lot number, quantity, weight, value… and the brands found on the lot, inclusive of packaging. These documents are necessary for obtaining the model EB license and also for guaranteeing the quality of goods offered to foreign markets over and above the fact that observation of all the procedures builds the exporter's credibility in the international market.

II.3. International cooperation in agricultural matters

The agricultural code favors and encourages regional integration and agricultural cooperation by underscoring DRC's determination to implement the different ratified international accords. The DRC is a signatory of the Cotonou accords since July 2000 and are founded on essential principles which encompass conception in the form of contracts, the principle of partnership, aid predictability and the basis for increased cooperation. [108]

The ACP and member states of the European Union agreed on a reorientation of their trade relations in line with WTO principles that are compatible to development. Trade relations and access to land are as important to the DRC as trade liberalization in the agricultural sector. Security concerns do not oblige the poorer countries to liberalize their markets and to continue to export certain agricultural products in exemption. These are some of the positive measures that the DRC could put into practice so as to establish her cooperation with the other countries that are signatories of these accords.

Agricultural products competitiveness on the international market has to be increased, taking into account both the price and quality. The convention on free movement of persons, goods, services, capital and the right to establish oneself in the Great Lakes Economic Community confers the freedom to carry out agricultural activity for peasant farmers entered in the funds register of a member State other than the one they originate from, and to proprietors or farm leasers of at least 1.5 hectares within the member state concerned.

CONCLUSION

The climatic conditions in the DRC in general and South-Kivu in particular, the agro-ecological zones in the province where it is possible to carry out two harvests each year from the same parcel of land, the scarcity of exports in South-Kivu, which in 2000 was limited only to quinquina (bark and quinine), as well as the global financial crisis which impacts on the mining market where DRC had concentrated most efforts, and the lack of interest in the agricultural sector by local and international investors, have influenced the choice of this subject whose goal is to set up legal standards with regard to agricultural product export from South-Kivu to the international market.

108 Dr. HEIKE KUHN, Cotonou Accord -a new dynamic in the ACP-EU partnership, in rural Agriculture and development, vol.7, n° 2/2000, Germany, p.3.

The necessary texts pertaining to agriculture, mostly dating back to the colonial days, have always been available and, at present, an agricultural code project, hitherto lacking in the Congolese judicial archives is also available. Agriculture, which is the engine for kick starting DRC's economy, an effective weapon in the fight against poverty, and the institutional framework whose goal is to protect farmers and promote export regimes are an imperative necessity.

It must be pointed out that in South-Kivu, several lands remain uncultivated. Mismanagement accompanied by poor governance, and persistent armed conflicts in the South-Kivu province as well as lack of interest in the agricultural sector by the rural population are among the reasons that bring about insufficiency of agricultural export products. The contribution of this study consists of research in the laws applicable in agriculture and foreign trade, especially with regard to agricultural export. Several related texts have been scrutinized and the choice of measures favorable to agricultural activities and agricultural export operations finally arrived at.

It is within this framework that we resorted, *de lege ferenda*, to the agriculture code project, through which, as the instrument viewed as the farmer's protector as the various incentive mechanisms set up are analyzed in this article in which we propose tax exemption on agricultural product exports. In order to tackle the various problems we have highlighted above, the DRC generally and the South-Kivu province in particular, will have to get down to elaborating agriculture programs since this is clearly spelt out in the 3rd Republic's constitution Article 204 point 20… involved working out the agricultural programs and their implementation in line with national planning goals…the appointment of agricultural personnel, the application of the national policy on agriculture, … the organization and oversight of agricultural campaigns as well as setting prices of agricultural products thus taking charge of promotion measures of the agricultural sector. The DRC government will be expected to integrate agriculture in South-Kivu's development strategies to attract national and international investors in line with the agricultural policy note. Promotion of external trade, especially regarding South-Kivu agricultural exports, facilitates the productive mobilization of financial and human resources hitherto underutilized owing to disinterest in the sector.

International agricultural cooperation creates greater access to modern technologies available in other countries. These become useful in modernizing agricultural methods, which in turn increase domestic market production and export as well. A regulated multilateral trade system guarantees transparency, stability and predictability as far as conditions of market access and other trade-related questions are concerned. The Marrakech preamble which instituted the World Trade Organization states that trade and economic relations need to be geared towards raising living standards, attaining full use of increased and rising level of production and marketing of goods and reinforcing the means to that end in a manner compatible with the respective needs of the parties. The DRC, like many other African countries, needs to take advantage of these favorable membership conditions.

The tea and sugar factories in Kiliba, the "ESTAGRICO" ginnery, the Kiringye rice scheme will need to be revamped in order to sustain the activity among the agricultural community. Nonetheless, the Democratic Republic of Congo will need to maintain peace, security and stability in order to create a favorable investor network, secure to attract foreign capital and technology in this sector.

Rule of law remains as much a prerequisite for all forms of development as the application

of it for any form of progress to be attained. The agricultural sector cannot be modernized unless the agricultural law, the rehabilitation of roads and other infrastructures leading to that agricultural wilderness, as well as the farmers' judicial security are guaranteed within the province and the republic as well. The rule of law must be the instrument that fosters the development of all people and families in South-Kivu living below the poverty line, where children and women will see their rights respected. The existing laws, if well implemented, will promote social progress not only in the entire South-Kivu province but in the DRC as a whole. Better access by the population to land, credit and technologies are tool in combating poverty.

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THE CONGOLESE JUDGE AND THE PRINCIPLE OF EQUALITY: THE FATE OF WOMEN'S RIGHTS IN JURISPRUDENCE IN BUKAVU MAGISTRATE'S COURT

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INTRODUCTION

In 1649[109], London women presented, their 'humble petition' to the English parliament, which, twenty years earlier, had enacted the Petition of Rights of 1628. They asked the following question: "…is it possible that the freedoms and guarantees of the Petition of Rights and the other good laws of the Kingdom were not as much made for us as they were for men?"

Bukavu women today have the right to pose the same question to the Congolese justice system. In effect, the current Constitution adopted through the referendum on 18th and 19th December 2005 and promulgated on 18th February 2006 currently governs the Democratic Republic of Congo in terms of human rights and has accomplished strides that many older democracies have not achieved to date.

To what extent has Congolese judge taken advantage of this progress over the last three years?

That is what we intend to establish in this write-up on the implementation of the principle of equality by the Bukavu Magistrate's court, specifically concerning the future of women rights within that court's jurisdiction.

After proclaiming in its first article that the Democratic Republic of Congo is ruled by law, in which equality is a key component, even a condition of life, the Constitution[110] has dedicated several articles to this principle, that has today become the corner stone not only for public law, but all the other branches of law. It has been viewed in other circles[111] that the transition to gender equality today constitutes an important milestone for member States of the European Union. Among them we quote Article 11, which explains the general principle of equality in these words: "All human beings are born free and equal in dignity and in rights".[112] Article 12 guarantees the two aspects of the principle of equality in these terms: All Congolese people are equal before the law and are entitled to equal protection by the law; equality before the law and equality in law.

Article 13 continues: "No Congolese national can, whether in education and access to public services or in any other matter, be subjected to any discriminatory act, whether resulting from the law or from an executive act, whether arising from his religion, his origin, his social status, his place of residence, his opinions or political persuasion, his race, ethnic

109 Abderrahman Youssoufi, 'The role of non governmental organizations in the fight against human rights violations' in UNESCO, *Violations des droits de l'homme, quels recours, quelles résistances ?* Paris, Imprimerie des Presses Universitaires de France, 1983, p.109

110 Constitution of the Democratic Republic of Congo, special edition, Official Journal, 47th year, Kinshasa, 18 Feb 2006 special edition.

111 European Human Rights Court, Ruling- Abdul Aziz and Balkandali vs. United Kingdom of 28.05.1985,

112 Constitution of the Democratic Republic of Congo, special edition, Official Journal, 47th year, Kinshasa, 18 Feb 2006 special edition

background, tribe, his belonging to a cultural or linguistic minority." Article 14 is especially dedicated to the protection of the woman: Public offices are alert to the elimination of all forms of discrimination against the woman and assures the protection and the promotion of her rights. They are taking appropriate measures in all domains, especially in the civil, political, economic, social and cultural spheres, to guarantee that total development and full participation of the woman in the development of the nation bloom'

Do these measures confer any justifiable rights? This discourse leads to a wider issue, notably, that of the justifiability of rights provided for by the constitution and other international judicial instruments. In examining the Congolese positive law, it becomes apparent that certain legislative texts, notably family law, the code of civil procedure and the penal… still contain discriminatory tendencies over which judges of the Magistrates Court of Bukavu found their decisions to deny certain rights to the woman, placing her in judicial inferiority vis-à-vis her husband and even vis-à-vis her adult children. Sometimes it is legal practice which places hostile laws on women rights, *contra legem* practices that have been followed by the judges of Bukavu. Nonetheless, this tribunal has already admitted the justifiability of the subjective constitutional rights. It has been judged under R.C.7206[113] that "by its ordinary duty for the State to guarantee all citizens the fundamental rights resulting so much from judicial instruments regularly ratified by the Constitution, in particular the right to access to public services."

The judge thus confirms the tendencies of Article 153 of the Constitution by which "courts and tribunals, civil as well as military, apply the international treaties duly ratified, the laws, the regulatory acts as long as they conform to the laws and customs and as long as these do not contradict the public order or accepted standards of good behavior." It is however incumbent upon us to question the choice that will be made by the judge in the event where the spirit and/or the letter of the law contradict the Constitution or an international instrument. The answer appears clear: the normative hierarchy which ensues from Article 215 of the Constitution along with other pertinent texts liable to give priority to subjective constitutional or conventional laws. We, nonetheless, lay the hypothesis according to which the Bukavu magistrate's court would register in addition to this evidence, consecrating liberticidal jurisprudence.

There are two types of judicial decisions that will enable us to verify this hypothesis, namely, the future of a woman's rights at dissolution of marriage through divorce, or by the death of her husband on the one hand, and on the other hand, the admissibility of actions in justice transformed by women. This will not hinder us from analyzing other pertinent decisions for all that they enable us to elucidate our analysis.

To do so, out analysis will begin from the study of justifiability of the principle of equality in Congolese positive law before confirming the manner in which judges of Bukavu Magistrate's court apply it. We will finish by the tools that the judge should mobilize for the effective implementation of the principle of equality and of human rights generally.

I. Justifiability of the principle of equality in Congolese positive law

We will be preoccupied with two questions, namely, the right to equality and to non-discrimination as guaranteed by the Constitution and international judicial instruments. Is it susceptible to a guarantee and control by the judge? If yes, what are the tools available to him? To answer that, we will examine first the legal bases of the principle of equality and non-discrimination before defining the content that follows these sources and their

113 Bukavu magistrates' court, R.C. 7206: Case of Jean de Dieu Mulikuza vs. SNEL and the Congolese Government.

justifiable prerogatives.

I.1. Legal basis and content of right to equality and to non discrimination

I.1.1. Legal basis

Earlier on, we had indicated the constitutional tendencies relative to equality and non-discrimination. These constitutional guarantees materialize, notably, through international guarantees.

Among the international judicial instruments applicable in D.R. Congo, we mention:

- The International Covenant on Civil and Political Rights, Articles 2, 3 and 26. This treaty is in mandatory force in the D.R.C. since 1st November 1976[114]. It has a direct effect and thus ought to be applied by the judge in conformity with Article 153 of the Constitution; it will have primacy over the laws as indicated in Article 215.
- The Convention on the Elimination of all forms of Discrimination against Women.
- The African Charter on Human and People's Rights Articles 2 and 3, among others;
- Article 2 of the additional protocol project relative to the rights of women in Africa. The D.R. Congo ratified this charter on 20th July 1987[115] along with its protocols.

After having indicated the principal sources of right to equality and non-discrimination, the content must be specified, as well as the rights that ensue from it.

I.1.2. Content of the principle of equality and non-discrimination

We will not redefine the entire theory of the matter here; all we will do is to briefly mention the recognized prerogatives for the woman whom the judge is called upon to protect.

A. What constitutes discrimination?

Article 1 of the Convention on elimination of all forms of discrimination against women defines discrimination as "any distinction, exclusion or restriction founded on gender, which results in or aims at compromising or destroying the recognition, enjoyment or exercise of human rights and fundamental rights by women, irrespective of their marital status, on the basis of equality between men and women in political, economic, social, cultural, civil or any other field."

The doctrine[116] uses situational comparability as a measure of the principle of equality. The rule of equality prohibits the application of differential treatment between categories of persons finding themselves in comparable situations without admissible justification. This is referred to as active discrimination and occurs when a standard or a public authority, without admissible justification, treats in a distinct manner, two categories of persons who find themselves in a comparable situation.

The rule of equality also prohibits treatment, in an identical manner and without admissible justification, categories of persons who find themselves in non comparable situations. This is known as passive discrimination. Passive discrimination happens when a standard or a public authority treats in an identical manner, without admissible justification, categories of persons who find themselves in non comparable situations.

114 http: www3. unhchr.ch / fr.
115 http: www3.aidh.org
116 Sébastien Van Drooghenbroeck, *Collective Dimensions of human rights Courts,* Complementary Master in Human rights, Académie Louvain, 2007-2008, unedited

B. Debtors of the guarantee of equality and of non discrimination[117]

Evidently, guarantee of equality and non discrimination is essential to the authorities, who on their part are not supposed to discriminate. Nonetheless it has been noted that effectiveness of consecrated law could not be achieved through state passivity. Consequently, the idea of guarantees of equality and non discrimination could place a positive obligation of protection upon the authorities. Apart from the authorities, the obligation not to discriminate imposes itself also on interactions between individuals. This is the lesson that ensues from the judgment *Pla and Puncernau vs. Andorre*[118] in which the Court censured a discriminatory provision of a will that granted succession solely to a child born of a canonical marriage.

Jurisprudence has also drawn a procedural obligation in the prolongation of positive obligations. In the matter of *Natchova vs. Bulgaria*,[119] the European Human Rights Court sanctioned the fact of not having investigated on the discriminatory motivations of the murder. The Bukavu magistrates' court judge will thus have to watch out lest a law or a ruling from the executive installs differentiated treatment for persons found in similar situations or an identical treatment for persons finding themselves in incomparable situations.

When authorities are unable to stop discrimination, the judge would have to verify if the procedural obligations have been respected. He will not only censure the authorities' shortcomings but also 'the individuals'. Let us look at the actual situation.

II. Bukavu magistrate's court and women's rights

To understand the application of the principle of equality by the magistrate's court, we proposed two approaches: the impact of the family on the rights of the woman, and the admissibility of actions effected by women. We will also refer to other cases which illustrate violation or protection of women's rights on equality.

II.1. should a married woman's ability be compatible with the principle of equality?

Under R. P. 11.133,[120] "despite the fact that dispositions of the above-mentioned family code have never been modified, the court confirms that there exists no contradictor character whatsoever between these dispositions and the constitution's dispositions or the international judicial instruments relative to human rights." In this matter, Mrs. Cibalonza M'Rwabika brought Mrs. Sikuzani M'Bahole before the law over injurious charges, slanderous denunciation, malicious destruction of property and public insults.

The defendant raises the exception of default of capacity. This exception finds its foundation in Articles 215 and 448 of the family code and Article 23 of the Congolese civil code, book 3. In application of these dispositions, the judge received exception of default of capacity and considered it as founded and, in parting, non-suited court action. If these articles appear pertinent, they contradict Article 14 of the Constitution in so far as the authorities will have failed to oversee the elimination of this form of discrimination against the woman but constituted themselves among principal actors of discrimination. The contradiction is still more flagrant in Article 13 which guarantees equality of rights and dignity to all people. The judges could still exonerate themselves in upholding that this discrimination finds its basis in law and that appertains rather to the legislation to modify the law to adapting to new changes consecrated by the constitution; which they did in upholding that the incriminated

117 Idem
118 European Human Rights Court, Pla and Puncernau vs. Andorra ruling
119 European Human Rights Court, Natchova vs. Bulgaria,
120 Bukavu magistrates' court R.P. 11.133, unedited

legal dispositions have never been modified. For them, the constitution has never created subjective rights; he could have simply indicated the objectives that the legislation had to achieve. Against this position, each of the following arguments (and which we will systematically review in point number three hereunder) suffices to demonstrate its fragility, indeed its liberticidal character.

Already in the Jean de Dieu Mulikuza case, the judge admits that the principle of justiciability of subjective rights contained in the constitution. The Constitution has, moreover, raised the principle of direct application of the international treaties duly ratified by the DRC we could also envisage state responsibility from the point of view of the legislator whom the judge must endeavour to inform. The same observations can be made from the contradiction between these legislative dispositions and Article 2 of the Convention on Elimination of all forms of Discrimination against the Women, according to which "the States engage themselves to set up a jurisdictional protection of women's rights on an equal footing with men and to guarantee, through the intervention of competent national tribunals and other public institutions, effective protection of women against all discriminatory acts.

The United Nations Committee on Human Rights[121] places non discrimination among the immediately eligible obligations, and justiciable. If it is true that Article 14 does not prohibit discrimination except for rights guaranteed by the Convention, Frédéric Sudre[122] observes that protocol 12 brings in rights accorded to the individual by national law into the field of control exercised by the court. A similar existing disposition in the CADHP (African Charter on Human and People's Rights) and the Congolese constitution, it goes without saying that a jurisdictional control will have to be exercised. That is exactly the letter of Article 13 of the Constitution whose violation would be sanctioned by the judge. No objective justification can justify this judicial inferiority of the woman, not to allow a married woman to act in justice in to deny her in real terms all rights and to snatch from her the guarantees thereof.

Fortunately this dark phase did not last long, the same tribunal, presided over by the same judge, did not have to wait for two years to affirm under R. P. 11.707 [123] that "the Congolese woman does not deserve to be treated as incapable since the constitution in its Article 11 proclaims equality of all people, irrespective of gender". In this case, Mrs. Ciroyi Nabintu Bernadette takes to court Kalibanya Zaluke, Watongoka Nginga, Civava Namwezi and Makelele for damageable charges. Here too, the defendants bring out the default in marital authorisation in the right of the court action. To support this exception, they invoke Article 492 of the family code. The civil part, which is the defendant under exemption, opposes this exception to the terms of the constitution which guarantees the equality between man and woman. In his judgement of 2nd July 2008, the tribunal decided that "besides the fact that it is stipulated in Article 492 of the family code that this exception can only be raised by the wife, the husband or their heirs. It can be considered that the Congolese woman did not merit to be treated as incapable because the constitution proclaims in its Article 11 equality of human beings without regard to gender, obscures this diminished capacity."

How does it explain that the same judge, after having consecrated the incapacity of the married woman has not taken two years to judge it unacceptable? Can we consider that it is a question of a reversal especially that the president of the chamber in the two causes is

121 DESC Committees, observations no. 11(1999). Primary Education Action Plans, 20th session, Geneva, 26th April-14th May 1999, www.aidh.org/ONU-GE/Comité-Drteco/hp-desc.htm

122 Frédéric Sudre, Exercise of "jurisprudence – fiction": protection of social rights by the European human rights Court; Florence Benoît –Rohmer and Constance Grewe (dir.), *op.cit* ; p.157

123 Bukavu magistrates' court, R.P. 11.707 case of Nabintu Bernadette vs. Kalibanya Zaluke consorts of 2nd July 2008

the same? Until the day when a reversal will reproduce itself again, our answer remains in the affirmative.

I.2. When the home annihilates women's rights

Under the R.P. 11.133, another exception drawn from quality defect was raised. The defendant realized that the titles of the legal contentious concession are in the names of the husband who did not attend the court process and hence refuses the wife's authority to act in law. The law points out that the civil part, defendant is opposed to these two arguments: on the one hand, all the infractions have no connection to contentious real estate concession, including the infractions of over injurious charges, slanderous denunciation, and malicious destruction of property and public insults. If the question of quality arose, it would not in any way concern the infractions of which court action is the sole victim, justified by soliciting reparation for the prejudices suffered. The second approach involves the fact that court action concerning infraction willful destruction of property, with a view of protecting the family patrimony. In effect, Article 442 of the family code states that it is marriage that creates the home. One of the spin-offs of the home is the confusion of the two spouses' inheritance (in the case of community regime), which is the case under scrutiny (a question that the judge did not examine) and consequently, though the home is not treated as a moral entity, it nonetheless is a non personalized grouping whose existence the judge may ignore. The evidence is that the dissolution of the home always brings about a liquidation of the common inheritance. One then wonders if the inscription of titles in the name of a family member, the husband in this case, confers sole rights to him, which in effect would mean that in the home, the wife has no inheritance rights whatsoever; and yet we know that patrimony is inherent to judicial personality. Hence the married woman is denied her human quality that is subject to rights, reducing her to a simple object of rights like a slave or an animal.

What is even more disastrous for women's rights in the case under examination is that, while it was necessary to take into account the existence of the home to deny the quality to the woman to act in law, the judge observed the existence of the home. But when the existence of the home should have served to protect the rights of the woman, notably by allowing her to defend the family inheritance over which she has a share, the judge decides otherwise, ignores or does away with, " the legal solidarity" between husband and wife in spite of the existence of the home. This enables us to conclude that in the eyes of the Bukavu magistrates' court, the home exists merely to the detriment of the woman's rights.

Nonetheless, the scenario is not entirely bleak since in R.C. 6838[124], the judge confirmed the rights of a widow in conflict with those of the children, heirs in the first order. In this case, the applicant reveals that she was married to Kashemwa, father to the first defendant, deceased since 14th October 1995. During the life of the deceased, they acquired a house that the first defendant sold to the second. She solicits and obtains annulment of its sale. The court accords it, confirming the usufruct of the widow over the house in question. Would one say that this is a pure application of the family code? If certainty relieves texts, it is noteworthy that the public ministry had given a negative opinion to the application and that one of the rare moments where a court confirmed a woman's inheritance rights. The ruling would still have been more interesting if questions of inheritance and liquidation of the family regime had been asked.

124 Bukavu magistrates' court, judgement R.C. 6838 case of widow Cibalonza M' Marume vs. Kashemwa Kavali and Mademwa Kajangu of 25 June 2007, unedited

II.3. Can the conduct of an under-age girl justify a rape?

It was judged under R. P. 11.261[125] "that for the case of an under-age girl to hold before a court that she was disposed to pursue sexual relations with the defendant once set free constitutes manifestly provocative attitudes of the victim in such a way as to justify a repression mitigated by the infraction.

In the case under examination," Mr. B. B. is pursued for having had sexual relations on the date of 5th March 2007, with Ms. F. M. a girl aged below 15 years of age at the moment of the act. The terms of Article 170 alinea 7 of the penal code book two as modified and completed by law No. 06/018 of 20th July 2006, reputedly was rape with violence, the sole act of carnal sexual union committed on the persons designated in Article 167 alinea 2.

The persons designated in the Article cited above are those aged less than eighteen years. The victim who beforehand had denounced the violence she had been subjected to by the accused and his friends to strike back before the court revealing that the matter was sexual relations with her consent. On his part, the defendant confirms having had sexual relations several times, including on 5th March 2007, still with the consent of the victim who is his friend.

The court certainly has condemned the accused - to 5 years in prison - but retaining it as extenuating circumstance the manifestly provocative attitudes of the victim. This provocation is deduced from the fact that during the hearings the victim held that she was disposed to continue sexual relations with the accused once he was set free. It notes also that the victim claimed to be of age by showing her elder sister's elector's card and orders an expertise which confirms the underage status of the victim. From the foregoing, the court establishes some sort of "shared penal responsibility" between the author and the rape victim.

Let us note in passing that the court notes the victim's change of mind without according it the least attention, and yet Article 14 (bis) of the Law No. 06/019 of 20th July 2006 modifying and completing the Decree of 6th August 1959 bearing Congolese Code of Penal Procedure should have been mobilised to this effect. In effect, the law does not demand that the victim institute court action to benefit from psychological, medical and judicial assistance. Under RP 12 103[126], the judge based himself on loose morals of an under-age girl to fix damages, reducing them to a symbolic figure of 300 dollars and holding that loose morals on the part of the victim might have influenced the defendant to commit the act. It appears to me that if the legislator decreed that consent on the part of a person under eighteen was not operational, it is in consideration of the fact that before this age, the victim does not possess lucid faculties to enable her to be held responsible for her decisions.

It is for this reason that she is protected, being particularly vulnerable and meriting special protection. What seems unusual is the fact that the judge gave consequences to what is necessary to consider as consent of the under-age victim (as extenuating circumstance) where in effect the legislator has refused to give it. Not only that consent by the under-age victim is not operational, but Article 14 enumerates hypotheses where even consent by the over-age victim will not be held in consideration by the judge. Certainly, extenuating circumstances are praetorian but are admissible in the fringe of such a clear and precise disposition. It is feared that this reading does not more or less hide a rereading of the law, by instituting a sort of "penal responsibility shared with the under-age victim" but also by

125 Bukavu magistrates' court, R.P. 11.261
126 Bukavu magistrates' court, RP 12 103

denying her the special protection that the legislator intended to accord to and under-age victim.

II.4. Liquidation of matrimonial regime

Man and woman have the same rights in marriage and during its dissolution (Article 16 of the Universal Declaration on Human Rights). During the dissolution linked to divorce, the matrimonial regime must be liquidated. The family code foresees, in its Article 572, that the judge can pronounce the divorce and reserve for a later decision on all other questions raised by the divorce. This disposition, in our view, needs to allow the judge notably to take stock of the family goods after having identified the matrimonial regime. However, in the case of Bukavu magistrates' court, it is not the practice.

To illustrate the point, let us look at, among others, the affairs facing Mrs. J.N. against Mr. M.N. in the case RD 079[127] where the latter solicited and was granted the divorce. During the procedure, the judge took a decree ordering provisionary measures; child custody was accorded to the husband who at the same time needed to find a residential house for his wife and pay her a monthly food allowance of 100 dollars until the final settlement of the divorce. In his judgment, he pronounced the divorce and abstained from correcting the other questions, namely, child custody and the liquidation of the matrimonial régime. He reserved this question for a latter ruling without any reason, except on the sole motive that it was a faculty recognized by the judge through Article 572, of the family code. In the interim, six months later, when the judge should have straightened out the other pending issues, Mrs. J.N. submitted to the court under R.C.[128] to solicit the liquidation of the matrimonial regime and child custody.

The defendant invoked the foreclosure on the grounds that the action had not been brought in within the six months, on which the court will stand, which court, on 26th April 2007, declared the action irrevocable for foreclosure. The Bukavu magistrates' court is not the only one to have this "liberticidal" interpretation of the rights of the woman and children. The Lubumbashi magistrates took a similar decision and the author of the ruling held that the Article in question posed an interpretation problem. Contrary to what appears to support Congolese jurisdictions, there isn't any problem in interpretation, but creates it.

Firstly, there exists no obligation for the judge well nigh pronounced the divorce and to reserve the other questions raised by divorce at a latter ruling. The legislature gave an option and not a requirement, and since the purpose of the rulings is a constitutional guarantee, the judge needs to motivate his ruling, justifying the reasons that hindered him from ending the suit against him. And there lies the second question, the extent of the judges' office.

The elementary rules of the equitable process demands that the judge may terminate the case by meeting all the questions submitted to him; in the case under examination, should he consider himself as having relinquished after the first decision? Our answer is in the negative. As said above, the legislator seems to have measured the interest of the questions in play that he wanted to permit a supplementary instruction after this decision. F or example, in order to take an inventory of the family goods, the exchanges relative to it (hence third party rights), the practical modalities for the protection and the other children's' rights. It would thus be like any other provisionary or partial measure such as producing items detained by one party.

127 Bukavu magistrates' court, R.D. 079 M.N. against J.N.
128 Bukavu magistrates' court, R.C. J.N. vs. M.N. of 26th April 2007, unedited

For us, therefore, the office of the judge is not voided by such a decision and to relinquish is nothing but denial of justice with its accompanying consequences. Thirdly, there is no room to consider that a six-month delay is a delay of prescription for the simple reason that all delays, in law, do not bring about a foreclosing. What should be said about the week or so period within which the judgment should be pronounced? Should one consider that there will be prescription if in this interim the judge has not rendered his judgment? Only God knows how many judgments are rendered in this time limit!

The judge henceforth avoids announcing the date to talk about the legal delay. The same could be said about the time limits required for an avis or an indictment from a public ministry and the consequences arising from that. What should be said also about expected delays in cases of sexual violence and the attendant consequences and related questions in terms of prescription? Fundamentally, the prescription is a measure of judicial security and social peace, it is a question of not subjecting it to public debate (through the process) – a question that is of no interest to public order. In a mere six months, can one be able to determine the fate of the children and family goods that no longer interest society? Is it conceivable that extra-patrimonial rights between parents and children can be permissible? Not to mention the constitutional and conventional tendencies that give the child superior attention and place him at the centre of our judicial system, it would be inconceivable that the judge hopes to extricate himself from his obligation to pronounce the law but sacrifices the elementary right of children already traumatized by divorce in the midst of a formality substantially rendered by a sad interpretation of a law conceived in favor of the family and the child.

Fourthly, the judge in the case under examination seems to create a new institution which is not foreseen by any text and which threatens the family. In effect, having not given a definitive ruling, the judge maintained his provisional measures, which means that throughout his life, Mr. M.N. will have to pay an upkeep allowance to the one who was his spouse, but on what basis? Thus the marriage is dissolved but its effects are maintained. As for the fate of the family property, would one consider that this was acquired by the husband by the simple fact that the husband exercised (good or bad) headship over it at the time when the conflict came up?

If yes, the notion of a matrimonial regime loses all its value on the one hand, and on the other hand, the control of the family property henceforth some perfidy and the more shrewd will monopolize it at the earliest opportunity, which does not finalize the stability in the homes subjected to the family code as explained in the exposé of the grounds. In the negative, and assuming that the custodian of the family property remarries (which probably is the case in the sample commented), this creates a three-some home, at least on the financial front, which presents its own risks for the new spouse and the third parties who will have to count on this "tripartite" inheritance as guarantee of their claim.

Fifthly, let us consider the most plausible assumption is that which we call "expropriation without cause": the goods will be acquired by the one who had control over them thus they become his property. This mode of acquisition does not correspond to any assumption of the law of 20th July 1973, except if the judge in his ruling accords all the goods of the home to the shrewd spouse thus gratifying his/her bad faith. Where then is the sacred character of rights to property as proclaimed by the constitution?

Lastly, it must be realised that in our country, the family property is often in the hold of the

husband. Household goods which constitute the core of the patrimony are registered most of the times in the name of the husband. The same applies to furniture subject to registration as well as bank accounts. If applied to the letter, this "liberticidal" jurisprudence in turn denies the woman all patrimonial rights in the home. This is not an innocent conception but has perpetuated an old tradition according to which[129] "the woman not only lacks inheritance or patrimonial rights but she is also included among the property subject to succession at the death of the husband. Thus if the deceased leaves several wives, the heirs can share out amongst themselves, on condition of not taking his own mother". We thus find ourselves in a worse form of slavery that our jurisdictions are restored when the legislation has not only posed the principle of equality and non discrimination, but has also enjoined it to the authorities, notably to courts and tribunals to oversee the elimination of all forms of discrimination against the woman.

For the moment, let us examine other cases where women's rights have not faced a bleak future. Under R. D. 104[130], the judge simply decided not to liquidate on the grounds that "the applicant/complainant does not formulate any claims regarding the family patrimony which, as a whole constituted merely of the building that the defendant had sold. Thus the court considers that it is without motive of the family's goods." In this case, the judge considered the question of matrimonial regime as a question of private law which arises from the power of the parties, which we do not dispute. This simplistic reasoning however is dangerous insofar as the liquidation of the matrimonial regime does not concern just the parties, it may happen that third parties, mainly creditors, may have bad intentions.

Moreover, the question of the sale of a communal building having been raised, the judge should have recalled that the sale of someone else is null and that the house did not belong to the husband but to the couple. Lastly, the principle being that any person with heritance and given that marriage brings about confusion of spouses' inheritance, the judge cannot pose a contrary principle according to which the parties have no patrimony. Under order R.D.097[131], the judge "pronounced divorce, ordered the husband to pay 2,500 dollars in damages and interest, and reserved himself for a complementary decision for the other questions raised by the divorce."

Here, the applicant Mrs. K.M.B. claims that her husband Mr. K. M. has subjected her to untold suffering, by abandoning her after the birth of her second child in 1998 and that this separation continued until February 2002. She is asking for, as a result of the dissolution of marriage damages, custody of the children and damages 10,000 dollars. In his judgment of 22nd December 2007 the court considers the request as partially founded, a judge adjudicates the requests of the applicant except for the damages which it divides into four.

Under R. D. 093[132] the judge restrained himself from pronouncing divorce. The complainant, Mrs. L.B.A. asks of the court to dissolve her marriage with Mr. L.S.A. To support her application, she held that "for reasons which we mutually have agreed upon not to involve third parties, my husband and I have opted for the divorce in a conventional manner."

Under R. D. 099[133], the judge "observes that the continuation of conjugal life has become impossible. The defender is judicially pinpointed as the guilty spouse, and grants freedom

129 Mirindi Carhangabo, *Les droits successoraux du conjoint survivant en droit congolais,* U.C.B. 2000-2001, mémoire de Licence, unedited

130 Bukavu magistrates' court, R.D. 104097 Mrs. R. B. K. against D. M. L. unedited

131 Bukavu magistrates' court, R.D. 097 Mrs. K.M.B. against K.M., 22nd December 2007, unedited

132 Bukavu magistrates' court, R.D. 093 Mrs. L.B.A. against Mr. L.S.A ; unedited

133 Bukavu magistrates' court, R.D. 099 Mr. T.M. vs. Mrs. L. L. of 24th September 2008, unedited

to each of them, with the option to remarry. The applicant got the custody for all the children born of both parties and the defendant was accorded the right to visit the children one day per week. The court fines were charged to the complainant/applicant."

In this case, the husband cites lack of submission on the part of the spouse, theft and insults to his parents and other members of his family. On this basis he seeks divorce. During the hearing, the court observes that the facts adduced by the husband are unfounded, but bring about mutual accusations that cause irremediable damage to the conjugal relations. The court refused to give a ruling on the fate of the couple's property, given that these had not declared that the property was part of their common patrimony, hence susceptible to being shared out. Apart from the prior observations regarding the future of women's rights during the dissolution of a marriage and which are relevant here, we realize that while noting that allegations against the spouse were not proven, the divorce was pronounced at their cost. Here, like in many other cases, the court fails to occasion the choice that it makes neither for child custody nor on visitation rights. And, as in other prior cases, the woman's patrimony rights are simply thrown out the window.

Under R. D. 115[134], the court "pronounces divorce, gives child custody and avoids to rule on the damages. In this case, the applicant Mrs. B. S. seeks the dissolution of marriage between her and Mr. M.L.D. on the grounds that the latter had abandoned her for 7 years. He fails to indicate anything about his fathers' contribution towards provision of food, and about the fate of the family goods.

II.5. The divorce pronounced to the detriment of the woman in all hypotheses[135]

Under RED 030, the applicant maintains that her husband abandoned her in 2006 after ten years of marriage. After several unsuccessful attempts at reconciliation, the applicant solicits divorce from the court at the detriment of her husband, allocation of damages of 10,000 dollars and the condemnation of the defendant with costs. In his judgement of 19.05.2008 "the court receives action from the complainant and considers it as founded, pronounces the dissolution of the marriage at the complainant's cost. "The applicant suffered no reproaches in the dissolution of conjugal relations, unless the court considers the fact of not having produced the marriage act as a fault needing to justify the divorce pronouncement with damages on the wife. Being a question of liquidation of matrimonial regime," the judge says that there is nothing common with inheritance.

Should it be pointed out again that any person has an inheritance, which is an element of his/her person?
Even if the patrimony were in deficit, the judge has said nothing about the damages or child custody both of which are in the hands of their mother without indication of the feeding obligations incumbent upon their father.

II.6. In cases where the interests of the children come before other formalities

The following was the ruling under R.C.6980[136] "given that the summonses do not indicate the applicants professions, the action will be considered terminated in public interest.

134 Bukavu magistrates' court, R.D. 115, Mrs. B. S. vs. Mr. M. L. D. of 29th December 2008

135 Uvira magistrates' court / Kavumu secondary seating RED 030 Mrs. J.B.B. vs. Mr. M.K. of 19th May 2008. This ruling was rendered by the Uvira magistrates' court; Kavumu secondary seating which is not covered by our study but its unusual character led us to mention it. It may be an indicator that the state of women rights is not the best in the other Congolese jurisdictions.

136 Bukavu magistrates' court, case of Akonkwa Katabi (underage child) and Mrs. Nabintu Musanganya vs. Léon Cidugundu of 22nd December 2007

In this case Mrs. Nabintu Musanganya, having entered into a free marriage union with Mr. Léon Cidugundu, a child named Akonkwa Katabi was born from this union. The lady and her child represented by her in person appear in court in search of paternity, provision of upkeep and allocation of damages. In spite of the justifiability of the Convention relating to children's rights which consecrate the principle supra legal of "superior interest of the child" and express constitutional guarantees of the following Articles 41 of the Constitution; the judge relied on a means of pure form which otherwise was not pertinent.

One needed firstly to ask oneself what ought to be the profession of the under age child.

From the foregoing, it will be concluded that several rulings from the same court affirm that there is no nullity without grievance, hence in the case under examination the flaw of mentioning the profession does not in any way cut into the rights of the woman.
It is dominant doctrine[137] that there would be no nullity if the omission or irregularity of form did not carry prejudice on the opposing party. The pronouncement of the nullity is thus subordinate to the existence of a grievance in the right of the opposite party. If the judge observes that the irregularity do not harm the interests of the person to whom the act or against whom it is opposed, he will not pronounce the nullity even if it is provided for by a text. Article 28 of the Civil Procedure Code stipulates that no irregularity of achievement or act of procedure attracts their nullity except if it harms the interests of the opposite party. It has been judged by our highest jurisdiction that"[138] it is not founded in the means of cassation taken from what would be null an act of appeal not consist of the name of the writer, or his signature, or the seal of the court before which the appeal is rejected. Once on the basis of the said act, the defendant was able to appear in court and defend himself." When the significance of a ruling contains an error of date, it will not be declared null if whoever alleges the nullity does not prove having suffered a grievance[139]. Faced with such a stable doctrine and such a clear jurisprudence, it becomes important to interrogate oneself on the grievance that the defendant would have incurred from the fact of non indication of the petitioners' profession.

II.7. Nemo auditur: as though immorality were feminine

With this adage the judge rejected the petitions upkeep and indemnity of a woman, mother of five children who had failed to prove the existence of her customary marriage under R.C.7078.[140] For the court, " the petition for sharing out goods, less still, the petition relative to the payment of an indemnity for services rendered and the purchase of a house for raising and educating the children have no legal basis and will not hold the court's attention. In effect, the sole fact of the defendant having children with the complainant would not suffice to oblige him legally to be carried out in his favour. Such a petition is regarded as immoral and thus illicit by virtue of the adage that it cannot be void on it own" Though we do not agree with the notion of services rendered such as the one which we will find in numerous requests, we will see eventually that before the same court, other judges have found legal basis for such demands. Nonetheless, the court in several judgements proves to be more open to women's and children's rights.

In R.C.6827[141] Ms. K. K. T. takes Mr. K. B. L. to court demanding payment of all medical expenses incurred as well as payment of damages equivalent to 10,000 dollars. In support

137 Mukadi Bonyi and Katwala Kaba Kashala, C*ivil Procedure,* éd. Batena Ntmbua, Kinshasa, 1999, pp.36-37
138 C.S.J, R.C. 27 of 10th January 1973, Bull. Judgments,1974, p ;3 cited by Alexis Takizala Masoso, Collection of jurisprudence of courts and tribunals of Congo, Lubumbashi University Press,1999, p.144
139 C.S.J., R.C. 66 of 10th August 1974, Bull. Judgements,1975,p.145 cited by Alexis Takizala Masoso, idem
140 Bukavu magistrates' court, matter of Mihigo Ndamuso vs. Buhendwa Mwenge Augustin of 14th August 2007, unedited
141 Bukavu magistrates' court, case of K. K. T. vs. Mr. K. B. L. of 29thDecember 2006, unedited

of her request, she confides that she was a student at the Mapinduzi Institute when on the date of 15th January 2006, she was made pregnant by the defendant, and that following this pregnancy, and she was expelled from the institute. On 15th October 2006, she got a baby girl through caesarean section, which unfortunately died three days later. She received no assistance from the defendant; all the costs were borne by herself and her family. In response to this request, the court says that "in interrupting her studies as a result of the pregnancy which the defendant was responsible for, that constitutes a prejudice that merits reparation. As the one responsible for the pregnancy, the defendant has the obligation to provide the complainant adequate assistance, notably by guaranteeing medical care. By not doing it, he had failed in his obligations." The court thus awarded damages to the complainant.

Under the case R.C. 7513[142] the judge retains the regime of the criminal responsibility when the man renders a young girl pregnant and abandons her with her child. The facts of the case indicate that while she was a second year student, Ms. Zula Malalyanga was impregnated by Mohamed Fariala. Expelled from school and from her parents' home, she cohabited with the defendant until the birth of their child. Following ill-treatment and threats, she found herself obliged to leave the defendant to live a wandering life and misery with her child. On the basis of Article 258, she asks the court to grant reparations for the loss suffered from the above.

In response to this application the judge realises that application of Article 258 of the Congolese Civil Code had to be directly effected in this application, given that she and her child were wronged through abandonment, discontinuation of her studies and loss of an eventual marriage."

In 6649[143] Mrs. Chahiabwa M'Banywesize solicits from the court the condemnation of Mr. Alfred Musombwa to bear the costs of medical care and school fees for children born from his free union with him as well as payment of damages of 20,000 dollars for the losses incurred. To support her claim, the applicant declares that she had been repudiated from the "conjugal roof" and that she lives with her children at her parents' home where they live a miserable life. In its judgment the court accorded the solicited up-keep.

In the case of R.C. 7584[144], Mrs. Awa Suzane solicits from the court the condemnation of Mr. Muzuri Kiriza to pay for upkeep and allocation of damages. In support of her request, she upholds that she has lived in free union with the defendant since 2001. From this union were born three children of whom one died. The defendant found her at Wamaza when she was aged a mere 15 years old. At the end, he abandoned her in Bukavu with her two children where she has neither sister nor brother. In response to this application, the court observes that law No. 87-010 of 1st August 1987 regarding the family code stipulates, in its Article 648 that the father and mother have the obligation to feed, keep and raise their children. On this basis, he receives action and considers it as founded and adjudicates postulated upkeep amounting to 200 dollars per month. As for the postulated damages, the court is of the opinion that the applicant has suffered prejudice from the defendant, in that the latter had left upon her the responsibility of educating and maintaining the children without giving her the necessary resources to do so.

From this series of rulings, it is apparent that the judge is led by concern to protect the rights of the woman and the child. Admittedly, the family code appears to bring in some progress

142 Bukavu magistrates' court, case of Zula Malyanga vs. Mohamed Fariala of 9th September 2008, unedited.
143 Bukavu magistrates' court, case of Chahiabwa M'Banywesize vs. Alfred Musombwa of 11th. January 2007, unedited
144 Bukavu magistrates' court, case of Suzane Awa vs. Muzuri Kiriza of 22nd. November 2008, unedited.

in favour of children born outside marriage without in any way endorsing free unions but the allocation of damages to the "abandoned" company and by clearly formulating the concern to reduce the (unmarried) woman's responsibilities in the children's upkeep, we think that the judge frees himself from the constitutional obligation of equality (of rights and responsibilities) between the man and the woman.

II.8. Can a girl be a legatee?

Under R.C.6721[145] , it was judged that "a girl applicant is not qualified to inherit if she holds a will without presenting proof that she is from the biological family of the deceased. In this case, the applicant is the niece to the deceased who, in his will, has bequeathed her a house, which would be sold by the deceased's son who in effect had received the lion's share of the succession and thus the testator had not disposed of more than a quarter of the succession. She issues a writ against the seller and the buyer and postulates the annulations of the sale. In his judgement of 20th September 2007, the court "reveals that in the terms of Article 601 of the family code, paternal filiations are established by the legal presumption in the case of marriage or by a declaration or by an action in search for paternity. The court also points out that no identity papers established her filiations to Mr. Umande. Consequently, the present application was deemed admissible for lack of proof." For the judge, only the children of the deceased should inherit, thus "repealing" the tendencies of the family code relative to the other categories of heirs but also the legatees.

II.9. Does a woman who abandons her matrimonial home as a result of the husbands services have a right to a modification of the matrimonial regime?

Under R.C.6618[146], "the court judged as baseless the petition for conversion of the common regime reduced to acquittal in separation of goods on the grounds that the applicant had refused to rejoin the conjugal roof." She insists that her spouse has become a drunk, leads a debauched life and has even infected her with a venereal disease, batters her and frequently wounds her and kicks her out of the matrimonial home. Currently, she is raising her child in the wild.

In Article 531 of the family code, she solicits the conversion of the universal community régime of her goods and the one of separation of goods. In his ruling of 15th June 2006 the judge receives action and considers it as founded, does not respond to the request of change from the matrimonial regime. He limits himself to note that the building solicited by the spouse is not a personal good but a community one. Hence Article 531 is not applicable, in other words the change of matrimonial regime cannot be effected. It follows that one cannot invoke the problem of upkeep allowance for the simple reason that the husband has done all to get her reintegrated into the matrimonial home but in vain. We can only ask ourselves on the legal fundamentals of this sanction, if it is true that the judge must watch over the union and the stability of homes, we do not think that the legislator could have admitted that one would go as far as starving the mother and her child to compel her to rejoin the matrimonial home from where she has been pushed out following grievous services.

II.10. Can a foreign woman inherit property situated in the DRC?

From the judgment rendered under R.C. 7693[147] it turns out that "a foreign woman, as sole heiress in conformity with national law cannot enter into possession of her goods." In the matter of Mrs. Themula Christodoulidou, born in Cyprus and living in Brussels, according to national law, is heiress of goods left by her brother. The latter, Theofanis Christakis

145 Bukavu magistrates' court, R.C. 6721 Sophie Umande vs. Adrien Bisimwa of 20th September 2007, unedited
146 Bukavu magistrates' court, case of Mrs. Baduha Kashisi Henriette vs. Vital Kagarabi Cibalonza of 15th. June 2006
147 Bukavu magistrates' court, case of Themula Christodoulidou (requête) of 22nd January 2009

Xenophontos, was born in Cyprus and lived in Brussels until his death on 24th October 2006.

During his life he had acquired two houses in Bukavu. Being a bearer of an act of notoriety delivered by notary Laurent Snyers, she solicits from the court to be given her ownership rights over the two buildings. In his ruling of 22nd January 2009 the court said that "to this day there exists no ruling which has ever conferred to the applicant any liquidator qualities and that in the absence of this quality the applicant cannot initiate such a request and that in view of the foregoing the action is deemed as unfounded."

On the whole, one wonders on what basis the judge concluded an action as unfounded when it was moved by a person who lacked the capacity to move it. The preoccupying issue is that, on the one hand, the judge does not seem to give the legal consequences to the extraneous costs borne by the case by deciding to apply the customary law where he should have applied the national law. Even when he would have applied Congolese law, he should have been informed that succession involves one sole inheritor, that is, the applicant.

II.11. Who Benefits from the absence of proof of customary marriage?

The judgement under R.C.7058[148] announces a soft will of balance of responsibilities and rights between the man and the woman in extramarital relations while reserving the benefit of the absence of proof of customary marriage to the one who would control the goods arising from common effort. In the present case, Mrs. Mihigo Ndamuso solicits from the court the condemnation of Mr. Buhendwa Mweze Augustin for share of property and upkeep for her and her children. She holds having entered into a monogamous customary marriage with the defendant from which were born six children whom she is raising single-handedly. The defendant claimed having lived in a free union and declares him too poor to provide children's upkeep and does not deny paternity. On his part, the judge thinks that "for such a marriage, the applicant should have presented before the court the parents of both families who assisted in the dowry transactions to confirm the celebration of the same." Consequently he rejects the application for sharing out of the property and the applicant's upkeep. Without revisiting the ease with which the judge concluded on the non-existence of the marriage from the sole proof that that he seems to institute, we must realize that on the assumption that the property in the defendant's hands, which is often the case, by this fact alone the woman shall be deprived of her hard earned income over the years. Admittedly, by concluding on the absence of marriage, it is clear that no regime to liquidate would be envisaged. Nonetheless one observes by the consecration of enrichment without cause and an insidious expropriation.

Let us, however, note that the court condemned the defendant to pay for upkeep in favour of the children under the care of their mother.

This summary certainly would not be exhaustive and our choice would be judged arbitrary but it nonetheless indicates that the fate of women's rights is at its best before the Bukavu magistrates' court. Intervening legislative innovations have not totally torn apart the legal morals, hence the necessity to identify the tools that the judge can mobilize to change this situation which does no honor nor happiness of our society and our justice.

III. Tools at the judge's disposal: some interpretation insights

In the face of this somber portrayal of the fate of women rights before the Bukavu magistrates' court and the systematic near-refusal by the judge to materialize constitutional progress in

148 Bukavu magistrates' court, The matter of Mrs. Mihigo Ndamuso vs. Buhendwa Augustin of 14th August 2007, unedited

terms of equality and non discrimination, two attitudes are possible. The first would consist of censuring this liberticidal attitude by formulating a true indictment against what would be convenient to qualify in this case of deliberate violation of women's rights despite the legislator's goodwill to bring to an end the marginalization that she has been subjected to for such a long time.

We need to know, however, that this situation is not unique to our country. Justifiability of human rights domestically has often been the subject of strong resistance from courts and tribunals. To this effect, one just needs to see the resistance of the Belgian or French State Counsel and of the cassation courts in the face of decisions of the European human rights court.

It sometimes required that the said court censure several times the same conduct before either jurisdiction aligns itself. An Italian prosecutor[149] went as far as proposing the suppression of appeal rights with a view to limiting the power of control of the European court in respect of guarantees of equitable process. That is what we opted for the second approach which consists of according a benefit of doubt to the judge by considering that the intervening innovations demand time for internalization. Used to applying the law and custom, he will need to understand that he will henceforth apply in priority the international treaties regularly ratified and this in conformity with Article 153 of the Constitution and the additional subjective rights contained in the constitution.

The preeminence of these instruments demands not only the letter of their disposition but to be guided by the goals that they pursue and thus largely to take into account their spirit. That is why we propose some interpretation directives that ought to assist a judge who is committed to fulfilling his constitutional objectives in the fight for non discrimination against the woman.

The doctrine teaches that[150] "domestic jurisdictions can invoke the African Charter on two accounts, either as an applicable legal fundamental that provides a legal recourse or serving as a guide in interpretation matters." This is true for other international instruments as well as for subjective laws that ensue from the constitution.

III.1. Giving effect to the pre-eminence of the Constitution

Constitutionality, the control of which does not relieve the competence of the judge whose rulings we are commenting on, is not what is in question; but it concerns the justifiability of rights affirmed by the preamble and the body of the constitution.

And if the question asked by the London women were posed again; are our rights as enshrined in the constitution subjective rights which we can take pride in before justice? The reading of the letter of our Constitution gives a clear, affirmative answer, but nonetheless it must be observed that all the judgments analyzed, only two invoke the Constitution in motivation or in pronouncement. We know that the pronouncements of military jurisdiction judgments refer quite systematically to the constitution but on tendencies relating to their competences.

It remains that rare are the visas or the circumstances that relate to an article of the constitution,

149 Jean François Van Drooghenbroeck, *Cours des Garanties du procès équitable,* Complementary Masters' in Human rights, Académie Louvain, 2007-2008, unedited

150 Franz Viljoen, The application of the African Charter of human and peoples' rights by national authorities in eastern and southern Africa, Jean -François FLAUSS et Elisabeth Lambert-Abdelgawad (dir.) *op. cit.*p76

a moment when the judge says if such and such subjective constitutional law/rule has been either respected or violated. For the judge, this means that the constitution is not a source of laws whose protection he must safeguard. It is a working tool like all other laws and superior to these others. We cannot find any explanation to this reticence as it is confirmed incidentally by other numerous foreign jurisdictions as well as the dominant doctrine.

In the words of Maurice Kamto[151] "owing to the constitutionalization of rights, their jurisdictional guarantee is effected, on the one hand, through control of the constitutionality of laws and on the other, by means of contentious rights and liberties." If the alternative pertains to the constitutional judge, the other is the prerogative of the judicial judge, who is the guardian of fundamental liberties. To this, he is the only one capable of giving useful effect to the guaranteed rights and liberties so long as the constitutional litigations and majority of the administrative litigations are objective litigations, or litigations of legality.

Surprisingly, neither the judge, nor the organs of the law (even lawyers) raise the unconstitutionality of certain discriminatory tendencies with a view to getting them fixed by a competent jurisdiction. Thus through such a procedure, other judicial actors have stabilized the status of rights enshrined in their constitutions. The constitutional High Court in Egypt[152] has thus had the occasion to censure discrimination in education.

Ruling No. 40/16(53) questioned Article 3 of law No. 99 of 1992 relating to students' social protection, which required an annual membership fee that was higher than in private establishments. A father of three private school students took the matter to the Tanta Tribunal in the first instance demanding the refund of the membership fees invoking the unconstitutionality of the Article. The court, thus, held by an exemption the Constitutional High Court of unconstitutionality.

The court examined the compatibility of his case with articles 40, 18 and 7 of the constitution and insisted more specially on the right to education, which impose positives actions on the part of the State which must guarantee the right to education in non public establishments without discrimination. The court then states that these principles have been recognized in the universal declaration of human rights (Article 26), in the international pact on economic, social and cultural rights (Article 13), and by Article 17 of the African Charter on human and people's rights. Consequently the court concluded on the unconstitutionality of the article.
In Benin [153] M. Moise Bossou submitted to the censure of constitutional judge the order n°260/MISAT/DC/DAI/SAAP of 22nd. November 1993 regarding conditions and modalities of registration of associations […]. The court observed that the ministry of interior had overstepped the domain reserved to the law through Articles 25 and 98 of the constitution as well as Article 10 of the African Charter on Human and People's Rights.

The Canadian Supreme Court[154] "stated on 15th March 1990 in the case of Mahé c. Alberta, that the Alberta province had the obligation to put in place public education structures that the constitutional Charter of rights guarantees to the francophone minority."

151 Maurice Kamto, African Charter, international instruments of protection of human rights, national constitutions: respective articulations; Jean-François Flauss and Elisabeth Lambert-Abdelgawad (dir.), *National implementation of the African charter of human and people's right,* Bruylant, Brussels, 2004 pp 37-38

152 Elisabeth Lambert-Abdelgawad, The application of the African Charter on Human and Peoples Rights for north African people in North Africa, Jean-François Flaus and Lambert –Abdelawad, *op. cit.* p116

153 Grégoire Alaye, *The Benin administrative judge and freedom*, Etienne Picard, *op. cit* ; p187

154 Ghislain Otis, The judge's power of injunction as a condition of fundamental rights efficiency; AUPELF-UREF, *op. cit* ; p.574

III.2. The Direct Effect: applying Article 153 of the Constitution

Like many Congolese authors and litigants, it appears difficult for us to explain the reticence of our jurisdictions to apply international treaties, in Bukavu, in Lubumbashi and in Kinshasa and it is rare to find a judgment that goes back on its motivation or in its pronouncement the tendencies of an international instrument with legal power in the D.R. Congo. The constitution writing process expressly sought to break this resistance by entrenching treaty justifiability in the constitution. Article 153 of the constitution confers to judicial order jurisdictions la competence to apply international treaties duly ratified, which are placed on top of the normative hierarchy. From this perspective, an appeal court in Nigeria[155] decided, by explicitly leaning on the African Charter On Human and People's Rights (CADHP), that the rights contained in this Charter were incorporated in Nigerian law; any Nigerian could lean on Article 24 of the Charter consecrating rights to the environment pour to demand the respect of the said law to his own advantage rather than basing himself on Article 20 of the constitution which did not pertinently touch on the issue. There is therefore no judicial or material obstacle which hinders the Congolese judge from applying a clear and precise disposition of a treaty, in this case those which touch on the principle of equality and non discrimination to the woman.

III.3. Priority given to international treaties

As noted above, the Congolese legislator has ruled in favour not only of the applicability of treaties by domestic jurisdictions but also from their priority over the domestic laws.

It ensues that these are public order dispositions and so the judge will need to pick them out automatically. The public order character of the rules ensuing from international treaties is affirmed by several jurisdictions. Such is the lesson arising from the Belgian jurisprudence.[156] The public order character was first recognized by the court cassation followed by numerous jurisdictions of a judicial order. From this recognition it is deduced first and foremost the obligation, for the judge automatically or for the cassation court to raise the question as a matter of course in the eventual violation of one of the dispositions of the Convention. It ensues then that a method used of the violation of the European Convention on Human Rights can be raised for the first time before the cassation court. The public order character was also equally recognized by the state counsel. It can be deduced from this that this jurisdiction is expected to raise as a matter of course the methods drawn from the misunderstanding of this instrument. It ensues also that such methods can be raised for the first time in a memoir in response or in a last memoir, or indeed to the audience itself, irrespective of the fact that the part which pleads from it would have been aware if it prior.

At the beginning of this lesson, the Congolese judge, and in this case the Bukavu magistrates' court judge, would have to base his decisions not only on the said instruments, by reviewing them in his judgement mechanisms, but he is also expected to bring them up as a matter of course even when none of the parties have invoked them and even if one is in appeal or in cassation. Article 153 gives it this power that his Belgian colleague worked out following a courageous interpretation. As for the authority of such decisions, rulings of the European Court and others international jurisdictions on the Congolese judge; inter jurisdictional dialogue is a reality today[157], it is not unlawful for the judge to draw inspiration from the interpretation done elsewhere: such, by the way, is the real translation of the universality of human rights.

155 Sciotti-Lam *op.cit ;* p.40

156 Olivier De Schutter and Sébastien Van Drooghenbroeck, international law of human rights before the national judge, Brussels, Larcier, 1999, p.22-24

157 Olivier De Schutter et Sébastien Van Drooghenbroeck, op. cit 89

III.4. Removal of laws contradictory to the constitution and to treaties

Admittedly, the judicial judge and the Bukavu magistrates' court judge in particular is not a constitutional judge, less still, a "conventional" judge. Thus in several judicial rulings and debates the idea is repeatedly comes up that it is not the judge's prerogative to repeal texts that have not been repealed by the legislator irrespective of their contrariety to the Constitution or the international treaties duly ratified by the D.R.C. The elementary regulations of conflicts in law over time and the principle of hierarchy of standards would incline to a contrary reading. In this spirit, foreign jurisdictions without openly coming out on the constitutionality of liberticidal laws systematically sideline the said regulations. In the *De Witte vs. Lievens* ruling[158] the cassation Court of Belgium ruled that "in the event of a conflict between the law of a treaty which directly affects the Belgian judicial order and a regulation of the less favourable domestic law, the treaty prevails.

III.5. True interpretation

For Sébastien Van Drooghenbroeck[159] the regulation for promotion purposes just like those of the convention on the elimination of all forms of discrimination against women or on Article 14 of the Constitution- in effect owe their adoption to the goodwill of their founding fathers to remedy it, by this means, an inequality of fact duly noted and viewed as problematic. For their interpretation, a reference to this end is therefore inevitable, failure to which it will, justify a more constructive and audacious interpretation. In this interpretation, a greater propensity to deduce veritable positive obligations from these is in the hands of the public authorities.

III.6. Even when the legislator has not yet intervened

The rule of non discrimination applies directly even without the legislator's intervention.[160] When what is in question is a differential treatment that is not objectively justifiable or disproportionate to the goal it intends to achieve, there seems to be a natural way out which consists of applying a regime of favor to the category that the discrimination disfavors from benefiting category. For the judge, it suffices to fulfill this alignment, that is, to anticipate the intentions of the legislator by inscribing in harmony with what he has already ruled. In order to apply a non discrimination law, the judge can restrict himself from laying aside domestic law which sidelines such a category of applicants of the benefit of the regime which applies to the category of the well-off.

This is the method of interpretation of the Belgian court of cassation which, in its ruling of 5th December 1994 passed the ruling that "until the moment when a member State has adopted the necessary implementation measures, women have the right to apply the same regime as men who find themselves in the same situation; a regime that holds in the absence of application of the directive, which is the sole valid system of reference." From these considerations, it appears that when the legislator announces measures for fighting discrimination, by this fact he invalidates all discriminatory dispositions. If meanwhile the announced measures are not taken, the Belgian Court of cassation considers that it is no more within the invalidated legislation that the judge draws the regulation, he will anticipate on the goals of the legislator in applying at least the recognized regime to the favored category.

Thus as the legislator waits to abrogate, or for the constitutional judge to invalidate the dispositions that limit the capacity of the married woman, the Congolese judge will need to

158 Olivier De Schutter and Sébastien Van Drooghenbroeck, op.cit., 89
159 Sébastien Van Drooghenbroeck, *op.cit.*
160 Olivier De Schutter and Sébastien Van Drooghenbroeck, op.cit.,p71-72

apply the regulations applied on the man and on the single mature woman, hence the plain and full capacity.

III.7. Activation of State responsibility

State responsibility internationally is often viewed through its relations with other subjects in international law. It must be noted that for treaties relative to human rights the State contracts obligations vis-à-vis its nationals or more generally persons under its jurisdiction. It ensues that the breach of its obligations will engage its responsibility, which those concerned can present before domestic and international jurisdictions as the need may arise (where they are in existence).

This is the kind of responsibility to be expected each time the State, through its courts and tribunals will refuse to accord its citizens the rights arising from the constitution or from international treaties.

We are not at this juncture questioning State responsibility for rulings carried out; we are simply pointing out defects in the application of guarantees accorded to the individual. Failure to this, the equality of all before the law each time the judge does a ruling but fails to apply the laws derived from international treaties and the constitution for the benefit of all justiciable Congolese.

This position was confirmed by the European human rights Court in the case of Markx ruling[161]. This ruling noted that Belgian filiations law, as it was applied in the applicants' situation, created unjustified differential treatment between legitimate filiations and natural filiations, both in terms of recognition of the filiations and descendants' succession vocation. Despite this judgment, Belgium did not modify its legislation. In the Vermeire ruling of 29th November 1991, the European Court condemned Belgium for failing to apply the principles arising from the Markx judgment. The State of Belgium invoked the argument that compliance of Belgian law with the principles arising from the Markx judgment reverted back to the legislator and not to the judge, and thus could call for a considerable delay linked to the respect of legislative procedures. Supporting itself on the recent jurisprudence of the Court of arbitration, the European Court responds to this argument that it fails to discern what would hinder the Brussels court of Appeal, then the court of cassation to conform itself to conclusions of the Markx ruling in the model of the county court : the rule that hindered to operate to the detriment of the applicants' discrimination founded on the natural character of family ties uniting it de deceased was neither inaccurate nor incomplete. From then, according to the European rights court, overall reorganization, aimed at deeply and coherently modifying the totality of filiations and successions law, did not in any way impose itself as an indispensable preliminary in respect to the convention […] Belgian jurisdictions before which the Veimeire cause was brought would have themselves avoided to reproduce the discrimination already condemned and the State of Belgium, which was the defendant in front of the international judge, cannot justify the defect in competence in their right in this regard to escape his international obligations.

The lesson of this jurisprudence is clear; the judge commits a fault which engages the responsibility of the State when a discriminatory law is applied, even when the legislator has not yet introduced the required reforms and this delay would arise from ordinary parliamentary procedures. Clearly, in practice, intervening innovations in terms of human rights take effect through the action of the judge handling the litigation well before the eventual required legislative reforms. And this is not an option but a requirement for fear of

161 Olivier De Schutter and Sébastien Van Drooghenbroeck, op.cit., p71 et s.

engaging State responsibility. Can he engage his individual responsibility?

The notion of act of negligence is so well documented in public law that it would be superfluous to repeat it; nonetheless, the judge does not engage his responsibility in the event of nonconformity to, or even erroneous interpretation of the law, otherwise each passage of judgment by a higher authority can be followed by an action in responsibility, thus the judge's sovereignty would be reduced to zero. Admittedly however, the judge can have a free hand to violate law with impunity, to a point of giving him an inverse sense of the legislator's will. We are aware that an act of negligence has its limits, notably when it is so glaring that the functionary would not be able to incorporate his behavior in the exercise of his functions.

CONCLUSION

We do not consider this reflection conclusive: there certainly must be some judgments coming out as we do this write-up. Nonetheless we have opened up a debate which hopefully will be of interest to a wide cross-section of actors.

Our contribution began from a problem arising from the notion that equality and non-discrimination are enshrined in Congolese law by the most crucial texts, notably, the Constitution, international treaties … but meanwhile, obsolete colonial or colonially inspired rules remain in use denying the basic humanity of woman. Ours was to find out what corpus of laws and regulations the judge will base himself on to resolve disputes involving women. To this end, we opted for a negative hypothesis which the Bukavu magistrates' court will refer to in the face of the discriminatory inclinations in our domestic law that often stifle equality between men and women, yet it is guaranteed by the Constitution and several international treaties duly ratified by our country. At the end of the judgments analysis, which we gained access to, our observation may not particularly have yielded impressive results; nonetheless the picture is not entirely gloomy.

If the judge knows that there exists no contradiction between married women's incapacity on the one hand and equality and non-discrimination on the other, if he can deny all patrimonial rights to a married woman after a marriage dissolution, if he can send children into the streets without guaranteeing measures for their protection…he will have just confirmed that the State had abdicated on its obligations to achieve human rights and to observe that today, differential treatment between men and women in terms of access to justice has no more foundation. Instead of focusing on the empty glass, we have chosen to relish over the half glass even if this would not quench our thirst.

This is why we believe that we have been able to identify the tools which follow, not from a theoretical construct but from an ordinary application of rules relating to equality and non-discrimination by other judges. If we consider that our hypothesis is verified only partially: we remain convinced that our reflection, just like any other human work remains limited; our sole fulfillment is that it stirs up a debate or triggers some action in favor of women rights in particular, and generally raises the question whether human rights are subject to trial (justifiable) in a criminal court.

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