REPORT OF THE STAKEHOLDERS'WORKSHOP ON "DECENTRALIZATION AND ADMINISTRATIVE LAW IN FRANCOPHONE AFRICA", HELD AT HOTEL DES ALMADIES, DAKAR, SENEGAL, 18-19 FEBRUARY 2010

The conference was organized within the framework of the Konrad Adenauer Foundation programme for the rule of law in Sub-Saharan Africa, in order to give the key participants the opportunity to deliberate and exchange their views and experiences on the development of decentralization and administrative law within their respective countries and regions, with a view to charting a clear and sure way forward for development in Africa. The purpose of the conference was also to offer participants a platform for discussing the different approaches to the development of an administrative law that attributes more scope and power to local authorities.

In their opening remarks, Dr. Stephan Gehrold, Resident Representative of the Konrad Adenauer Foundation in Senegal, and Prof. Christian Roschmann, Director of the rule of law programme in Sub-Saharan Africa, underscored the importance of decentralization and administrative law as fundamental elements for any democratic state. They stressed that administrative law, whereas it was part of the subjects of constitutionalism and separation of powers, remains a fundamental element of rule of law . Prof. Roschmann explained that after having organized two conferences on administrative law in Africa, that is, in Namibia for Anglophone countries and in Mozambique for Portuguese-speaking countries, the Dakar conference aims specifically at addressing the importance of the subject in francophone Africa.

His Excellency the Minister of State, Minister of Justice Mr. Amadou Sall and His Excellency Mr. Christian Clages, Ambassador of the Federal Republic of Germany in Senegal approved the initiative of Konrad Adenauer Foundation and emphasized the impact of decentralization as a prerequisite for political participation.

Giving his overview on the history of decentralization and administrative law in Mozambique, Prof. Gilles Cistac of the Mondlane University in Mozambique observed a weakness in the local institutions, owing to the architecture, the gradual dynamic and the challenges faced by the local authority. In the ensuing discussion, Prof. Cistac noted that economic, cultural, social, political, geographic and demographical criteria are taken into account in the law in defining the local units. The participants were of the opinion that the key stakes lay in skills transfer to the local authorities coupled with budgetary constraints and highlighted the difficulties in enforcing the rule of law and advancing decentralization within the context of a party in power such as in Mozambique.

In his presentation on decentralization and administrative law in Senegal, Prof. Ismaila Madior Fall of the Sheikh Anta Diop University, Senegal, pointed out that the control exercised by the state was strictly a control of legalities and explained that it was a matter of a two-phase control, namely, an administrative phase and a jurisdictional phase. He painted a rather positive image of the progress of decentralization in Senegal; however, certain deficiencies affect the control of legality. During the subsequent discussion, participants noted that decentralization –

if poorly carried out might become the very means of alienating the citizens from the administration. Consequently they asked for the creation of a level of decentralization which facilitates good governance.

In his presentation, Dr. Folefack underscored the need to reinforce good governance through the transfer of power from individuals to democratic and legitimate institutions. He observed that decentralization is currently more or less theoretical and reinforced the importance of law and order and the struggle against vote-catching and individualism of power.
He observed in particular that the persistence of a unitary state and the politicizing of judicial rulings led to a centralization of power in a context where citizens are no longer viewed as such.

Giving an insight into the progress of decentralization in Côte d'Ivoire, Prof. Meledje of the Cocody University, painted a rather somber image, demonstrating that the creation of hundreds of provinces resulting from political goodwill coupled with an exaggerated decentralization led to a confused and ineffective structure. He challenged the key actors to find a reasonable level of decentralization through progressive agreements and local legislations to enhance the functions of local authorities. He considered decentralization in Côte d'Ivoire as theoretical, due to deficiencies in terms of the local authorities' function which is largely dependent on a non-operational tax allocation.

From a joint presentation, Prof. Hamann of Germany and Dr. Diallo of Senegal followed a comparative approach to identify experiences and perspectives with decentralization of the different political sectors in their respective countries. They observed that local authorities played a major role for decentralization by guaranteeing job creation and managing natural resources; numerous challenges persist however with regard to the implementation process of an effective administrative law.

In summary, three elements seem to recur and are characteristic for the progress of decentralization and administrative law in Francophone Africa, namely:

(1) The importance of competence of institutions and civil servants at the local level
(2) the financial challenges and transfer of power to local the authorities
(3) the fact that decentralization, though not a new concept, remains quite unknown and is characterized by poor implementation.

APPENDICES

I. WELCOME ADDRESS BY DR. STEFAN GEHROLD, RESIDENT REPRESENTATIVE OF THE KAS – SENEGAL

The Minister of State and Minister of Justice of Senegal,
His Excellency Mr. Clages, Ambassador of Germany
Professor Roschmann,
Honorable professors and experts
Media representatives,
Dear participants, ladies and gentlemen

On behalf of the Konrad Adenauer Foundation, I welcome you to the international symposium of the key actors in administrative law and decentralization in Francophone Africa. The Symposium is part of the program for the promotion of law and order in sub-Saharan Africa.

For the benefit of those who do not know us yet, I would like to briefly talk about the Konrad Adenauer Foundation. The Konrad Adenauer Foundation is a German political foundation. It bears the name of Konrad Adenauer, the first chancellor of the Federal Republic of Germany, who was one of the most renowned and influential politicians of his era. Thanks to Konrad Adenauer's policy, democracy and freedom were solidly grounded in Germany after the Second World War.

The Konrad Adenauer Foundation was founded in 1954 with the goal of promoting democracy, human rights, freedom and law and order. In the context of international cooperation, it currently supports projects in more than 86 countries in the world, 24 of which are on the African continent.

The bases of our activities are the ideals and convictions of Christian democracy: solidarity, individual freedom and human rights.

We have established ourselves in Senegal since 1976. The principal themes of the Konrad Adenauer Foundation in Senegal are: good governance,rule of law , support for decentralization and strengthening of private sector economy.

Our foundation sees itself as a bridge between politics, the economy and society; between authorities and individuals. The engagement of each individual according to our convention is basic for the society so as to allow it to develop.

The foundation works with several local partners to reach the goal of promoting democracy and decentralization in Senegal. Decentralization and Administrative law and are the essential elements of any democratic state. Over the last decade, decentralization has gained in importance as a deliberate goal in various African countries. Hence it is necessary to discuss the legal position of the local authorities, or more precisely, their constitutional position.

This is why we gathered around this table among eminent experts from Africa and Europe. The aim is to move forward in the process of decentralization and strengthening the constitutional position of the locale authorities.

As I have already mentioned, decentralization is a central theme for the Foundation and for the last thirty years or more we engage ourselves in this theme. Alongside the Taataan agency, we engaged in capacity building for the local elected leaders in the local authorities. Our areas of participation have become pilot zones for the big investment projects, which attest to the level of our program's success.

We are much honored to welcome Prof. Roschmann, director for the rule of law programme in sub-Saharan Africa, who has come in from Nairobi. I cordially thank His Excellency Mr. Christian Clages, Ambassador of the Federal Republic of Germany to Senegal, who kindly accepted to be with us this morning. My sincerest thanks to His Excellency the Justice Minister for his kind cooperation and for being with us today.

Thank you all for your kind attention and let me wish you a fruitful exchange of ideas.

II. OPENING REMARKS BY PROF. CHRISTIAN ROSCHMANN, DIRECTOR, OF THE RULE OF LAW PROGRAMME IN SUB-SAHARAN AFRICA

The Minister of State,Minister of Justice in the Senegalese Ministry of Justice,
His Excellency the German Ambassador, Mr. Clages
Dear participants, ladies and gentlemen.

In most of our conferences, I begin my speech by an explanation of what is the Konrad Adenauer Foundation and what it does. As for the Senegalese participants, I need not go over it because the Konrad Adenauer Foundation is not unknown here. On the contrary, we have a national programme for Senegal and a national office in Dakar. Moreover it is a very active programme and I am certain that you have had numerous occasions to get acquainted with it as well as to meet its director, Dr. Stefan Gehrold.

For the foreign participants, I need not do a lot of explanation either, since all of you have had some contact with the foundation in one way or the other. The last such occasion was in Djibouti where we have just had a conference on constitutional themes.

To the Senegalese participants, it is precisely because our foundation is so well known that you may be surprised to come face to face with another programme representative of the same foundation.

The Konrad Adenauer Foundation actually pursues two types of programmes: on the one hand, those that are country specific and on the other hand, regional programes

which deal with specific but at a regional level. The program which I am honored to talk about falls under the latter category. Our foundation deals exclusively with rule of law, but in the entire sub Saharan region.

Rule of Law is quite a sweeping a term evoking numerous ideas and different thoughts. And, really, taking care of all the ramifications of the idea of rule of law would be practically impossible and would certainly be beyond our means. For this reason, in our work, we limit ourselves to four aspects that we particularly consider interesting, important and promising.
These are:

Separation of powers
Constitutionalism, which includes cooperation with national constitutional councils,
Human rights
Regional integration, together with its judicial instruments

The emphasis that we have laid on this conference that I have the honor to open today is on administrative law, which, at the same time, has been part of the subjects of constitutionalism and separation of powers, and which is in itself an important aspect of constitutionalism.

We have already conducted conferences on administrative law in Africa, including in Windhoek, Namibia, for Anglophone countries and in Maputo, Mozambique, for the Portuguese speaking countries. The time for organizing one for the francophone world is finally here.

And thanks to my friend, Dr. Stefan Gehrold, the foundation's representative in Senegal, this conference is now taking place in Dakar. I am thankful to him and his team, especially Madame Fatoumata Gueye, for having so meticulously put together this conference and for having chosen such a good hotel as its venue.

The theme of our conference is decentralization, an integral aspect of administrative law.

It is difficult to choose where to lay emphasis when dealing with one field where everything is of extraordinary importance for the implementation of the rule of law . We chose decentralization because it appears to us to be an extraordinarily relevant and current theme for Senegal as well as for the other African countries and my partners and myself would like to wish you success in this conference.

III. DECENTRALIZATION AND ADMINITTATIVE LAW IN MOZAMBIQUE BY PROF. GILLES CISTAC, UNIVERSITY OF MONDLANE, MOZAMBIQUE

Introduction

Decentralization of is not a new process in Mozambique though it has become more consistent from the late 1980's[1].

In effect, from the second half of the 19th century, decentralization is a question of a political nature which interests Mozambique directly as an overseas province of Portugal. In the presentation of the grounds of the Decree of 1st December 1869 (Portuguese Overseas Organic Charter), it is written that: "Persuaded that the state of some of our possessions (…) require reform in the administrative institutions in the sense of prudent decentralization which would pave the way for wider action for the local initiative …"[2]. Long before in the text, the reporter continues: "in the granted allocations to the province's general assemblies that this present project consecrates, it translates the principle of decentralization".

Thus, the principles that the Portuguese Overseas Organic Charter applied to the possessions of the overseas province would have been considered as very advanced at the time: decentralization, initiative and local action and relative emancipation of the supervision of the metropolis.

Nonetheless, this legislative work has not been, to a large extent, put into use[3].

This failure could be attributed to two fundamental reasons.

The administrative organization of the Portuguese overseas provinces from the very onset was based on the principle of "assimilation" for the metropolis for the colonies in general, and for Mozambique in particuler[4].

The colonies were persistently viewed as simple provinces of the kingdom, "províncias ultramarinas" as they were otherwise called, to which the approved laws were applied, with slight alterations for the continental regions of the empire, with the criteria of administration and the established government plans drawn by the métropolis[5].

The second reason lay in the strongly centralized character of the Portuguese colonial state, not only by the fact that the power of decision for questions considered as strategic continued to appertains to a metropolis but also but the fact of the existence of a strong internal centralization within each overseas province, once the Governor-general and his government, held the principal scope over the administration of the territory.

In the Mozambique province, there existed formally what was called in administrative language the "corpos administrativos" (municipal assemblies,

municipal commissions, local assemblies [6]) which enjoyed some degree of autonomy[7]. Nonetheless, the appraisal by certain authors on the activity of these "corpos administrativos" is largely negative. In effect, it has been observed that the authoritative nature of the colonial régime, allied to the need for a strong control over the overseas provinces, has made the existing municipal structures function as simple extensions of the central power. Theirs was a reduced autonomy, and so was their scope and their own financial means almost inexistent"[8].

The country's declaration of independence in 1975 heralded a major breakdown in the nature of the administrative organization inherited from the colonial state. Nonetheless, despite this breakdown, some of the characteristics of the colonial administration have persisted to this day. Mozambique inherited an administrative structure essentially based on the principle of centralization which translated itself, notably, by centralization of power of decision at the level of the central administration's upper organs. The nature of the political régime was substantially modified but it was not possible, in the initial phase of the country's independence, to spread this movement to the collectivity of the state's administrative structures. The necessity to reinforce national unity and the single party leadership, in its obligation to attain some of the social, economic and political goals, recommended the maintaining of the "centralism of administrative decision"[9].

Over and above the fact that the structures and the organization inherited from the colonial administration have been maintained by and large, this situation has limited the spirit of initiative of the lower levels of the administration, once these latter were deprived of all power of decision and all resources and capacities to achieve the necessary activities in the interest of the communities.

This system of administration has weakened the management of the local institutions and has produced negative effects in terms of the quality of services provided to the people.

In the early 1980s, the Government officially recognized that the system in place until then was excessively centralized and that the state was disproportionate at the central level and of a very low efficiency at the provincial and district levels.

The political, economic and social reforms put in place since 1987 with the launching of the Economic Rehabilitation Program (PRE), consolidated by the adoption of a new Constitution on 2nd November 1990 and the end of the civil war (signing of the Rome Accord of 4th October 1992) created favorable conditions for the development of the politico-administrative decentralization process.

From the 90's, public debates (provincial seminars, provincial and national workshops) were born, and were based on the theme of "decentralization and autonomy of the local state organs". In May 1992, the Government approved the Local Organs Reform Program (PROL) whose objective was to reform the state's existing local administrative system and its transformation into local organs endued with judicial personality completely distinct from the one of the state, endowed with

an administrative, financial and patrimonial autonomy[10]. As a result of this initial work, Law No. 3/94, of 13th September was approved. Nonetheless, despite the numerous innovative aspects of this legislative text, this law was highly criticized and was not implemented in reality. The principle critique was, to some, linked to its unconstitutionality. The Constitution had not provided for the creation of local authorities; the legislator could not create them *ex nihilo*. To circumvent this obstacle, the Parliament proceeded with a partial reform of the Constitution, in 1996, introducing a new title (TITLE IV) dedicated to localized power. This constitutional reform introduced new judicial figures by which the elaboration of the laws and regulations for the coming implementation of the decentralization process had to be taken into account. Thus, Parliament approved on 27th December 1996 the framework law on the judicial régime of the local authorities (promulgated in February 1997). At the beginning of the following year, seven new laws were approved (local finances, administrative supervision, the local authority organs holders statute, the special statute of the city of Maputo, the creation of local authorities, electoral law for the local authorities, electoral census) which opened the door for the effective implementation of this process. This collection of legislative texts – which underwent several subsequent réforms[11] – constitutes what may be referred to as a model of territorial decentralization of Mozambique.

To study this model, it is important first and foremost to present its general architecture (I); and secondly, it will be necessary to describe its dynamic (II) and lastly, to look into the future to identify the challenges that the Mozambican "local power" will have to face (III).

I – The Architecture of the "Local Power"

The Constitution of the Republic of Mozambique (2004) dedicates, in its TITLE XIV, the existence of "local power". According to the terms of fundamental law:

1. The local power has, as its objectives, to organize the participation of citizens for resolution of problems unique to their community, promote local development, the deepening and the consolidation of democracy, within the framework of unity for the Mozambican state.

2. The local power relies on the initiative and capacity of the people and acts in close collaboration with the organization and participation of the citizens".

Thus Fundamental law attributes objectives to the Local power "which it twill have to pursue". Nonetheless, the achievement of these objectives requires structures (A) and some degree of sufficient autonomy (B) to facilitate the concrete achievement of interests and ends consecrated by the Constitution. However, the creation of local authorities does not free the state from its overall responsibility over the country and the functioning of its various institutions constitutionally in place; it must, as a result, exercise a certain measure of control over the local authorities (C).

A. The structures of the local powers

There are two perspectives to be dealt with. Firstly, describing the organization, the function and the scope of the organs of the local authorities (a) and, secondly, presenting the relationships between the organs of the same local authorities (b).

a) The organs of the local authorities

The administration of the local authorities is conferred to two types of organs: a deliberating and representative organ: the municipal or the locality's assembly (1) ; and executive organs: the municipal or local council and the chairman of the municipal or local council (2).

1. The municipal or local assembly

The municipal or local assembly is the representative organ of the community endowed with deliberative powers. It is the concrete expression of ideological and multiparty pluralism at the local authority level. In other words, it is the forum for the political and ideological currents in vogue within the community[12].

The municipal or local assembly is elected in polls that will be direct, equitable, secret, personal and periodic by the entire electorate resident within the territory of the community in line with a proportional representation system. The term for the municipal or local assembly members is 5 years.

The municipal or local assembly is made up of a number of members proportional to the number of voters residing in the respective electoral circuit. The number of members to be elected in each community is determined by the National Electoral Commission at least 30 days before the date of ballot.

As for its function, it is regulated, in principle, by Decree No. 35/98, of 7th July which establishes the fundamental principles of the municipal assemblies regulations (principle of legality, principle of democratic legitimacy of the local elected member, principle of specialty, principle of participation of resident citizens and principle of publicity). These principles must be introduced in each of the regulations of the municipal assemblies. Decree No. 35/98, of 7th July equally points out that municipal assemblies' regulations must also arrange for measures related to rights and obligations of the municipal assembly members in issues of assembly functions, suspension and loss of seat for the assembly members, the scope of the municipal assembly, quorum, presence of members of the public during municipal assembly meetings, deliberations and voting modalities, presentation of suggestions, claims and petitions by resident citizens.

The municipal or local assembly carries out 5 ordinary sessions per year. The calendar of ordinary sessions is fixed by the municipal assembly or the

community on the occasion of the first ordinary session of each year. The municipal or local assembly sessions are public.

In principle, the municipal or local assembly jurisdictions are defined by articles 45, 46, 77 and 78 of the Law No. 2/97, of 18th February. These scopes can be grouped into two categories.

The first category consecrates the jurisdictions that the representative organ exercises alone and exclusively; in particular, this is the case with the jurisdictions linked to the organization and internal operation of the assembly (approval of internal regulation), jurisdictions linked to relations with other entities (executive organs of the community, state organs and other public entities). Two domains of activity can be identified within the framework of the execution of the authority. Firstly, the representative organ controls the action of the executive organs of the community; and secondly, the assembly of the community evaluates the policy followed by these same organs.

The second category of scopes involves intervention or partnership of the executive organs for their implementation. In effect, the initiative for municipal action can revert to the exclusive goodwill of the municipal or local assembly and belong to executive organs of the community: municipal council (this is the case in particular, as concerns approval of municipal regulations) and chairman of the municipal council (for example, the determination of the number of municipal councilors by the municipal assembly is done through proposal of the municipal council chairman).

2. The executive organs of the territorial community

The organs of the executive of the local authorities are constituted by the municipal or local council (2.1.) and by the chairman of the municipal and local council (2.2.).

2.1. The municipal or local council

The municipal or local council is the collegial executive organ constituted by the municipal or local council chairman and by the municipal councilors chosen and nominated by him. The number of municipal counselors is fixed by the community assembly through proposal of the municipal or local council chairman or according to parameters established by the law[13]. In particular, the law operates a distinction between two categories of municipal councilors: the permanent municipal councilors and those who work part-time. It is up to the municipal or local council chairman to define which councilors should carry out functions in each of the two regimes. The municipal or local councilors are answerable to the chairman of the community's collegial executive.

The frequency of meetings and the adoption procedure of the municipal or local council deliberations are defined by the internal regulation of the organ in question.

The totality of the scope of activities for the community's executive collegial organ is determined by articles 56 and 88 of Law No. 2/97 of 18th February. Several types of competences can be pinpointed: those whose end is to facilitate the execution of selected tasks or programs (for example, implementing economic, cultural and social tasks and programs, defined by the municipal assembly), those aimed at supporting the municipal or local council chairman in the fulfillment of his activities (for example, the municipal council assists its chairman to carry out the approved deliberations through the community's representative organ: implementation of the budget and the activities defined by the municipal assembly), those whose goal is to organize its participation in the elaboration of municipal management (for example, presenting to the municipal assembly the requests for permission and exercising the authorized scope of activities in the matters provided for by the law) and those of a normative nature (for example, the municipal council by regulation fixes the amounts from which of real estate acquisition is approved).

2.2. The municipal or local council chairman

The municipal or local council chairman runs the municipal or local council. He is elected for 5 years through popular vote which is direct, equal, secret and personal over a two-round majority ballot by resident voters in the particular electoral constituency.

The law in force entrusts the municipal or local council chairman with a wide scopes of activities.

These can be classified into 5 distinct groups: the areas of management and administration (for example, the management and coordination of the functions of the municipal or local council) ; the areas of representation (for example, it is the municipal council chairman who is the legal representative of the community) ; the domains of implementation and supervision (for example, the municipal or local council chairman is the official in charge of the implementation of the municipal or local council deliberations); the areas of nomination of councilors and administrative staff; areas of substitution (for example, in cases of emergency, the municipal council chairman can take up the acts of operation of the municipal council).

Over and above this scope of activities, the municipal or local council chairman participates in municipal or local council sessions without rights to vote. The municipal chairman's presence during municipal assembly sessions aims on one hand, at enabling the municipal assembly to carry out its supervisory function over the activity of municipal council, and on the other hand, to guarantee its participation in decision-making procedures of the municipal assembly.[14]

It is this institutional framework that enables the expression of a politico-administrative autonomy which translates into the ability to develop real political action.

b) The local governance model

What was the local governance model chosen? (1) and what are its specific characteristics? (2).

1. The municipal governance model: the presidential regime

The municipal governance model, in terms of comparison, is similar to the presidential system of the United States of America.

Why was this model chosen as inspiration to the Mozambican municipal governance system?

VITALINO CANAS aptly describes the choice: "What happened is that we researched over long debates which preceded the elaboration of the law project to interpret Mozambican tradition and to identify which system would be better and adaptable to its realities, to the needs of the people, to the reconstruction period and to change and the appropriate mentality of Mozambican citizens. The initial hypotheses gradually reduced until the final choice which, coincidentally, has numerous points of convergence with the North American presidential system of government."[15]

Certain characteristics of the North American presidential system are clearly identifiable in the Mozambican municipal governance model. On the one hand, the chairman of the municipal council cannot dissolve the municipal assembly, and on the other hand, the municipal assembly cannot approve a censure motion against the local executive's chairman. This absence of responsibility finds its justification in the necessity to avoid situations where political changes or personal alliances may weaken the local executive.

In the same vein, similarities in terms of responsibilities for the two chairmen can be observed in the different systems; in both cases, the chairmen are responsible to the executive and the management for the totality of the community's administrative services.

2. "Municipal chairmanship"

What characterizes Mozambican municipal chairmanship is the strict separation of the functions of the community's organs (2.1.) on the one hand, and, on the other hand, the necessary partnership between the latter (2.2.).

2.1. Separation of functions

The democratic legitimacy with which each of the principal community organs is endowed - the municipal or local assembly and the chairman of the municipal or the local council – ensures that the above-mentioned organs do not superimpose or substitute another in the exercise of its skills since each of them has been endowed with its own distinct fonction[16]. Just as article 15 of Law No. 2/97, of 18th February

establishes it: "The local authority organs can only deliberate or decide within the scope of their skills and for the accomplishment of their own allocation".

The Mozambican municipal governance system maintains a model of separation of powers and ensures that no organ governs in a "solitary" manner.

2.2. Partnership of the organs

Even if on the surface it may appear as though there exists some concentration of powers at the "presidential organ" level, the concentration is more visible than real, once the municipality or local council chairman needs partnership and support from the other organs for approval of essential instruments for the function of the community. In short, if a separation of powers exists, there also exists a real duty, for the different organs, to coordinate the exercise of their actions.

Crossbreeding the scopes of activity thus becomes a necessity. The "municipal executive" needs to partner with the community's assembly so as to translate its policy program into normative decisions. In practical terms, without the adherence of the community's representative organ, the municipal council and its chairman cannot conduct any meaningful reforms.

B. Local autonomy

Local autonomy is "the local authorities' right and the effective capacity to regulate and manage a key part of public affairs, under their responsibility and in the interest of the people, within the framework of the law."[17]

Local autonomy presupposes, apart from the above-mentioned rights, the right to participate in the definition of national public policies which affect the interests of the respective local populations; the right to share the decision-making power with the State on matters of common interest; the right to regulate, standards or national plans as much as possible, so as to adapt them better to local realities. This means that "…over and above the inclusion of a domain reserved for the exclusive use by local authorities, the principle of local autonomy goes much further (…) in demanding independent decision-making powers and the right to oppose solutions unilaterally imposed by the central power."[18]

The study of the autonomy of local authorities also includes very practical aspects. Its measure in effect, enables one to appreciate the true degree of decentralization in a particular State. Local autonomy is actually "the expression of administrative decentralization"[19].

The principle of local authority autonomy is enshrined in the Constitution (No. 3 of article 276) and consecrated by the law[20]. The law consecrates three types of autonomy in particular: administrative autonomy (a), financial autonomy (b) and patrimonial autonomy (c) of the local authorities.

a) Administrative autonomy

Administrative autonomy in itself opens out into two types of autonomy: normative autonomy (1) and organizational autonomy (2).

1. Normative autonomy

Local authorities have a normative autonomy which is expressed by their ability to spell out the regulations freely approved in the material domain of proper interests of the community. They have a regulatory power and this regulatory power is consecrated by the Constitution (Article 278 of the Constitution). In other words, in the scope of their own interests, the local authorities can spell out and approve regulations whose enactment is not subject to authorization of the legislator or of the government. The regulatory competences that the local authorities' organs possess and which enable them to take measures of a general and impersonal nature are attributed by the legislator.

2. Organizational autonomy

Organizational autonomy or auto-organization constitute one of the essentials components of the fundamental principle of free administration of local authorities which in particular concretizes itself through the creation and the organization of public municipal services (2.1.) and by autonomy which the community possesses in its internal organization and the management of its personnel (2.2).

2.1. Creation and organization of the local public services

Essentially, the traditional function of local authorities is to avail services to local public utility users. In a sense, local public services are the core of local administration. In terms of running the local public services, what needs to be looked into is, on one hand, that the law endows some degree of freedom to local authorities to create public services and, on the other hand, it concedes to them some relative freedom in the modes of running these services.

Law No. 2/97, of 18 February truly establishes a principle of freedom to create local public services. Alinea b) of No. 2 of the said law's article 7in particular, leaves a lot of lee-way operation to the community's organs to create services aimed at pursuing their allocation: "the administrative autonomy comprises the following powers: … b) creating, organizing and supervising services aimed at providing the pursuit of these allocation".

Hence in the area of these allocation defined by Article 6 of Law No. 2/97, of 18 February, notably in the sectors of economic and social development, the environment, health, education, culture, urbanization and construction, local authorities can create and organize public services.

The decision to create or to dissolve local public services lies with the municipal or locality's assembly by virtue of the general clause on competence which empowers the representative organ of the local community, the power to deliberate within the framework of the municipal allocation over the matters and fundamental questions pertaining to the community's economic, social and cultural development, satisfaction of community needs and the protection of the people (No. 1 of article 45 of the Law No. 2/97, of 18 February).

Local authorities are equally entitled to freedom of space in the choice of management modalities of local public services. The law does not impose any models of municipal management. In other words, subject to hypotheses in which the legislator expressly imposes a mode of management of a given public service, it appertains exclusively to the community to choose the best form of management of its services, that is, concretely, to proceed on, as an entity, with the management of the service (direct management) or, on the contrary, to concession it to a third party (indirect or delegated management)[21].

2.2. Internal organizational autonomy and personnel management

In order to fulfill its functions, the law empowers local authorities with several means among which, services and personnel hold special importance[22]. In fact, the functioning of the local community demands the existence of an in-house personnel framework, sufficient in number and in qualification to carry out the tasks ascribed to the community. The local authorities' internal organization is not subjected to any specific legislative standard. In all the cases, the factors that may influence the local authorities' internal organization are numerous (the size of the territory, the population, the resources, the choice of modes of management of local public services, etc.).

As for the autonomy of management of personnel, the Fundamental Law points out that "The local authorities possess an in-house personnel framework, to be defined according to the terms of the law" (No. 1 of article 279). Autonomy of management of local personnel specifies that competent municipal authorities have the powers to determine the creation and cancellation of jobs, to go ahead with the nomination in the framework of the municipal public function, to decide on the career progression of its executives, the promotion, and the disciplinary powers and to proceed with the nomination of management executives. Moreover, the law guarantees to the local authorities that in the case of necessity, they may solicit from the State the necessary human resources for its function (No. 4 of article 18 of the Law No. 2/97, of 18 February). The local government officials are subject to the general statute of the State government officials[23].

The municipal or local assembly approves the community's personnel framework which must be subsequently ratified by the oversight authority.

In effect, backing up the process of elaboration of the local personnel framework in each of the communities, the National Civil Service Council has worked out a "methodology for the elaboration of local authorities' personnel frameworks"[24].

b) Financial autonomy

For decentralization to be really effective, one of the challenges face is for local authorities to have resources to their disposal, which would enable them to develop their program of activities under suitable conditions. In other words, if the local authorities do not have sufficient resources at their disposal, their actual existence would be almost fiction. It is not enough to have an unlimited scope of activity, it is necessary also to have own financial resources at one's disposal. In this perspective, decentralization as a whole is efficient if the communities truly have control over their finances. Conversely, decentralization is purely evident if the local authorities do not benefit from real financial autonomy, even if in other respects they possess a widespread scope of activities.

Over and above this aspect, it should be added the creation, access and management of own resources inevitably creates a sense of responsibility among the representatives of the people who will have to manage these resources and also among its own citizens.

As FRANÇOIS LABIE aptly put it, in real terms, local authorities' financial autonomy assumes a twin dimension:

"-first and foremost, a judicial dimension, which consists in recognizing the local authorities' free decision-making power both in terms of revenue and expenses; this power ought not to be hampered by strict controls from the State. In other words, on the judicial plane, financial autonomy is defined as the judicial capacity for local authorities in financial matters;

- secondly, a material dimension which consists in the possibility for local authorities to provide cover for their expenses by their own resources without being obliged to revert to the State for supplementing their budgets. In other words, on the material end, financial autonomy is defined, no more in terms of judicial capacity, but in terms of material independence vis-à-vis the State."[25]

On the analysis of these two aspects – the judicial capacity of the local authorities in financial matters (1) and material autonomy of the local authorities vis-à-vis the State (2) – a realistic vision of the efficacy of Mozambique's local authorities financial autonomy can be drawn.

1. The judicial capacity of local authorities in financial matters

Financial autonomy presupposes that the local authorities have decision-making powers such that they are guaranteed autonomy of decision vis-à-vis the State. This

implies a decision-making power of the community both in terms of revenue (1.1.) and expense (1.2.).

1.1 Decision-making powers in revenue matters

Analysis of positive law demonstrates that local authorities' decision-making power in matters of revenue is highly restricted. The communities have no power of creating revenue except in tax or license cases in compensation for services (1.1.1.); they have limited power in matters of fixing the basis for their revenue (1.1.2.); they also have limited power in fixing the amount to be collected (1.1.3.); nonetheless, they have a judicially autonomous power en as concerns levying for their revenue (1.1.4.)

1.1.1. Power to create revenue

Positive law prohibits local authorities from creating revenues of fiscal nature. The Constitution confers to Parliament the power to create taxes (article 127) and no constitutional disposition foresees any sharing of scopes of activity in this matter. In other words, the legislator holds the exclusive rights to create local taxes[26].

If the local authorities have no power as concerns the creation of fiscal revenues, they in turn enjoy relative freedom of creating revenues of a non fiscal nature, notably, taxes and charges resulting from a service rendered. For example, Alinea (e) of article 73 of the Law n.° 1/2008, of 16th January provides that "The local authorities can collect charges for services rendered to the public."

1.1.2. The power of determining the revenue base

As a general rule, the power to create incomes revenue and to determine one's base are narrowly linked[27]. thus, when a local community creates a charge resulting from the benefits of a service, it necessarily determines the base because in principle, it points to the beneficiary user size of the local public service and fixes the services accomplished by the latter, compensation amount to be received. As concerns taxes, the situation could be different. In principle local authorities have no powers to determine the revenue base. Nonetheless, the legislator will, in some cases, acknowledge the local authority decision-making powers on the determination of revenue base. The latter can apply to the determination of scope of tax or levy application and consists in the possibility to accord exemptions of certain local taxes or levies. To this end, the major decisions on exemption are those which could intervene in matters of local staff tax, which enables the local community to exempt certain local contributors from payment of this tax (No. 2 of Article 53 of Law No. 1/2008, of 16 January).

1.1.3. Power of fixing the amount of revenue

If local authorities possess a relative autonomy with regard to the creation of taxes and levies which constitute the product of services rendered, conversely, as far as the

fixation of amounts to levy is concerned, there is no total freedom in their determination. In effect, on one hand, the community have to determine the amount of taxes and levies to levy and acting with "equity, being restricted from fixing amount which, by their size, surpass the equilibrium between the compensation for the services rendered and the amount received" (No. 2 of Article 7 of Law No. 1/2008, of 16 January), and, on the other hand, with regard to certain local public services, notably those that are specifically identified by the law, under direct administration by the community (water and electricity supply, waste management, cleaning up, urban transport, municipal abattoirs, markets, gardens and green spaces), "it is incumbent upon the community's assembly to determine the levies (…),on the basis of recuperation of costs" (No. 2 of Article 74 of Law No. 1/2008, of 16 January).

1.1.4. Power to levy revenue

According to Article 76 of Law No. 1/2008, of 16 January: "Liquidation and levying of taxes and other incomes are achieved by competent services of the community".

In other words, in the Mozambican judicial order, local authorities judicially have the oversight over the levying of their revenues. In practice, several difficulties come up. Firstly, a substantial part of the population was not paying taxes, it was then necessary to educate the population about paying taxes. Secondly, when the people were paying taxes, they were going to discharge their fiscal responsibility before the devolved State administrations devolved and not to the competent municipal services. It thus became necessary there also to organize civic education campaign to explain to the people that they needed to pay local taxes to the community's competent services. Finally, a major training work was necessary to train the municipal government officials responsible for all the technical operations necessary for the liquidation and levying of local collections and taxes.

2. Decision-making power in maters of expenses

For a local community to be endowed with financial autonomy, it is necessary for it to have the power to freely decide whether or not to spend the funds allocated in its own budget[28]. The existence of this power supposes that on the occasion of the budgetary approval, the State cannot impose a budgetary requirement or prohibition to local authorities.

In matters of the choice of their expenditure, local authorities do not have unlimited autonomy. In the first place, there are expenses prohibited to local authorities (expenses contrary to the regulation in force resulting from the concrete implementation of allocation not belonging to the local authorities or which aim at fulfilling the interests not presenting a character not sufficiently belonging to the people[29]) and, secondly, there exists "necessary expenses" for the community (debt payments, loan refunds, payment for works carried out, payment of purchases delivered, payment of salaries of employees of the community). This implies that the

local authorities have at their disposal only those powers of freely deciding their expenses in a residual manner.

2. Local authorities' material autonomy vis-à-vis the State

Material autonomy for the local authorities imply for them the possibility to have at their disposal own resources in sufficient quantity to deal with expenses that they have, without overly depending on State subsidies[30].

The purpose of this question is to establish if local authorities have at their disposal a sufficient level of resources to enable them to effectively carry out their activities without depending on external financing, notably, state funding.

It would be difficult to give a reasonable answer to this question for all the communities.

First and foremost, in a general sense, local authorities have not effectively exploited the fiscal potential offered to them by the law and have functioned almost exclusively on State financial endowments. This then does not mean that the local authorities did not have sufficient resources but rather that they have underutilized them or not utilized the mat all, resorting to the facility access resources being transferred annually by the State through the Local Authorities Compensation Fund. This fund whose main objective is to "…complement the communities' budgetary resources" (article 43 of Law No. 1/2008, of 16 January), has in effect become the principal source of financing for their budget.

Secondly, and this perhaps is where financial autonomy faces its principal limitations, the financial mechanisms of the transfer process of functions established by Article 16 of Law n.° 1/2008, of 16 January, do not offer real guarantee of financial autonomy for the local authorities. In effect, it is the State budget which finances annually the exercise of transferred competences. Thus local authorities depend exclusively on state resources to exercise their transferred competences which are, in principle, contrary to financial autonomy.

c) Patrimonial autonomy

According to the terms of the Constitution, "Local authorities have (…) a defined patrimony" (No. 1 de Article 276). Also No. 4 of Article 7 of Law No. 2/97, of 18 February specifically points out that "patrimonial autonomy consists of having own patrimony for the pursuit of allocation of local authorities"[31].

The law establishes the terms by which patrimony previously belonging to the State is transferred to local authorities. Thus, according to the terms of Article 88 of Law n.° 11/97, of 31 May : "edifices of State patrimony are transferred to local authorities, based on terms of property ownership (…) where currently the functioning services have to include municipal administration, as well as the tools of function which, while equally being State property, the same date on which they were allotted".

Over and above these mechanisms that worked with some degree of success at the beginning of the decentralization process, the Mozambican legislator equally foresaw the gradual transfer of the available material resources by the State to the local authorities, which would become necessary in the pursuit of their allocation (No. 4 of Article 19 of Law No. 2/97, of 18 February). In the same vein, Article 25 of the same law stipulates that: "The transfer of competence of State organs to local authority organs is always accompanied by the transfer of financial resources and of human and patrimonial resources if necessary".

Hence the process of transfer of State patrimony to communities is gradual and realistic; as VASCO BRANCO GUIMARÃES points out: "…it is not necessary (…) to transfer properties which cannot be immediately utilized or which would have no returns for the community"[32].

C. State oversight on local authorities: administrative supervision

The autonomy enjoyed by the local authorities equally signifies that there is no relation of hierarchical subordination of the local authorities vis-à-vis the State[33]. Nonetheless, the hierarchical non subordination does not mean that the local authorities become independent of the central authority. In other words, the creation of local authorities does not free the State from its overall responsibility over the country and the function of the various constitutionally existing institutions[34]. Mozambique is a unitary State (Article 8 of the Constitution) hence the local authorities develop their activities within this framework of reference (No. 3 of Article 1 of Law No. 2/97, of 18 February).

Consequently local authorities constitute the infra-state administrative structures. Under those conditions, the existence of State oversight over local authorities is an element that constitutes a proper decentralization process. Nonetheless, it is necessary for this oversight to be organized in such a way as to respect the principle of autonomy consecrated by the Constitution. The law organizes the oversight of activity for local authorities' organs through State agents by means of setting up of a collection of means and procedures implied by the term "administrative supervision" (article 277 of the Constitution).

Administrative supervision as conceived by the Mozambican legislator is a power conditioned in this sense that supervision is carried out only in the forms that the law has planned in advance (article 2 of Law No. 6/2007, of 9 February). In other words, administrative supervision cannot limit the autonomy of the local authorities except in terms legally provided for by the legislator (article 3 of Law No. 7/97, of 31 May).

The study of State supervision over local authorities necessitates, in the first instance the presentation of its organization (a) before analysis, then secondly, the modalities according to which it is put into action (b).

a) Organization of administrative supervision

Administrative supervision is exercised by the State organs (1) which possess the specific means of intervention and control (2).

1. The organs of administrative supervision

It is important to distinguish between the central level (1.1.) and the local level (1.2.)

1. Supervision organs at the central level

The exercise of administrative supervision belongs to the Government (No. 1 of Article 8 of Law No. 11/97, of 31 May; Article 80 of Law No. 1/2008, of 16 January). It is exercised by the minister of State administration and by the minister of finance in the domains of their respective competences.

The ministry of State administration is the central organ of administrative supervision. It generally coordinates the decentralization process (alinea a) of Article 2 of DM No. 144/2009, of 24 June) and provides "technical support for the exercise of State administrative supervision over the local authorities" (alinea c) of Article 2) of DM No. 144/2009, of 24 June).

The ministry enjoys the support of specialized services directly linked to activity areas of the territorial organization and of the decentralization process in its totality (in particular, the National Management of Local authority Development and Local Administration Inspection[35]).

The oversight of the acts relating to the financial management of local authorities falls under the ministry of finance. In the exercise of this competence, the ministry of finance enjoys the support of the General Finances Inspection.

2. Supervision organs at the local level

As per Article 8 of Law n.° 6/2007, of 9 February, "Provincial Governors and provincial governments exercise administrative supervision over local authorities in accordance with the terms stipulated by the Council of Ministers…"[36]. Decree No. 56/2008, of 30 December is the one that defines the modalities of the exercise of administrative supervision exercised by the Governors and the Provincial Governments.

In this perspective, the above-mentioned local authorities can confirm the legality of the administrative acts and the contracts taken and signed by the local authorities' organs. For the smaller towns, the oversight could be carried out through inspections and inquiries set out by the Governor [37].

Moreover, the supervision authorities can participate in meetings organized by the local authority organs with a say but without right to vote (article 8A of Law No. 7/97, of 31 May).

2. Capacity of the administrative supervision organs

The exercise of administrative supervision needs capacities to guarantee the efficiency of control of the legality of municipal action. These skills are expressly spelt out by the Law. Article 4 of Law n.° 7/97, of 31 May in particular establishes that: "The exercise of administrative supervision by the State includes verification of the legality of administrative actions by the local authorities through inspections, enquiries and ratifications". To this list, one could add audits (article 2 of Decree n.° 56/2008, of 30 December).

More particularly, as concerns the "ratification" procedure, the judicial efficacy of certain administrative acts depends on the prior « ratification » (approval) of the competent authorities (ministers of State administration and finance). It is a question of the development plan of the local commune, budget, urban plan, personnel framework, pluri-annual loans and tax creations or modifications, subsidies and remunerations (article 6 of Law n.° 7/97, of 31 May).

b) Modalities of administrative supervision

Modalities of administrative supervision can be tackled through the scrutiny of the of its exercise of the local authority organs (1), over the acts and contracts subject to it (2) and over decisions of a financial nature taken by the local authorities (3).

1. Supervision over organs and members of the local authority

Administrative supervision over the organs and the members of the local authority organs simultaneously base themselves on the maintenance in line with the deliberative and executive organs of the local authorities and over the work accomplished in the exercise of their functions by the members of these organs. Certain authors have qualified this control as "supervision penalty »[38]. It manifests itself principally through two penalties: the loss of a seat and the dissolution of the commune's local organs.

The rationale for the dissolution of the commune's organs has a constitutional basis and is established by the Law. According to No. 4 of Article 277 of the Constitution: "Dissolution of local authority organs, though resulting from direct elections, can only take place through the fulfillment of actions or grave legal omissions, provided for by the law, according to the terms established by it". The legislator in particular understood "grave legal acts or omissions", notably, the practice of grave illegality in the area of the commune's management, the manifest negligence in the exercise of its skills; the manifest negligence in the exercise of its administrative duties; the non approval of the instruments essential to the functioning of the local commune within the stipulated time, hindering the implementation of inspection or inquiry, the refusal to provide information to inspection agents[39].

Cases of dissolution of local authority organs or of loss of seat by its members became the subject of heavy critique[40], especially for particularly grave measures where less radical penalties would have been applied. When one understands that a municipal assembly could be dissolved for a resulting general reason of interest, for

example, from the inability by the latter to exercise its duties, one should not forget that the penalties adopted often collide with the fundamental political rights such as the right to be elected and the right to exercise a public responsibility. Hence it is necessary and even healthy to balance every issuance of penalty in this domain. The decree of dissolution or of loss of seat is issued by the Council of Ministers.

2. Supervision over administrative acts and contracts concluded by local authority organs and services

The constituting legislator opted for a hybrid regime with regard to supervision over the administrative acts and contracts concluded by local authority organs and services. No. 2 of Article 277 of the Constitution on one hand affirms that "The administrative supervision over the local authorities consists in verifying the legality of the administrative acts of the local authority organs, in line with the Law", and on the other hand that, "The power of supervision can still be exercised on the appropriateness of the administrative acts, solely in cases expressly provided for by the law" (No. 3 of Article 277 of the Constitution).

To date, the legislator has not found it appropriate to subject to oversight the local authorities' administrative acts. Therefore it is only the supervision of the legality which is effectively exercised on the administrative acts and contracts concluded by the organs and services of local authorities. In all the cases, it is the administrative judge who remains competent to nullify the tainted act.

Over and above supervision over legality, what Portuguese doctrine refers to as "integrative supervision", must be explained, that is, what is meant by power to authorize or to approve acts of the entity being supervised [41].

In this perspective, the Mozambican legislator requires the competent organs of local authorities to submit certain acts of the supervising authority for prior approval notably designated for giving them execution powers (article 6 of Law No. 7/97, of 31 May).

3. Supervision over financial decisions

As per the terms of Article 24 of Law No. 2/97, of 18 February, financial management for the local authorities is subject to supervision. This supervision comes in two forms: internal (3.1.) and external (3.2.).

3.1. Internal audit

Internal audit interne consists is a realistic auto control. In other words, the audit is organized in and by the actual commune. To begin with, it is exercised by the actual author of the financial act. Secondly, the commune's representative organ has at its disposal the means for guaranteeing control of financial and patrimonial management of the commune. The municipal assembly can, at any moment, request

for information about the commune's financial management and evaluate its accounts before sending them to the Administrative Tribunal.

3.2. External audit

External audit translates to General Inspection of Finances and Administrative Court (prior expense and audit controls).

II – The Gradual Dynamic of "Local Power"

The dynamic of territorial decentralization process guided by the principle of "gradualism" which applies itself both at the level of the local authorities' process' of creation (A) and at the level of transfer of skills from the State to the local authorities (B).

A. "Gradualism"in the creation of local authorities

Although in certain countries the entire national territory is divided into "municipal territories"[42], this is not yet the case in Mozambique. In effect, the process of the country's "municipalization", initially took into account only 33 communes[43] (1997) and quite recently adjoined 10 other communes (2008).

The preamble of Law No. 10/97, of 31 May highlights the objective reasons for this choice (a) and the law fixes their criteria (b).

a) Raisons for the choice of gradualism

The reasons for the choice of gradualism are directly associated with the existence of minimal conditions to be able to effectively enjoy administrative, financial and patrimonial autonomy. The totality of these conditions characterizes what was later dubbed the "principle of gradualism"[44]. Hence, the choice of the principle of gradualism is explained by reasons directly associated with the existence or the fulfillment of the economic and social conditions necessary and inevitable for the smooth and sustainable management of the municipal administration.

b) Criteria of gradualism

As a first step (1997), as local authorities, the country's capital and the 10 provincial capitals were chosen, to which 22 average sized communities were added. The criteria of choice of these latter communities involve two aspects. The first one is geographic (1 commune per province)[45]; the other was as a result of the application of criteria established by the law.

Article 5 of Law No. 2/97, of 18 February establishes the criteria for the creation of local authorities.

From this perspective, Parliament has to take into account:

- Geographical factors, demographic factors, economic factors, social and, cultural factors as well as administrative factors;
- The interests in play, nationally and locally;
- Historic and cultural considerations;
- Evaluation of financial capacity for the pursuit of allocation conceded to them.

Thus, the rationale for gradualism rests upon objective factors. geographical factors must enable the localization of a community by province (at least) ; demographic factors take into account the number of voters in the constituency in question; economic factors are characterized by the capacity to generate economic activities (production and marketing) all sectors included; social and cultural factors are characterized by the capacity of health services, education and sports and financial capacity factors represent the degree of the State's financial dependence for each of the communities (contribution by the State to the community's budget).

Nonetheless, the purely political in the choice of the creation of a community cannot be totally avoided.

B. "Gradualism" in the skills transfers process

It is incumbent upon the Government to create the appropriate conditions for skills transfer carried out by the local organs from the State to the local authorities. This transfer needs to operate in a "gradual form" and be accompanied, on one hand, by technical training for the local agents and, on the other hand, by the necessary financial resources (Article 84 of Law No. 1/2008, of 16 January). Decree No. 33/2006, of 30 August is the one to regulate the skills transfer modalities (b) and to institutionalize, a realistic "free-choice"transfer (a).

a) "Free-choice" transfer

The legislator had, since 1997, held on the principle that skills transfer of State organs to local authority organs needed to be accompanied by a transfer of financial, human and patrimonial resources if necessary, (article 25 of Law n.° 2/97, of 18 February). Financial difficulties upon which the Government based its argument (more than 50% of the budget is provided by international development partners), and perhaps also the absence of real goodwill to push forward the skills transfer process (a well-known phenomena of administrative conservatism), resulted in part to the legislator not opting for a transfer of "skills blocs", and for the Government, on the other hand, not having adopted a proper policy on the matter.

It was only in 2008 that the Mozambican legislator lent some support to the skills transfer process, by dedicating the guiding principles required to spear-head this process.

In the first place, the Government is responsible for creating the necessary atmosphere for the implementation of the transfer process (political responsibility). Secondly, the legislator assumes the gradual form of this procedure and establishes a

substantial link with the necessary material conditions for its success (technical, human and financial). Finally, the legislator fixes a deadline for its implementation, whose maximum is 3 years.

Ironically, the above-mentioned decree comes to situate the local authorities in the centre of the process of transfer of skills since they are the same ones who have to claim this transfer in the domains enumerated by the decree. A tailor-made skills transfer thus takes shape: the more "aggressive" and convincing local authorities will benefit from skills transfers while those less proactive or less ambitious benefit little or not at all from the new skills.

b) Transfer modalities

The skills transfer initiative falls under, either the local State organs, or, to local authorities. In practice though, it is the local authorities that have been the principal drivers of this initiative. Loss or reduction of powers is never well received by State organs. The community soliciting the transfer must indicate its technical capacities in order to take up the claimed skills.

The local community in particular needs to come up with a proposal in which it spells out its capacities and needs in terms of human, material, financial and patrimonial resources as well as the modalities by which they shall be utilized.

The skills transfer is formalized by an accord entered into between the Government Provincial and the local community.

If one could justify the option of "gradualism" by saying, for example, that it is useless to transfer skills that the local authorities are not in a position to implement, conversely two obstacles hindered this process. The former arises from the combined inertia by the State and the local authorities whose effect was to hinder the transfer of the totality of the domains planned for in the regulation in force. This delay was prorogued by two years by Decree No. 58/2009, of 8 October. The latter results from the nature of financing for skills transfer, which does not guarantee the local authorities' financial autonomy. It is through annual budgetary endowments that the exercise of transferred skills will be financed. The accompanying risks to this choice are clearly visible.

III – Challenges for the "Local Power"

The Mozambican decentralization process will face two opposing challenges. On one hand, local authorities will have to face a rampant process of "recentralization" kick-started by the State since year 2000 (A) and will have to fight to strengthen its own autonomy (B).

A. The tendency towards recentralization

Recentralization is not a phenomenon unique to Mozambique, but the tendency can be observed in several countries[46]. In Mozambique, the effects can be seen in (a) financial, (b) administrative, and (c) supervisory terms.

a) Financial recentralization

As pointed out earlier, the financing of transfers of skills is achieved by budgetary endowments and not by the creation of local authorities' own fiscal incomes. This mechanism institutionalizes real material dependency on the State by the local authorities for the exercise of transferred competences. The State thus maintains oversight of the local authorities' activity on the basis of budgetary controls.

Besides, the legislative reform of 2008 on local finances did away with any flexibility in the determination of fiscal obligations which existed in the prior legislation (for example, the removal of the "fork" technique for determining rates).

b) Administrative recentralization

Administrative recentralization has taken several forms from the most petty (for example, the elimination of powers given to local authorities to decide on the name of new streets and avenues[47]) to the most preoccupying. To concentrate on the latter, the State via decree of the Council of Ministers imposed the modes of organization of the community's technical and administrative services. In other words, the commune's administrative autonomy saw itself lose its autonomy in order to organize itself. The key justification stealthily appears in n.° 4 of Article 2 of the above-cited decree which stipulates that: "The organization of the municipal technical and administrative services reflect the functional link between the community's administration organs and the of the central et locale administration of the State". In other words, to facilitate the life of the State's central and devolved organs, the communities have the obligation to organize themselves according to a predetermined model by integrating administrative structures into their organigram for which they will perhaps have no use.

c) Recentralization of control: the introduction of "dismissal supervision"

"Dismissal supervision" presupposes the ability for the supervising authority to revoke the administrative acts taken by the local authority organs. This form of supervision was non existent in the approved legislation at the beginning of the decentralization process. It was introduced by Law No. 6/2007, of 9 February which provides recourse before the supervision authorities of decisions by the local authorities organs (No. 3 of Article 4 new edition).

The constitutionality of such a legislative disposition comes into question in the face of local authority autonomy consecrated by the Fundamental Law.

B. Strengthening local autonomy

Any action that would lead to strengthening local autonomy (a) will have to take into account the ruling party's regulatory role (b).

a) Strengthening local autonomy through democracy

The decentralization process is a real project for a democratic society and, conversely, only democratic context can facilitate a decentralization process. This will doubtlessly require an effort in terms of creating mechanisms aimed at fostering an ever increased participation by the "municipal citizens" in the local authorities' decision making process. The increased participation by the citizens can contribute to strengthening government responsibility in its relations with the society and better consideration by the State, of the institutions where it decentralization carried out. The Brazilian model of "participative budget" could perhaps be one of the techniques for infusing more democracy in the local decision-making, but is certainly not the only one.

Local authority organs will need to draw closer to communities and traditional authorities and organize modes of consultation and participation so as to integrate them in decision-making processes. Participation by the local population, in some cases, facilitates and determines the success of implementation municipal policies.

A more participative local management can thus reinforce local authority autonomy.

There is need also to look at association movement. Local authority associations, as a general rule, wield stronger negotiating power with government authorities than isolated communities.

Internationalization of local authorities' actions through the conclusion of decentralized cooperation agreements can also play a key role in reinforcing local autonomy by creating trans-border synergies.

b) The regulatory role of the majority party

It is important to understand that the thinking behind local authorities to claim and to protect their autonomy could be disrupted by the presence of a ruling majority party. The leaders in charge locally will have many difficulties criticizing government action if they are at the same time members of the party, hence legitimate claims by the local authorities will remain unheard. Ironically, building an opposition is an essential element for building freedom for the local authorities.

Conclusion

The ideal model of territorial decentralization which was formulated in the late 90's in Mozambique was introduced in a volatile reality. Insufficient means in terms of material and financial, human resource exiguity, notably, of personnel well trained in new techniques of decentralization, infrastructures, most of the time, degraded

and/or in poor state of function and voters expectant of radical change in the management of local resources.

Nonetheless, the local authorities were able to face their difficulties with ample success and the larger majority of Mozambican citizens recognize their usefulness. Decentralization by nature is a process and, like all social processes, the time element develops an important role in progressive structuring of its dynamic. The decentralization process is still in its infancy in Mozambique and will still need state support. The state needs to take stock of the effects of decentralization – a process that the state itself has engaged in – and to be conscious of the highly creative potential that this process can generate.

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11 En 2004, 2006, 2008 et 2009.

12 CANAS, V., "O sistema de governo municipal em Moçambique", in Seminário de Lançamento do projecto PROL, Maputo 15-16/02/1995, p. 11.

13 Le conseil municipal ou de localité est constitué par un nombre de membres qui est proportionnel à un nombre d'habitants déterminé sur le territoire de la collectivité.

14 LOUREIRO BASTOS, F., As relações entre os órgãos dos municípios, Curso de Introdução da Autarquia aos Eleitos Municipais, Maputo, MAE, Outubro de 1998, p. 7.

15 CANAS, V., "O sistema de governo municipal em Moçambique", op. cit., p. 4.

16 LOUREIRO BASTOS, F., As relações entre os órgãos dos municípios, op. cit., p. 5.

17 Article 3.º de la Charte Européenne de l'Autonomie Locale (1985).

18 FREITAS DO AMARAL, D., Curso de direito administrativo I, Coimbra, Livraria Almedina, 2ª ed.., 1994, n.º 129.

19 OLIVEIRA, A, CÂNDIDO de, Direito das autarquias locais, Coimbra, Coimbra Editora - 1993, p. 125.

20 Article 7 of Lawn.° 2/97, du 18 February.

21 Le mode de gestion pour assurer la gestion d'un service public local est conditionné par l'existence de plusieurs facteurs : les ressources financières, la volonté de la collectivité locale d'organiser et d'assurer ou non la gestion du service et, finalement, le régime fiscal le plus favorable selon la nature du service.

22 ROCHA, N. et DOMINGOS MATEUS, S., Sistema financeiro. Organização Administrativa e Financeira: Aspectos principais, Curso de Introdução da Autarquia aos Eleitos Municipais, Maputo, MAE, Outubro 1998, p. 1 et suivantes.

23 Sur la mobilité des fonctionnaires locaux et des fonctionnaires des administrations centrales, le Conseil des Ministres a approuvé un décret qui régule la mobilité des fonctionnaires entre l'administration de l'État et ceux des collectivités locales. Il clarifie également les relations de travail des fonctionnaires de l'État en activité dans les collectivités locales – Décret n.° 45/2003, du 17 décembre.

24 Résolution n.° 8/2003, du 24 décembre.

25 LABIE, F. Finances Locales, Paris, Ed. Dalloz, 1995, nº. 7.

26 Ainsi la loi n.° 1/2008, du 16 January crée les impôts locaux suivants : impôt personnel local ; impôt sur les immeubles ; impôt sur les véhicules ; impôts sur les transactions immobilières ; contribution pour plus value due à des travaux publics municipaux.

27 LABIE, F. ibid, nº. 21.

28 LABIE, F. ibid, nº. 37.

29 Par exemple, les dépenses d'entretien de voies privées dont l'usage est réservé aux propriétaires.

30 LABIE, F. ibid, nº. 64.

31 Voir également, n.° 3 de l'article 3 of Lawn.° 1/2008, du 16 January. TEIXEIRA ALVES, A., Contabilidade e Património, Curso de Introdução da Autarquia aos Eleitos Municipais, Maputo, MAE, Outubro 1998, p. 1.

32 "As Finanças locais - dilemas fundamentais", in Seminário d Lançamento do projecto PROL, Maputo 15 - 16/02/1995, p. 8.

33 Les agents de l'État ne peuvent donner des instructions, des injonctions ou, plus généralement, des ordres aux agents des collectivités locales.

34 GERENTE, J., "Administração territorial no contexto da municipalização", Bol. MAE, 4-1997, p. 18.

35 DM n.° 23/2008, du 31 mars.

36 N.° 2 de l'article 141 de la Constitution.

37 Pour les grandes et moyennes villes ce sont les organes centraux (ministres de l'administration d'État et des finances) qui sont compétents.

38 FREITAS DO AMARAL, D., Curso de direito administrativo I, op. cit., n.° 169.

39 Article 98 of Lawn.° 2/97, du 18 February et article 9 of Lawn.° 7/97, du 31 mai.

40 CISTAC G., Manual de Direito das Autarquias Locais, op. cit., p. 396 et s.

41 FREITAS DO AMARAL, D., Curso de direito administrativo I, op. cit., n.° 229.

42 C'est le cas, par exemple, du Portugal, voir, FREITAS do AMARAL, D., Curso de direito administrativo I, op. cit., n.º 127 et de la France, voir, AUBY, J. M. et AUBY, J. F., Droit des collectivités locales, Paris, PUF, 1990, p. 52 et suivantes.

43 Voir MAE, Folhas informativas dos 33 municípios, Maputo, Abril de 1998.

44 Os « Laboratórios » do Processo Moçambicano de Autarcização, AWEPA, 2001, p. 11.

45 Ce premier critère n'a été appliqué qu'imparfaitement. Le Gouvernement d'alors a subis de nombreuses pressions internes et externes et s'est vu contraint d'augmenter le nombre des collectivités sélectionner selon ce premier critère. SUMINE, M. B., "O desafio da municipalização", Notícias, 15/04/1996.

46 Voir par exemple en France, CARLES J., "La recentralisation est en marche", Droit Ecrit n.° 3 – 2001.

47 Loi n.° 15/2007, du 27 juin.

IV. DECENTRALIZATION AND ADMINISTRATIVE LAW SENEGAL BY PROF. ISMAILA MADIOR FALL, CHEIKH ANTA DIOP UNIVERSITY, SENEGAL

Decentralization in Senegal was re-launched in the 1996. By adopting new text in 1996 and implementing them in 1997, the Senegalese state aims at taking a positive step towards the progress of the decentralization movement set in motion during the colonial era.

After experimenting with various decentralization reforms since independence, Senegal, *"which opted for a gradual and prudent but now irreversible decentralization policy"* will according to the terms of law 96-06 of 22nd March 1996 on local authorities broaden and reinforce decentralization; an opportunity to re-launch political, economic and social development. This re-launch mainly involved transforming regions into local authorities alongside traditional local authorities such as counties and rural communities whose jurisdictions have also been enlarged. This reform is rightly termed regionalization although this is only one aspect of the reform.

It is within the dynamics of liberation and development of more responsible local or regional authorities that the law, *"in recognition of the importance of local authorities* decided to replace the current system of centralized, a priori approval checks with an a posteriori legality check. Generally speaking, it involved *"organizing a single mode of verification for the three types of local authorities in which a posteriori checks will henceforth be the rule while a priori checks will be the exception"*. This means that "*the notion of supervision must henceforth disappear and be replaced by the notion of verification"*[1]

This new system of checks on local acts, inspired by the French law raises the question of the effectiveness and efficiency of the new mode of checks imposed over local authorities. Research attempts to bring answers to these questions through legal analyses based on normative[2] sources of checks on local authorities practically applied as described in *reports on legality checks*[3]. Such an analysis makes it possible to

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[1] Exposition of the motives of law 96-06 of 22nd March, 1996 on the code of local authorities

[2] In order to appreciate the level of change, we refer to earlier texts that governed supervision before the advent of the code of local authorities in 1996. For counties, this refers to law 66-64 of 30th June, 1966 on administration of counties while for rural communities; it is law 72-25 of 19th April 1972 (abrogated). On current texts, the following may be cited: Article 102 of the constitution of 22nd January 2001, touching on the principle of free administration of local authorities, texts on decentralization, notably the code of local authorities, especially the chapter "legality checks", to which should be added the circular on modalities of verifying legality (circular nº 1737/MINT/DCL of 21st March 1997 on budgetary and legality checks); not forgetting the jurisprudence on legality checks. This jurisprudence is characterized by its austerity. In such conditions, the researcher has to pay attention to the voluminous French jurisprudence

[3] Article 339 of the code of local authorities states that *"every year, the government will submit to the national assembly a report on the legality check conducted the previous year on local authorities for debate in its first ordinary session.* This provision has proven ineffective as in the eight years since the adoption of decentralization texts, no report on legality checks has ever been submitted to the national assembly. However, it is important to note that two unpublished reports on legality checks titled Interior

advance the notion that the new system of verification overhauls the current system of supervision by reducing the powers of the verifying State while granting greater freedom to local authorities. This translates into a reduced field of application of controls (I) and a wider mandate (II)

I. Reduced field of application of checks

By virtue of article 102 of the Senegalese Constitution, of 22nd January, 2001, *"local authorities constitute an institutional framework for citizens to participate in the management of public affairs. They are freely administered by elected councils"*

For the traditional mode of supervision, the law has substituted modalities of control that are more respectful of local freedoms and the dignity of local authorities. The dominant features of the new system are that on the one hand, verification is limited to legality (A) and on the other hand, verification is exercised after the execution of the act (B)

A. Verification limited to the legality of the act

By deliberately giving the title *"legality checks"* to the first chapter of title IV of the code of local authorities, the law wanted to highlight the change in relation to the past by confining the controlling State to a strict reference which is legality. It is important at this point to analyze the strict confinement of verification to legality through the abolition of verification of opportunity (1) before identifying the acts affected by the verification (2)

Abolition of opportunity checks

By virtue of legal text and regulations effective until 1996, the checks exercised over local authorities were so far-reaching and so restrictive that some authors studying the phenomenon at the time concluded that supervisory authority checked not only on the legality of local acts submitted for its approval; that is their conformity to the law, but also on their timeliness. The modification of legality checks was clearly suggested in the basic texts on counties and rural communities which make provisions for two ways of invalidating local acts: legal nullification and the possibility of nullification. Article 51 of law 66-64 of 30th June 1966 on the administration of counties (abrogated) stated that, *will be considered null and void: 1°) deliberations of a municipal council on an item outside its prerogatives or conducted outside its legally constituted meetings; 2°) deliberations conducted in violation of an existing law or rule* 'Article 55 added that deliberations may be rendered null and void if members of the interested council participated in the deliberations, either in their personal capacities or as proxies in the matter under discussion. Just like in the case of supervision of nullification, it is the aspect of legality which determined the approval or non-approval as well as the legal nullification and whether or not deliberations of

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Minister have been written: The first covering the period1998-2001 is dated June, 2002 while the second covers the year 2002 and is dated October, 2003.

municipal councils and rural councils as well as the activities of their executives (Mayors and chair persons of rural councils) may be nullified. In 1996, the law solemnly prohibited opportunity checks.

The circular of 21st March, 1997 on legality and budget controls[4] moves in that direction by specifying that *"one of the main innovations brought about by the reform was the substitution of legality checks, effected a posteriori, with advance checks"*.
That is the reason why Senegalese law emphatically proclaimed the suppression of supervision by prohibiting all types of opportunity checks in article 3 *in fine* of the code of local authorities which states that: *"local authorities are solely responsible, within the confines of the law and regulations, for determining the timing of their decisions"*. Article 12 adds: "Acts of local authorities are subject to legality checks". The intention to confine the checks and the verifiers to legality is hereby unequivocally affirmed.

The prohibition of checks on timing is thus clearly stated to avoid abuses on the part of the authority charged with exercising the checks. It prescribes, as the name suggests that the verification in question is exclusively on the aspect of legality. This suggests on the one hand prohibition of checks on timing and on the other hand, the confinement of verification to the sphere of legality. The verification or appreciation of the legality of local acts by the State representative can only be referenced in legality. In addition, prohibition of timing checks stipulates that the jurisdictional checks to which local acts are subjected are legality checks exclusively. In fact the State Council, which rules on abuse of power, is only judge on legal matters whose authority may not go beyond matters of legality into matters of opportunity; although it is known that issues related to opportunity are not completely absent when it comes to implementing legality matters in general and more [5]particularly, legality checks on local acts.

Actions affected by legality checks

In determining the acts that are subject to legality checks, the law of 22nd March 1996 on local authorities highlights a structural criterion. The first paragraph of article 12 *in limine* of the code of local authorities reads as follows: "The acts of local authorities are subject to legality checks by representatives of the State". Article 334 *in limine* reemphasizes the structural link between the acts that are subject to verification and local authorities: "acts undertaken by local authorities are passed…." It emerges from the flow of the texts that the acts subjected to legality checks are the acts conducted by local authorities, either through their councils (regional, municipal or rural) or by

[4] Republic of Senegal, Ministry of Interior, Directorate of local authorities, circular n° 01737 of 21st March, 1997, *To Regional Governors, District Commissioners and District officers.* Subject: Legality and budget checks.
[5] V. The above-cited Senegalese circular on legality and budget checks. The French circular on which the Senegalese circular is inspired is even more explicit: *"The verification to be conducted by the State representative should only be concerned with the legality of the act. Appreciation should in no way bear on the opportunity of the act. It should instead focus on all aspects of legality"*. Cited by O. Gohin, *les institutions administratives,* Paris, LGDJ, 1992, p.505. V. Similarly, P. Cadieu, *le déféré préfectoral,* Territorial, « l'essentiel sur » collection, 1999, p.1.

their executives (chair person of a regional council, mayor or chair person of the rural council).

On the onset, it is not all actions by local authorities that are affected by the new system of legality checks provided for by the code of local authorities. From the volume of actions taken by local authorities, it is possible to distinguish between acts affected and those not affected by legality checks.

Although it is easy to identify acts affected by the new rules on verification, as these are already stipulated by law, the same cannot be said of non- affected acts[6]. The Identification of actions that are subject to verification does not pose any major challenge. After introducing the principle of transmitting acts of local authorities to State representatives, article 334 of the local authorities code states that *"the provision affects the following acts: Deliberations of councils or decisions made by council delegations; regulatory measures taken by local authorities in applying the law in all areas within their jurisdiction, agreements pertaining to sales, concession or leasing of public services of an industrial or commercial nature, individual decisions pertaining to appointments, promotion of agents of local authorities, individual decisions pertaining to sanctions on the advice of the disciplinary committee and dismissal of agents of local authorities.* Article 334 does not however exhaust the list of affected actions. Article 335 extends the list to include the following: *"Regulatory and individual decisions taken by the chair person of the regional council, the mayor or the chair person of the rural council in exercising their policing authority and in daily management decisions on behalf of local authorities other than those mentioned in article 334 above".*

The acts listed in article 334 and 335 emanate from a special system of legality checks, the system of referrals by the State representative[7]. There is a category of acts that are not based on the referral system of the State representative but are subjected to legality checks under common law. These actions are listed in article 336 of the code of local authorities: The main and supplementary budgets, borrowing and loan guarantee, regional, rural and county development plans, international financial cooperation agreements of an amount stipulated by law, public affairs and urbanization, guarantees and acquisition of shares in general interest private companies turning into public share-holdings, transactions above an amount stipulated by law and contracts lasting more than thirty years.

Verification after implementation of acts

In the law pertaining to local authorities before 1996, the effectiveness of acts by local authorities was dependent on their express or tacit approbation or approval in some cases. In 1996, the verification mechanism instituted by legal text on decentralization did not move to radically suppress advance verification as was the case in France[8], but rather to reduce it considerably by moving it to the level of exception rather than the rule. Henceforth, the principle is that acts of local authorities are subjected to a

[6] V. Chapter 1 of title VI: legality check.
[7] V. article 337 of the code of local authorities. Infra, II
[8] V. Paragraph 6 of article 3 of French law of 2nd March, 1982

posteriori checks (1). This is doubtlessly an important development whose significance should be put in perspective in the face of continued a priori checks on a category of important acts (2).

Establishment of *a posteriori* checks as the norm

A posteriori checks were instituted as a reaction to a priori checks. The latter subjects the effectiveness of acts of local authorities to approval or authorization by a supervising authority erroneously termed a "superior"[9] authority in the legal text, as though operating in a hierarchical structure. It is seen as one of the most severe forms of supervision. As for a posteriori checks, these are seen as based on confidence in local authorities and embracing *"the principle of execution of full rights by local authorities"* in accordance with the principle by Vedel and Devolvé[10] . The main problem to be precise is therefore the execution of acts of local authorities. Further, the substitution of a priori with a posteriori checks assumes an importance that can only be appreciated by comparing the current system of execution of full rights with the previous system of supervision by approval and authorization.

Before 1996, the rules setting modalities for a priori controls were stipulated by the law on the code of administration of counties[11] and the law on rural communities[12]. As far as counties are concerned, paragraph 1 of article 47 of the code of administration of counties was clear: "*Deliberations of municipal councils on the following subjects can only be executed after they are approved".* The article proceeds to list an impressive twenty six items ranging from budgetary acts to acquisition of buildings to naming of streets. The twenty sixth item on the list targets *"in a general manner, deliberations subjected to approbation or authorization by virtue of a special text".* At the end of article 48, deliberations on the twenty six (26) items cited in article 47 are effective after approval by a supervising authority.

The result of these texts is that the supervising authority could expressly or tacitly refuse her approval within thirty days. In such a case, the municipal council could only pursue legal recourse, more precisely for abuse of power by lodging an appeal before the president of the republic[13] within two months.

In 1996, the law inverted the tendency; a posteriori checks became the rule and a priori checks the exception. This is can be clearly seen in the new regulations governing legality checks on local acts. An analysis of these regulations makes it possible for us to identify two means of executing acts under the principle of execution under full rights: the system of executing local acts under article 334 of the code of local authorities and the system of executing local acts under article 335 of the same code. The important acts of local authorities cited in article 334 take full legal

[9] V. article 44 of law 66-64 on administration of counties (abrogated)

[10] G. Vedel, P. Devolvé, Administrative law, volume 2, Paris, P.U.F., 12th edition, 1992, P. 574. V. Similarly, J. Morand –Deviller, Courts of administrative law, EJA, 2001, p. 183

[11] Law nº 66-64 of 30th June 1966 on administration of counties (cited above) (abrogated)

[12] Law nº72-25 of 19th April 1972 on rural communities (cited above) (abrogated).

[13] Article 48 paragraph 3 of the code of administration of counties

effect fifteen days after delivery of the acknowledgement of receipt by a representative of the State, except when a second reading is required and after their publication (in the case of regulatory acts) or their notification to the relevant parties (in the case of individual acts). The fifteen (15) day limit may be reduced by the State representative on the request of the local authority. Other less important acts such as those related to routine tasks undertaken by local executives pertaining to their daily management of the local authorities enjoy a more liberal mode of execution under full rights as stipulated in article 335: The acts are *"effective as soon as they are published or communicated to the relevant party, after having been presented to representative of the State.*

It therefore appears clear that the local authorities are obliged to present these acts but are not compelled to do it within a given time limit. As long as they do not fulfill the formality of presenting these acts, the proof of which may be brought by any means[14], the acts remain non-effective and incontestable. Despite this fact, it is important to note that in reality, local authorities do not always subject themselves to this formality although their acts enjoy the principle of execution with full rights[15]. Acts that are theoretically incontestable and ineffective are nonetheless executed, according to the findings of *"reports on legality checks[16]"*. This raises the question of respect for texts pertaining to the effectiveness of local acts and further, the question of the effectiveness of the law on decentralization[17].

2. The persistence of a priori checks

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[14] V. article 334 paragraphs 2 of the code of local authorities.

[15] The French judge had the opportunity to point out that presentation of the act to a representative of the State, being a condition for the execution of the act, application of the act before presenting it is illegal. C.E. 27th April, 1987, State Commissioner, Côtes-du-Nord, Rec., p. 721, AJDA, 1987, note J.B. Auby

[16] The first report on the legality checks states that from 1998-2001, an average of only seven (7 acts) are presented annually to State representatives. According to the report, this weakness in the proportion of acts presented in relation to the norm is due to the absence of a time limit within which the acts should be sent and also a deliberate withholding of the acts by some elected representatives. This behaviour is particularly noted with regard to urbanization acts and State matters that require approval by the State representative before being implemented. It is appropriate to note that according to the report, the number of acts presented by the local authorities to State representatives has increased by 34.15%. The acts emanating from article 335 have contributed 66% (569/863 that is exactly 65.93% to this growth), against 36% of acts under article 334 while acts under article 336 declined to 2%. Cf. Republic of Senegal, Ministry of Interior, report on legality checks (1998-2001, June, 2002 (unedited). p 9.
On an optimistic note, the second report covering the period 1998-2002 records *"a very high increase"* in the number of acts sent to the State representatives which may even have *"doubled in relation to the period 1998-2001"*. With nearly 6,000 acts sent by the 397 local authorities, an average figure of 15 acts per local authority is obtained for the financial year 2002 while for the period 1998-2001, the average number of acts presented per year and per local authority was only 7.4. Republic of Senegal. Ministry of Interior and local authorities, Report on legality checks, (financial year2002), October 2003 (unpublished). p. 11 and s.

[17] The effectiveness of texts is one of the major problems of the Senegalese decentralization system. For an academic writing on the subject, v. I. Diallo, Effectiveness of the Senegalese law of local authorities, doctoral dissertation in law, Panthéon Sorbonne University, 2002

The institutionalization of a posteriori checks has doubtlessly had a liberating impact on local authorities. It broadens and reinforces the freedoms of local authorities as the implementation of their acts is no longer dependent on the will of supervising authorities. This is progress in the development of local liberties. The introduction of the a posteriori checks is justified, according to the terms of the afore-cited circular, by the fact that *"in reality, advance checks, also called a priori checks were the source of delays in the implementation of acts and decisions of organs of local authorities"*. As a matter of fact, it is a real transfer of decision-making powers from supervising authorities to authorities under supervision. That is the reason why the law and the elected council members see in it the end of supervision. However, a close analysis of the texts should help establish the extent of the freedoms bestowed on the local authorities, to put into perspective the development of local freedoms and to tone down the enthusiasm of local leaders and pro-decentralization activists who consider the abrogation of law 66-64 of 30th June 1966 on administration of counties and the adoption of law 96-06 of 22nd March 1996 on the code of local authorities as indicating a passage from a code of distrust to a code of confidence. It is important to point out the continued existence of a priori checks for the most important acts of local authorities. Article 336 of the code of local authorities is very clear on this point: *"Apart from the executive nature of the acts listed in articles 334 and 335 of the present code, acts taken in the following areas shall remain subject to prior approval by the State representative"*. These are essential, if not vital acts such as budgets, loans, local authorities' development plans, financial agreements related to international cooperation of a specified value, public affairs, share-holding in some companies, some important transactions[18]. The list enumerating areas in which acts must be subjected to prior approval indicate that the acts in question are in actual fact the most important ones in the life of a local authority.

As seen therefore, in the Senegalese decentralization law, there is still a co-existence of the system of execution of local acts with full rights and execution of the said acts through supervisory approval of the most important acts.

This co-existence or duality of systems which vividly explains the reality beneath the surface: is the continued existence of tension between the option of strengthening decentralization on the one hand, and the wish to continue supervising local authorities on the other hand.

II. A Broader implementation check

In reaction to the previously existing system of supervision conducted primarily by the Ministry of Interior and which resulted in the slow pace of handling local affairs, the law wanted to institute, as stated in the objectives of law 96-06, *"close and adapted legality checks"* which should *"translate into a new mission for State representatives assigned to local authorities and to the State council for the sake of legal verification'*.
Article 12 of the code of local authorities states that: *"Acts of local authorities will be subjected to legality checks by representatives of the State. The State Council will be judge*

[18] V. article 336 of the code of local authorities

over any contention arising from the verification exercise". As seen above, article 12 creates a distinction between the role of the State representative and that of the State council. The role of verification is given to the State representative while that of settling of disputes arising from the verification exercise goes to the State council. The process of verification follows a path channeled into a mandatory administrative phase where the State representative is under obligation to verify the legality of acts submitted to him (A) and into an eventual jurisdictional phase; depending on the willingness of the State representative to refer the case before a judge.

The administrative phase of verification

The code of local authorities gives the State representative the power to check acts of local authorities submitted to him. In reality, this constitutes the first stage of evaluating the normative validity of acts. The State representative actually proceeds to examine the legality of the acts (1). After this verification, the State representative may adopt one of two alternatives: Either he will consider the acts as conforming to the law, making them instantly legal, pending the expiry of time allocated for any appeal against them[19]; or he will decide that the acts do not conform to the law and will therefore refer them, if need be, to a judge dealing with abuse of power, more precisely, the State Council. These are the outcomes of legality checks on local authorities by the State representative.

Legality checks on the acts by the State representative

In the decentralization law that existed before the laws of 1996, the power to supervise the acts of local authorities was vested in the Ministry of Interior. This system was characterized by a centralized system of checking the regularity of acts but also by a diversified system of verification of acts based on the type of act and the type of local authority in question. In this regard, the development introduced by the law in 1996 involved reducing concentration on and creating uniformity in the supervisory body by replacing the different authorities of the supervising body with one State representative. Uniformity is thus created as the State representative examines the legality of all acts irrespective of their subject matter; whether administrative or financial. When acts of local authorities are presented to him, the State representative establishes their legality. The lists presented in articles 334 and 335 provide further information on the type of acts affected by the new legality check[20]. The acts in question are essentially and mainly unilateral acts and acts that supplement contractual acts. The targeted unilateral acts are deliberations of councils or decisions made by council delegations, regulatory acts taken by local authorities, individual decisions pertaining to administration and human resource management of local authorities, regulatory and individual decisions including daily management acts taken by executives of local authorities. The only contractual acts affected by legality checks are agreements on transactions and leasing of local public services of

[19] It is not superfluous to mention that apart from the local authority being checked, physical and moral persons may appeal against acts of local authorities they find detrimental to them.
[20] V. supra. I. A. 2.

a commercial or industrial nature and concessions. One may therefore state that legality checks are therefore mainly on unilateral acts of local authorities, whether resulting from the deliberating or from the executive organ. Moreover, whether the acts are unilateral or bilateral, the checks exercised by the State representative remains in all cases, a legality check *stricto sensu.* The law does not specify the type of legality check to be exercised but if one was to base himself on the circular on legality checks[21], he or she may conclude that it is the aspects covering external and internal legality as developed by administrative jurisprudence and theorized by doctrine[22]. The checks exercised on unilateral acts are also the same as those exercised on contracts subject to a few peculiarities for the latter.

After receiving the acts, the State representative, in his capacity as the protector of national interests and as the custodian of legality should on his own initiative exercise legality checks or do so at the request of an aggrieved party[23]. He will check aspects related to internal and external legality to identify what René Chapus calls *"vices likely to affect the legality of administrative acts"*[24]

Consequences of legality checks of acts by the State Representatives

Legality checks end in two ways: A tacit or express confirmation of the act or forwarding of the act to the judge dealing with abuse of power, for nullification through a channel of law open exclusively to the representative, commonly known as the referral. In the first option, after verifying the acts submitted to him, the representative confirms that the said acts conform to the law and states the regularity of the acts. Legality checks that end without ensuing contention constitute a kind of tacit affirmation of the regularity of the acts by the State representative. To make explicit the confirmation of the regularity of this act by the State representative and in order to be reassured that his act will not be contested before a judge handling cases of abuse of power, the executive of the local authority may ask the State representative for clarification on the status of acts presented to him, meaning his plans with regard to the same. This is what is provided for in article 337 paragraph 3 of the code of local authorities which states that: *"On request by the chair person of the regional council, the mayor or the chair person of the rural council, the State representative informs him of his intention not to refer to an administrative judge, an act that has been sent to him in accordance with article 334 of the code of local authorities"*[25]

In the second option, the State representative wears the cloak of "legal police" because he has to undertake to follow up on an act that he considers tainted with illegality. This is an obligation that is placed upon him by virtue of paragraph 1 of article 337 that states that *"the State representative will refer to the State council acts*

[21] V. The above-cited manual

[22]Manuals on administrative law tackle mainly the question of the principle of legality and the conditions of legality of administrative acts

[23] Article 341 of the code of local authorities.

[24] V. René Chapus, administrative law,op.cit.,p.1019

[25] Exclusion of acts under article 335 is noticeable

mentioned in article 334 and 335 that he considers tainted with illegality….". This provision raises two issues.

First, it constitutes a very important change as unlike before, the State representative no longer has the power to nullify acts but more of the right to a special, personal and discretional recourse that allows him to contest acts of local authorities before a judge handling cases of abuse of power. In the legality case, he is no longer a judge but simply one of the parties, a total overhaul which in the local context is likely to erode his authority and affect his prestige. In this respect, there is *"A change of relations between local authority officials and State representatives"*[26].

Secondly, the invitation made to the State representative to refer acts that appear illegal to him is an obligation that weighs on him from the moment the act appears illegal. This obligation is however tempered by two factors. On the one hand, the State representative has some room to manoeuvre which allows him to avoid court and enter into a compromise with local authorities. The first type of room for manoeuvre is provided for in the texts. The State representative may temporarily suspend the execution of acts cited in article 334 by formulating a demand for a second reading, addressed to the local authority.

This move is meant to allow the local authority to go over any possible illegalities detected by the State representative. The second type of manoeuvre room, not provided for in the texts but often used in practice consists of advice given by the State representative to local authorities to get them to redo or abrogate their illegal acts or reformulate the acts to make them legal. The end of this legality check that emphasizes the advisory role of the State representative is to avoid contention. The competence of the State Council to exercise power is therefore clearly documented in the texts.

On the other hand, since these acts are deemed to be tainted with illegality, the State representative may decide, in good faith or bad faith, that the acts submitted to him are not illegal, even though they may well be.

The Legal phase of checks

The peculiar thing about this phase in the process of legality checks is that it is not systematic. Its effectiveness is dependent on the goodwill of the State representative. The decentralization laws of 1996 were special in that they made it possible for the judge handling cases of abuse of power to be more involved in the new mode of checks on acts of its organs at the local level(1). However, this involvement which is expected to make the checks more effective is fairly limited at this stage of implementation (2)

The involvement of the judge

[26] Koubi (G), "Change of relations between local authority representatives and State representatives: Evaluation thesis….", LPA, 29th January 1988, p.9

The possibility of intervention by a judge in matters of abuse of power in relations between the State and local authorities was not entirely introduced by the laws of 1996. As a matter of fact, in the context of implementation of checks exercised on local authorities, there was a provision in the text that allowed the supervising authorities to contest acts of local authorities before the judge in matters of abuse of power.[27]

The change in the involvement of the judge brought about by the laws of 1996 is in the format of the contentious phase. If before, the initiative of taking matters before the courts lay with the local authorities, it now belongs mainly to the State representative. Likewise, if the judge was in the periphery of the system, he would now be in the centre of it, at least in the formal order. Consequently, if the judge's involvement was the exception, it would now become the rule.

As it currently stands, the system of legality control comes close to the system of appeal for abuse of power in terms of the identity of the judge who is the State Council defined by the law and the constitution as judge of abuse of power by executive authorities[28] as well as legality of acts of local authorities[29]. The authority of the judge to take cognizance of the referral is drawn not only from the structural law on the State Council cited above but also from law 96—06 on the code of local authorities[30].

In setting in motion the process of referral, the guiding principle is that the time limit accorded to the State representative is the same as that is normally accorded in cases of appeal against abuse of power, that is two months from the date of presentation of the acts; a date which takes effect at different times depending on the type of acts and whether the referral is taken on the State representatives initiative or whether on request by an aggrieved party. The referral is also close to an appeal against abuse of power in terms of the powers of the judge over the acts. These are acts that may only be nullified or upheld by the judge handling cases of abuse of power which can only lead to partial or total nullification of the act[31].
However, the referral differs from an appeal against abuse of power in other respects. The demands placed upon the party lodging an appeal against abuse of power are not placed on the initiator in a referral. As holding the status of defender of legality vested upon him by the law (and not by the constitution as is the case in

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[27] For example, law 66-64 of 30th June 1966 on the administration of counties (abrogated) states in article 56 that *"the municipal council, and any interested party outside the municipal council may appeal for nullification on grounds of abuse of power before the supreme court against an explicit or implicit decision made by the supervising authority".*

[28] V. article 92 paragraph 2 of the constitution of 22nd January 2001

[29] V. article 1 of law 99-72 of 17th February 1992 on the State Council, in *JORS* nº 5848 of 6th March 1999 modifying structural law nº 96-30 of 21st October on the State Council

[30] This law states in article 12 that *"acts of local authorities are subject to legality checks conducted by the State representative. The State Council will be judge over any contention arising from the checks….."*
Article 337 adds: "The State representatives refers to the State Council acts that….."

[31] J.C. Debbasch, J. C. Ricci, *Contentieux administratif*, 7th edition, Précis Dalloz, 1999, p. 601

France), the State representative has the *"monopoly of the right to refer*[32]*"to the State Council,* acts that he considers tainted with illegality. Consequently, he does not need to justify the quality or reason of his actions.

Incidentally, as one progresses towards the case, more and more procedural peculiarities of the referral are manifested. One of the strongest peculiarities of the referral is the opportunity open to the State representative to attach a request for a stay of execution, *"annex to his main recourse*[33]*"* which is the referral. This type of stay of execution of acts of local authorities is exceptional to the administrative system of common law[34]. To gauge the difference, it is necessary to first consider the principle of the executive nature of administrative acts and the conditions for granting a suspension in general before looking at the system of suspension provided for in the code of local authorities. It is a general principle of administrative law that is well known: Administrative decisions are effective even if contested before the judge dealing with abuse of power, so long as they have not been nullified by the judge[35]. Any stay of execution pronounced against them can only be upheld exceptionally as conditions for granting a suspension are decreed in a very reserved manner by administrative jurisprudence.

The law requires that the grounds presented by the applicant for a suspension be serious and the harm irreparable[36]. Even where the normal conditions for suspension have been met, the judge has room for evaluation which means that granting of suspensions is never automatic. Moreover, so as not to render meaningless the principle of the executive nature of administrative acts, the judge handling cases of abuse of power makes an assessment, generally in a restrictive manner, on the true existence of conditions for suspension invoked by the applicant.

It is this well established principle of administrative law that has been put in perspective or even in jeopardy by the law of decentralization. In this respect, article 338 of the code of local authorities provides for a kind of *"automatic stay of execution"*[37]with varying intensity, for acts referred by the State representative. A close look at the said article reveals three steps in the system of implementing a stay of execution of acts of local authorities, all having the formidable capacity to paralyze acts of local authorities.

The first step of an automatic stay of execution is provided for in paragraph 1 of article 338 of the code of local authorities which states that: *"the State representative may seek recourse with a request for a stay of execution. A stay of execution is granted*

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[32] V.O. Gohin, *Institutions administratives, op.cit.,* p.423

[33]J. C. Debbasch, J. C. Ricci, *contentieux administratif*

[34]V. G. Porcell, "Le sursis à exécution au Coeur du débat » dans *ADJA.*, 1984, p. 149-152

[35] In Senegal, this principle is enshrined by article 19 of structural law on the State council (cited above)

[36] Classic jurisprudence of the French State Council found in article 36 of the structural law on the State Council (cited above) which facilitates granting of suspension in relation to the rights of refugees.

[37] S. Martin, *Contrôle a posteriori des actes des collectivités locales, op.cit.,* p. 216

immediately if one of the grounds invoked in the request is serious enough and able to justify the nullification of the contested act". This provision partially jeopardizes the traditional principles of suspension by reducing without harming the judge's freedom to examine the situation before granting a suspension. Partially jeopardizing because it places the judge under the obligation to grant a suspension the moment he finds serious grounds that are likely to lead to the nullification of the act. This is the first departure from a traditional suspension due to the fact that the granting of a suspension is not subjected to the condition of the existence of an irreparable or almost irreparable harm on execution of the contested act. By being forced to proceed in this manner, the judge is forced to abandon his classic jurisprudence which is restrictive and thin with regard to a stay of execution. However, this obligation that weighs on the judge to grant a suspension does not radically neutralize his power to assess, which depends more particularly on the seriousness of the grounds presented.

A second point of departure from common law is found on paragraph 2 of article 338 of the code of local authorities by virtue of which, *"if the contested act is likely to compromise the exercise of public or individual freedom, the chair person of the State Council or one of members delegated for this purpose will pronounce the suspension within 48 hours".* In this case, the conditions for the granting of suspension appear to be a degree softer because here, the only condition stated in the text is the threat in exercising public liberties. The moment an act of a local authority is likely to compromise the exercise of public freedoms, the Chair person of the State council or another member of the council is obliged to issue a suspension of the act. The law took this direction to cater to an urgency that could compromise the necessity for a group meeting of a legal team of the State Council. In this way not only is the automatic granting of suspensions more prominent but also the speed with which it is done appears to further facilitate the granting of a suspension; because it has to be pronounced not by the court as an authority but by its chairperson or by a member of the body, all within a period of 48 hours.

The third level of departure from suspensions in common law is based on paragraph 3 of article 338 of the code of local authorities which states that: *"The State Council can, on her own initiative pronounce a stay of execution of all public transactions transmitted to it by the State representative for nullification".* This is yet another level of facilitation of the procedure for granting suspensions in that it even denies the State representative the initiative to ask for a stay of execution of the transaction. To this effect, the law accords a special opportunity to the judge: the option of pronouncing an official stay as soon as the transaction is presented to him by the State representative. The financial (commitment of public funds) and material (difficulty to reverse an already concluded transaction) consequences explain the modification to this type of function in favour of the judge to allow him to take the lead and hinder the start of an execution that could very easily be reversed, that is the execution of a public transaction.

One cannot deal with the specific problems of referrals without an original feature of Senegalese law: The obligation placed upon the State Council handling referrals to *"give his verdict within a maximum of one month*[38]*"*

It is through submission of cases before a judge and the ensuing court proceedings that legality checks truly get moving. It is at this point that the judge uses all his skills and methods to conduct standard investigations for the purpose of identifying any problems in the act. At the end of this legality check procedure which is similar to the one conducted by the State representative, the judge, unlike the state representative has power to make decisions, creating a marked difference between him and the State representative; decisions to nullify illegal acts and to validate non-illegal acts through non-nullification. Therefore, though he has no power to prosecute, and even if his duties are partially linked to the willingness of the State representative especially in relation to referrals, to submit cases before the court, the judge becomes at the very least in the institutional grid, an important link in the new chain of legality control of local authorities' acts.

Having very few or hardly any cases referred to him by the State representative (the main focus of this study) and more sought after by aggrieved parties, (system of checks of ordinary legality, secondary to be precise[39], the State Council has few opportunities to exercise the functions accorded to it by legal texts; of being the last bastion in the defense of legality. In the few occasions when it had the opportunity, it did not appear to be at the peak of its mission. All these factors work to cause one to reconsider the efficiency of its involvement in the system of legality checks established in 1996.

Limited Involvement of judges

By means of legality checks, the judge is equipped to be involved as a referee in the game of decentralization. It is therefore legitimate to expect him to be involved in clarifying and completing the texts. However, almost ten years after the decentralization texts came into effect, the judge's involvement has not reached the level expected of his normative power. The weakness of the judge's involvement can be grasped from observations made on the austerity of jurisprudence on legality checks. This austerity needs to be explained. After taking stock and analyzing the jurisprudence pertaining to referrals, and on to legality checks of acts initiated by aggrieved parties, an observation is made: A Weakness of the jurisprudence in terms of quality and quantity. In terms of quantity, the statistical audit of decisions made by the State Council in relation to legality checks in the period 1998-2001 remains disappointing. Out of all the sources of jurisprudence put together (publications on decisions of the State Council, unpublished decisions, decisions contained in reports on legality checks), the number of decisions we have recorded in almost ten years of

[38] V. paragraph 1 of article 337 of the code of local authorities.

[39] It is necessary to point out the absence of local authority representatives (rural, municipal and regional councilors) as initiators of recourse against local authorities acts. This is a practice where the legal channel is used by members of the local authorities in opposition in France which is not yet developed in Senegal.

application of legal text on decentralization hardly reach three[40]. The number of decisions reached is slightly higher if decisions made due to requests made by aggrieved parties are included. This means that checks on the acts of local authorities through the initiatives of the aggrieved party remain the norm while those initiated by the State representative are the exception. Such a statistical observation foils the attempt by the law to make referrals the main legality check of contested acts.
In addition to this quantitative weakness of the jurisprudence, there is a qualitative weakness that is noticeable when one reads the rulings made by the judge. One of the first observations that one makes on reading the rulings of the State Council is the inadequate grasp of the concepts of decentralization law by the authority charged with legality checks of local authority acts. This is doubtlessly the cause of the incredible blunders in interpreting text, especially those pertaining to the powers of the State representative.

The inadequate grasp of concepts of decentralization law is seen in the naming of the parties to the dispute. In identifying the latter, the State council severally mentions an organ of the local authority as a party to the dispute. For example, it is indicated as follows: *Governor of the region of Tambacounda Vs the regional council of Tambacounda* whereas it is the chairman of the regional council who wrongfully signed a contract[41]. By targeting and mentioning the deliberating organ of the local authority as party to the dispute, the State Council is committing an error as the party to the dispute is not the council which is only an organ of the local authority; but the local authority as an entity that is, the region, county or rural community which should as a matter of fact be represented in court by its executive. The entity with a legal personality and which can be represented in court should not be an organ but the authority itself. However for the sake of judicial and practical convenience, the latter is represented in court by its executive arm[42] (the chair person of the regional council, the mayor and the chair person of the rural council)[43].

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[40] During the year 1998: Only one decision: Governor of the region of Tambacounda Vs/ Regional council of Tambacounda, ruling n°14 of 29th July 1998, *in Bulletin du Conseil d'Etat* n°2,2001, p.12. Another unpublished decision of 25th November 1998: Head of the district of Sédhiou and the county of Goudomp represented by the mayor. In 1999: One decision: The administrator of Dagana Vs Municipal council of Richard Toll, ruling n°28 of 31st August 1999, *in the publication cited above,* p. 24. Reports on legality identified 5 decisions.

[41] Other examples: State council, 31st August, 1999, the district commissioner of Dagana Vs the Municipal council of Richard Toll, *in* ***Bulletin du Conseil d'Etat, n°28, p. 24.*** The error is even more serious in this case because the district commissioner had referred an act of the mayor. The council was not in any way involved in this case. The criticism is valid for the cases of the State Council of 29th June 2000, Hassane Diallo Vs the rural council of Thilogne, ***Idem, n° 17,*** **p. 34.** State council, 28th February 2002, the District Officer of Baba-Garage Vs the rural council of Dinguiraye (unpublished). State Council, 1st February 2001, Abdoulaye Amadou Kane Vs the rural council of Dabia Odedeji (unpublished).

[42] For example, listing the powers of the mayor as a representative of the local authority, article 116 of the code of local authorities, 9-) gives him the power *"to represent the county in a court of law".*

[43] That is why the following information would interest us: Governor of the region of Tambacounda Vs the chair person of the regional council of Tambacounda or the District commissioner of the district of Dagana Vs the county of Richard Toll (cited above). The local authority or the organ mandated to represent it, the executive may be targeted.

Another example of inadequate grasp of concepts is a lack of perception by the judge of the peculiarities of the legal system of referrals. Incidentally, it is difficult to tell from reading the rulings whether or not a case is as a result of a referral. This is rendered even more difficult by the fact that legality checks have been placed under the section *"abuse of power"*. Although they indeed pertain to abuse of power, legality checks have their own specific norms and procedures from which one must draw conclusions. On some occasions, referrals are treated as simple appeals against abuse of power, *"appeal for cancellation of a protocol of agreement between the chair person of the regional council of Tambacounda and the chair person of Parents Association"* and the governor who is the initiator of the referral as a mere applicant[44]. On other occasions, it considers, by its format, a simple appeal for nullification as a referral and rejects it on the basis of qualifications that apply to referrals[45]. On yet other occasions, he exceptionally uses the term *"District Commissioner's referral[46]"* as though it was a special category or the district commissioner was the only authority with the power according to Senegalese law to make a referral as is the case in French law in which the district commissioner enjoys the monopoly of making referrals. In Senegalese law, the correct terminology would be referral by the State representative (at the very least, referral by the District commissioner when emanating from the district commissioner) as there is also referral by the governor or District officer which are not included in the term *"District Commissioner's referral"*. Blunders of reasoning and other debatable legal argumentations are also noticeable in as far as grounds for rulings are concerned. This can be illustrated using the example of the judge's wrong application of the system of legality checks on acts that are subject to prior approval. In the case of Djiby Basse and others[47], the applicants appealed to the State Council to nullify the deliberations of the municipal council of Ouorrossogui approved on 28th October 1997 to create new divisions on grounds of abuse of power. In response to the applicants, the State council decided that the deliberations of the municipal council for the creation of new divisions could only be executed after they are approved by the State representative. This case shows a relative lack of knowledge of decentralization texts as the creation of new divisions does not fall under acts requiring prior approval as listed in article 336 on the code of local authorities. By his attitude, the judge is in reality erecting a supervisory barrier of approval where there is no legal provision for it.

The inappropriate use of the power of approval by State representatives, supported by the State Council, clearly shows a limited understanding of the new system of legality checks on the part of the elected members of local authorities, representatives of the State and judges in charge of its application. Another case of mishandled interpretation of the power of prior approval by the State representative is seen in the State Council case of 1st February 2001, Abdoulaye Amadou Kane Vs the rural council of Dabia Odedji in which deliberations on the change of site for erecting a

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[44] Ruling, governor of Tambacounda…. (cited above)

[45] State Council, 25th November 1998, District commissioner of the district of Sédhiou (unpublished)

[46] State Council, 31st August, 1999, the District commissioner of Dagne Vs Municipal council of Richard Toll (*cited above*)

[47] State Council, 29th June 2000, Djibby Basse and others Vs the State of Senegal, in *Bulletin n°2 cited above*, n° 15, p.24.

community building was approved by the District Officer but the judge failed to condemn the act although it was not provided for in legal texts.

This inappropriate use of the power of approbation by some state representatives is highlighted in the first *Report on legality*[48] Statistical observation of rulings made by the State Council in relation to legality checks, and the analysis of the content of rulings using a few examples has shown the deficiency of the jurisprudence in terms of quantity and quality. The explanation revolves around factors general and specific to the new legality checks on acts of local authorities.

The general factors, which are of a sociological and political nature remain linked to ignorance of the official law by a great mass of citizens, their refusal to seek legal recourse and the fear of reprisals[49], the distance from the judge (the State Council sits in the capital) and lack of confidence in the justice system not to mention the high cost of justice.
All these factors put together can explain the small number of applicants and thus the very small number of court rulings. In addition to these general factors, there are other factors specific to legality checks: The existence of elements that do not facilitate the implementation of legality checks by the State representative, a procedure that is necessary for the involvement of the judge. This is the non-transmission or late transmission of acts by local authorities. As revealed in *Reports on legality checks*, the failure by actors to accomplish these formalities raises problems in the implementation of legality checks, particularly in the flow of the process until its conclusion before a judge. Appeals, where they exist are a matter of individual initiative rather than that of the State representatives[50] who prefer to emphasize their advisory roles. The relations between State representatives and members of the local authority[51] in Senegal are thus dominated by dialogue.

As for the qualitative weakness of the jurisprudence on legality checks, this can be explained by a classic cause: The lack of specialization in administrative law in general on the part of the judge. This explanation of the judge's lack of specialization in administrative law has been the source of much controversy[52] in the past that still remains unresolved. One thing is however clear, that the judge is unable to manage

[48] *Report on legality, op. cit.,* p. 25
[49] D. Sy, "the Senegalese judge and the creation of administrative law" in *The creation of law in Africa,* (directed by D. Darbon and J. du Bois de Gaudusson), Kartala, 1997, p. 404.S
[50] For example, in 2002, fifteen (15) appeals were submitted before the administrative high court distributed as follows: 2 initiated by the State representative, one by executives and twelve by aggrieved parties. V. *Report on legality checks, (year 2002), op.cit.,* p. 15
[51] J. C. Hélin, "La régulation administrative du contrôle de légalité et le droit », RFDA 1987, p.765 and s.
[52] Debate on the issue a few years ago, for illustration of this debate among others, For a perspective which feels that a duality of jurisdictions is necessary for the efficient functioning of administrative law, P.F. Benoit, "Des conditions de développement d'un droit administrative dans les Etats nouvellement independents" In ***Annales Africaines 1962, p. 129.*** For a contrary opinion, arguing that administrative law can be developed without necessarily having a judge specialized in administrative law, A. Bockel, "Sur la difficile gestation d'un droit administratif Sénégalais", *Annales Africaines,* 1973, p. 137. For a middle ground opinion, B. Kanté, *Unité de juridiction et droit administratif, l'exemple du Sénégal,* doctoral thesis in Law, Orléans, 1983

the *"difficult transition in Senegalese administrative law"* in general and more particularly acts of local authorities, a dimension that is currently in the developmental process.

Conclusion

The decentralization laws of 1996 established new rules of legality checks on acts of local authorities, undermining the pre-existing principles of supervision by increasing the autonomy of local authorities. By virtue of these new regulations, legality checks exercised on local authorities became on the one hand confined to the aspect of legality after execution of the act and on the other hand became spread out into two phase of implementation: An administrative phase and a legal phase.

The first years of the implementation of mechanism of checks on acts of local authorities show some inadequacies, *"deficiencies that affect the exercise of legality checks"* as stated in the first report on legality control[53]. These deficiencies are noticeable at the level of local authority members as well as at the level of the State representative.

In identifying the parties responsible for the deficiencies affecting legality checks, the reports forgot two important players: The central government and the judge. The government has never produced or published any report on legality checks for the sake of making improvements as provided for in article 339 on the code of local authorities. The judge of acts of local authorities, more precisely the State Council stands out, as proven by its jurisprudence, as lacking sufficient knowledge in the law of decentralization. This hinders it from producing quality jurisprudence necessary for the establishment of quality decentralization law. Based on these observations, the authors of *Reports on legality checks* have emphasized the need to build capacities of players in legality checks and the need to reinforce devolution[54]. In response to these recommendations, the State has taken important measures to improve checks. These include the hiring of community secretaries to assist the chair persons of rural councils, the production of a *manual of procedures of legality and budgetary checks* which has acted as a training tool for State representatives and the production of reports on legality checks, though unpublished[55].

These are indeed important measures but which in our opinion need to be supplemented with others such as extending the training given to State representatives to judges and elected members of the local authorities. Another measure that seems very important to us is the need to follow up the movement towards decentralization and devolution, initiated in 1996 with a move towards judicial devolution. This will involve creating at the level of regional courts, a section specializing in legality checks for local authorities or by establishing a system of duality of jurisdictions through the creation of regional administrative courts at the

[53] *Report on legality checks,* op.cit., p. 24
[54] *Report on legality checks 1, op. cit.,* p. 28
[55] *Report on legality checks 1, op.cit.,* p. 19 and s.

local level to facilitate access to judges dealing with issues of legality. It is possible that decentralization and the advent of legalized legality checks was the opportunity that Senegal was waiting for to establish administrative courts in every region, finally making duality of jurisdictions, a reality. In any case, the firm establishment of decentralization and the adoption of a new system of legality checks of local authorities' acts re-trigger the debate on the opportunity for the establishment of duality of jurisdictions and the completion of reforms of 1992 on the creation of the State Council in Senegal.

V. DECENTRALIZATION AND ADMINISTRATIVE LAW IN CAMEROON BY DR. ERNEST FOLEFACK, FACULTY OF LAW, UNIVERSITY OF DSCHARG, REPUBLIC OF CAMEROON

COUNTRY PROFILE: CAMEROON

Cameroon:
Area: 475,000 KM²
Population: Approximately 18 million

Official languages: English and French

Geographical location: One side faces the Atlantic Ocean. Neighbouring countries are Nigeria, Equatorial Guinea, Gabon, Congo Brazzaville, the Central African Republic and Chad

Colonial History: German protectorate 1884-1916
Take-over by Anglo-French forces 1916-1919
Relinquished by the Germans through the treaty of Versailles of 1919

Placed under SDN: 1920
SDN Mandate: 1920-1946 (Exercised by France and Great Britain)
United Nations Protectorate: 1946-1960/1961 (Exercised by France and Great Britain)

Independence:
1st January 1960 (The part under French rule)

1st October, 1961: (The part under British rule and the reunification of the two parts)
Form of government: It has evolved over the past few decades

Federal State (two States): 1st October 1961 to 20th May, 1972 (two states)

Centralized Unitary State: June, 1972-January, 1996

Decentralized Unitary State: Since the constitutional review of 1996; especially article 1 (2) of the constitution

"The Republic of Cameroon is a centralized Unitary State, one and indivisible, secular, democratic and social".

NB. *This information is based on a Unitary decentralized State although the process of decentralization, inscribed in the constitutional law of 18th January 1996 has not made significant progress to date. As a matter of fact, the first transfers will take effect on 1st January 2010.*

General Introduction

The first topic of our discussion will be the general issue of administrative law as one of the keys to the establishment of the rule of law. An operational definition of administrative law will help us to establish the problem. Administrative law is the body of rules pertaining to administrative organization and activity of the administration but also its relations with those administered. In the context of research on the rule of law and good governance characterized by strong involvement of the administration, administrative law raises a number of questions: What is the set up of administrative structures? Who are the leaders? What are the resources at their disposal? What are their obligations? To what extent are they subjected to legal rules? What are the penalties?

The second part will dwell on the modalities of participative management of administration called decentralization. In Cameroonian law, this consists of transfer of certain powers and appropriate resources by the State to decentralized regional authorities. It involves granting to such decentralized local authorities some financial and administrative autonomy. It covers the administrative problem mentioned above in the sense that it is established for the purpose of promoting development, democracy and good governance at the local level.

The results of a study by the World Bank which appear in the synopsis of the organizers of this conference reflect a certain reality of the Cameroonian administration and its decentralization process which is struggling to establish itself. I believe that fifty years after independence, we should no longer systematically attribute the failures of these administrations to the centralized French system. Our analyses show us that the problems are not all linked to centralization but to a state of mind. I wish to take the risk to identify this state of mind: The appropriation of institutions by individuals, the search for financial gain from administrative situations. With such a mindset, decentralization means an extra source of income at the local level. It is for this reason that it is important to have a system of checks and sanctions which targets the legality of both acts and of accounts. We shall look at the Cameroonian administration in its perspective of satisfying general interests, the state of decentralization and finally the issue of courts and the implementation of checks and sanctions.

The Set-up of Administrative Structures in Cameroon

It has been mentioned several times since yesterday that when it comes to creating institutions, the imagination in Francophone Africa is not very fertile. Administrative law provides a perfect vehicle for centralized and authoritarian power.

I – Administrative Law as a Vehicle for nn Authoritarian and Centralized State

A look at the pattern of setting up administrative structures in the country characterized by devolution of structures and a centralization of administrative decisions reveals the following:

I – A: Devolution of staff at the territorial level and concentrated handing over structures.

- The territory is divided into 10 regions, 58 districts and 373 locations which are devolved administrative units.
* The State is represented in these units by Governors, District Commissioners and District Officers appointed through a discretionary act by the Head of State.
* Each ministry deploys itself according to the need to meet the people under it through delegations to the regions, districts and sometimes to the locations. These delegations are headed by delegates appointed by the ministers at their discretion.

II – Centralization of decisions: Vertical unidirectional relationship.

- No agent of the administration deployed on the ground by discretionary appointment has any autonomous decision-making power. He is accountable to the authority which appointed him (Governors, District commissioners, District officers and other officers at all levels)
- These administrative agents are under no obligation to consider the wishes of the people under their areas of jurisdiction. There is no existing framework for any type of consultations with the people for whom these administrative units were established. Despite its distance from the central government, the administrator, or rather, the administrative agent listens to no one at the local level but is seen as simply echoing the people at the central government.

NB: At the current stage of decentralization, none of these non-participative administrations have been effectively transferred to counties which have incidentally been in existence for over fifty years.

MEANS OF ACTION FOR THE ADMINISTRATION: Administrative law with outrageous rules created to satisfy the needs of the cause: In pursuit of general interest.

Like many Francophone countries, Cameroonians have read from books on French administrative law, beautiful formulae which form the basis of administrative law of which some and not the least imagine to be the same thing. The pursuit of general interest is the reason for being of public administration. If in the process of this

search a law becomes necessary, such a law should have the sole objective of protecting this general interest. The public service seems to be the regal means of preserving this general interest. The theoretical generosity of the criteria of administrative law contrasts with the reality of relations between the administration and the people under a particular administration. At the advent of independence 50 years ago, the State, in a context which made her the sole viable actor in social and economic affairs, became the sole actor and dominator of national life. Its secular arm, the administration, acquired tremendous importance, crushing on its way other social forces. Today, its failure or rather its perversion is at the heart of the disarray in the rule of law.

II- Cameroonian administrative law perverted by power struggles

The foundations of Cameroonian administrative law are the very same ones that were developed by French authors such as Léon Duguit. Based on the generous concept of the pursuit of general interest, administrative law demands and obtains a special status with specials needs, exceptional to those of common law. These clauses justify themselves for the need of public services, giving credence to the pursuit of general interest.

Unfortunately, administrative entities are people who, in a context where institutions are weak, where poverty opens the door to a world of anxious people in search of security, general interest disappears behind façades to be replaced by power games for the control of public resources for the satisfaction of selfish interests of individuals, groups and clans. That is the disease that is ravaging Cameroonian administration today. This disease is latent in the points developed below.
Two points illustrate our discussion: The behaviour of actors in the Cameroonian administration and the relationship between the administration and the people under it.

II – A: The power conferred by Cameroonian administrative law has become a source of power struggle between the administration (the institution) and the "administrators"

In this power game, the administration, that is the institutions are dominated by "administrators": The custodians of chunks of political or administrative power.

- **At the head of this pyramid are the Head of State: Political head and head of administration:**
    - Political head in a system that has difficulty leaving single party authoritarianism. This situation gives him considerable advantage over his adversaries who only agitate for democracy with the perspective of a substitution. This lack of sincerity on the part of politicians is our greatest concern as it hinders us from ever dreaming of a change.
    - As the head of administration: The head of State has the enormous powers to appoint administrative heads, starting with ministers. The special feature of this power to appoint is that it has no opposing power, it is completely discretionary (a sure recipe for arbitrary power). This situation

has contributed greatly to the development of the system of patronage which is slowly destroying the administration to the detriment of legal rules

- A quick analysis of the careers of more than 10 former ministers and another twenty or so former General Managers of State Corporations who are currently in prison either serving jail terms or in remand reveals that they ran their offices without any controls on their morality. Faced with such a phenomenon, all the other powers are powerless.

- **Usurpation of power by administrators has transformed the administrative units into sources of incomes**

The person wielding the smallest amount of power in the administrative chain does not believe he has it by virtue of his services in accordance with the law but according to his degree of allegiance. Obviously this situation does not apply to 100% of the cases but is the dominant thought around administrative law where only repressive acts are emphasized. It is such that in the imagination but also unfortunately in most cases, State representatives evoke the idea of harassment in the form of administration police. With this mentality, the expression administrative authority does not signify the institution but the person representing the institution.

For example: Some people automatically think that all services by the administration demand thanksgiving to the Head of State (support motions). The administrators on the ground are further rewarded in cash and kind (a feature of corruption used to push forward administrative documents). The slow pace of administrative procedure are a boost for administrative agents.

Two Examples

- Very rarely are retirees able to receive their dues in less than three years of frustration.
- A few years ago, the media revealed a story in which a container of fridges destined for hospitals were held for one year at the customs depot because the consignment was a Japanese grant and no customs official wanted to waste time clearing goods that brought no extra financial benefit.

II-B: Administrative Report – The people administered.
"The administration is everything. The individual is nothing".

The following observation was made by a colleague who is currently an acting minister in the Ministry of Justice, in a practical publication on administrative controversies.
When you put in the same packet: an administration based on patronage, turned into a cash cow by its leaders who occupy their positions by decree, faced by a non-functioning administrative justice, the individual loses consciousness entirely and disappears behind a poor person who when asked the question "who are you?" answers: "No one"

To illustrate this point: The word citizen does not appear anywhere in the administrative vocabulary of Cameroon. On the other hand, the Governors, District commissioners and District Officers systematically use terms such as the administered when talking about the citizens. These nobodies have no right.

- There is no provision in the law or regulations that put the administration under the obligation to respond to the requests of citizens (it does not exist);
- There is no explicit right to information
- There is no way of accessing administrative documents, not even for research purposes: A personal experience in 1988/89: When researching for my Masters thesis, I was thrown out for having asked for a list of candidates to the municipal council elections in the City of Yaoundé.

In conclusion, the general set-up of administrative law in Cameroon does not allow the construction of a constitutional State. Decentralization has been seen as a possible hope in reconnecting with the basics of the rule of law. However, we feel that decentralization without a proper diagnosis of the failure of governance and the absence of the State may only result in a simple transfer of the problem towards the periphery and worse, a multiplication of centers of bad governance.

DECENTRALIZATION IN CAMEROON

The county is today the only visible manifestation of the decentralization process, even though the level of decentralization is still far from reaching the level promised by the constitutional law of 1996 that gave it a place in the political and administrative landscape of Cameroon.

Decentralization endeavours from 1922 to 1960/1961

The county was officially institutionalized on the date of the SDN mandate but it was a project of mandated powers which was interrupted by independence.

The part under British administration

True to her tradition of indirect rule, Great Britain did not hesitate to introduce elements of an autonomous administration in the form of "Native Authority" which handled certain public services at the local level (including justice, hygiene and sanitation and construction of schools). Its progressive evolution led to what was termed the "local council" in 1961.

The part under French Administration

Granting autonomy was a little slower, even hesitant. It is during the Second World War that the government decided to very hesitantly introduce the creation of counties. In 1941 two counties, Douala and Yaoundé were created. This involved the unilateral creation of two organs by the high commissioner: a municipal commission (a deliberating body) and an administrative mayor (municipal council executive).

A law on the organization of municipalities in Africa and Madagascar acknowledges the right of established local authorities to manage their own affairs based on the municipal law of 1884: Average exercise and full exercise

COUNTIES MINUS DECENTRALIZATION 1960/61 TO 1996

Liquidation of the Colonial Heritage

This was a period of stagnation that annihilated the administrative foundation of the British and French. It was also the era of the single party rule (1966), of the rise accusations against the Federation which is on the other end of the power spectrum characterized by:

- Excessive centralization of power which was also concentrated in the hands of one person.
- Personalization of power to the detriment of institutions
- The disappearance of any kind of debate, of local initiative and eventually the onset of stagnation.

Whitewash reforms of 1974: The local administration and decentralization

This law reinforced stagnation or rather regression, with the idea of turning the county into a school of democracy and governance. It is a step backwards in relation to the principle of free administration by elected councils. It does not mention the term decentralization. The single party by principle put an end to the free election of leaders of the county. The administrative supervision exercised by the district commissioners over the counties in his district is heavy in that the supervising authority has to approve all acts of the executive and the local council. Its refusal to approve nullifies all acts of the municipal council or its executive. This was more of "decongestion" rather than decentralization. Under this arrangement, the entire national territory is under a county; rural or urban.

The decentralization triggered by the constitutional reform of January 1996

The constitutional reform of 1996 is a politico-legal response to a crisis of the State and thus of the Cameroonian administration. It seeks to solve three problems considered as the source of the crisis and the excesses of the State: Centralization, justice and political freedom

The crisis of too much centralization decried by the free speech of the 90's and donors who made it a condition for their support to the State: The response was the acceptance of decentralization as a constitutional requirement; thus article 1(2) which states that Cameroon is a unitary decentralized State: The Republic of Cameroon is a unitary, decentralized State. It is one and indivisible, secular, democratic and social. This decentralization is further developed in articles 55 to 66 of the constitution.
Therefore, *"the decentralized local authorities of the republic are regions and Counties. The decentralized local authorities are moral persons of public law. They enjoy administrative and*

financial autonomy for the management of local and regional interests. They are administered freely by elected councils in accordance with terms stipulated by law. The mission of decentralized local authorities is the promotion of economic, social, sanitary, educational, cultural and sports development of these local authorities. The State supervises decentralized local authorities in accordance with conditions stipulated by law.

The State watches over the harmonious development of all decentralized local authorities based on national unity, regional potential and inter-regional balance.
The organization, functioning and financial systems of decentralized local authorities are determined by law. The system of counties is determined by law.
This theoretical framework is far from reflecting the reality in that the implementation of decentralization at the regional level has not even begun. The counties, which have existed for over 70 years are barely coming from under supervision to begin a real walk towards decentralization. In principle, 2010 should witness the first transfer of jurisdiction and resources.

CURRENT DECENTRALISATION STRUCTURE

It is necessary to distinguish between theoretical and real structures

The theoretical Structure; Two levels of decentralization

Only counties are functioning in a decentralized state. 14 years after the constitutional law took effect, the region is still long-awaited.
373 counties are led by mayors, elected from among the municipal councilors. In 12 urban centres divided into 43 counties, the government has put in place urban communities headed by a government delegate appointed by the president of the Republic but not elected.
The establishment of the laws necessary for the effectiveness of decentralization is still very hesitant. Today, out of more than 10 supplementary laws, only five have been adopted.
Law N° 2004/17 of 22nd July 2004 on the orientation of decentralization
Law N° 2004/18 of 22nd July 2004 on counties
Law No 2004/19 of 22nd July 2004 on regions
Law N°2009/011 of 10th July 2009 on financial systems of decentralized territorial authorities
Decree N°2008/013 of 17th January 2008 on the organization and functioning of the National Council of decentralization.
Decree N°2008/014 of 17th January 2008 on the organization and functioning of the inter-ministerial committee of local authority services
This law stipulates conditions for drafting, preparing and presenting, executing and checking the execution of local authority budgets; Regions and counties but also other types of organizations: Urban communities, trade unions and public organizations at the county level.
The counties function under an imperfect legal framework
Counties and urban communities
The relationship with the central government (see report by Prof Madior Fall)

Whether it is the national administrative law, decentralized law or the law of relations between the central power and decentralized power, only a system of sanctions conducted by the justice system can give further reassurance.

CONSTITUTIONAL ADMINISTRATIVE JUSTICE AND ACCOUNTS

My analysis cannot separate three types of disputes which are necessary for the organization of a viable constitutional State: Constitutional disputes, administrative disputes and disputes pertaining to public accounts. In the Cameroonian context, this association is of fundamental importance if one hopes to create a basis for the rule of law. This is because the constitutional question aims at subjecting political actors to the rule of law and to protect the basic rights of the citizens; the administrative question because it keeps a daily watch over possible abuses of an administration surrounded by its mission of service to the public in pursuit of general interest. The accounting contention because the resources which are already limited in relation to the needs of the citizens, are sought after by vultures. All forms of abuse noted in the administration are aimed at taking control of public resources while enjoying impunity

The debates that triggered the constitutional reforms of 1996 were particularly lively when it came to the question of impunity enjoyed by those who had through notoriety laid their hands on public fortunes. The only instrument existing at the time (The Higher State Audit) was an administrative structure attached to the office of the president and seen as politicized and used to serve the president by organizing impunity for his cronies and punishing his enemies. Donors also demanded a system of auditing accounts that is independent from political power.
In response to these debates, the constitutional reform of 1996 introduced constitutional justice (the Constitutional council), a reform of the administrative justice and re-introduced accounting justice. I need to mention here that bad faith on the part of politicians has affected the implementation of these judicial reforms.

Constitutional Justice, a whitewash

It has not been implemented and even if it was, it is completely useless for the citizens as they have no access (a servile imitation that makes turns 60 members of parliament into a laughing stock)

Accounting Justice: Partially implemented but silent

In addition to the demand for transparency in accounting, constitutional reform requires an advance declaration of wealth for some political and administrative officers. The refusal to implement article 66 and delays in setting up accounting bureaus and accounting courts can be easily explained.
Refusal to apply Article 66.- The President of the Republic, the prime Minister, the members of Government and those in similar ranks, the President and members of the Senate, Members of Parliament, Senators and all holders of elected office, The Secretary Generals of Ministries and the like, Directors of Central administration,

Director-Generals of State and Parastatal Corporations, judges and administrative officers charged with collecting and handling public funds, managing credit and public property have to make a declaration of their wealth at the beginning and at the end of their term of office

The re-introduction of Accounting Justice

Accounting justice "Its inefficiency and non-existence seriously compromise proper management of public finances and entrenches a climate of impunity and misappropriation of public fund. The pursuit of personal gain and the transformation of administrative offices into cash cows are the primary source of bad governance.
Accounting justice has always been mishandled in Cameroon

Introduced by the order of 1962, it was abolished in 1969 without having been issued a ruling. The democratization process of 1990 re-introduced the issue in debates and the constitutional reforms of 1996 announced the creation of an accounting bureau as well as regional accounting bureaus. From 14, progress has been difficult.
In 2003, a law (Law n° 2006/o5 of 21/ 4/2003 established it. In 2006, it took effect and to date, no accounting ruling has been made or published.

As for lower accounting bureaus provided for by the same constitution, their theoretical implementation began in 2006 with the adoption of a law on the organization and functioning of regional accounting courts (Law N° 2006/17 of 29th December, 2009). To date they are still non-existent and yet their reason for being is to audit accounts of decentralized authorities.

One of the key elements in making their audit viable is the implementation of article 66 of the constitution which requires that political and administrative office-holders declare their wealth before occupying certain offices identified by law and by me

Non-existent regional accounting courts
Administrative Justice.

As far as the principle of a specialized judge is concerned, the French heritage has been maintained despite some slight differences.
Unlike in France, administrative justice is part of the judiciary.
The French model was introduced in France at the onset of the SDN mandate (1919) through the decree of 14th April creating the Council of Administrative Disputes, existing in the colonies since 1881 (decree of 7th September); a tradition of administrative justice that is merged with administration.
As a transitional measure, the State Tribunal was created in 1959 by the decree of 4th June.
On independence of francophone Cameroon on 1st January 1960, a law (Law N°60-12 of 20th June 1960) was passed creating a supreme court which became the court of appeal for the State Tribunal.
Article 33 of the Federal Constitution of 1st October 1961 instituted a Federal Court of Justice (established by the order of 4th October 1961, revised in 1965 (Law of 29th November) and 1969 (Law of 14th June). It acquired full rights.

1972 and its constitution of 2nd June demanded reforms: CS (article 32)
Order No 72/6 of 26th August 1972 establishing the Supreme Court was modified by Law N° 76/28 of 14th December 1976
Law N°75/16 of 8th December, 1975 defining the procedures and functioning of the Supreme Court
Law N° 75/17 of 8th December 1975 defining procedures before the Supreme Court ruling on administrative matters.
This legislation is gradually abandoned in favour of texts adopted in accordance with the constitutional reform of 1996.

(article 38, 40 and 41)
Article 38:
What we are interested in is the output of such justice: Output in terms of efficiency as an instrument of resolving conflict between the administrators and the administered (we are avoiding the term citizens as this is hardly used and the administrative judges do not seem bothered about it)
The theoretical structure: An administrative chamber of the Supreme Court and administrative tribunals.
Administrative

Its structure is as follows:

The administrative chamber has been in existence since 1972 and to date remains the only court for hearing administrative disputes.
The administrative courts provided for by the constitution in 2006 (lower administrative courts) and established by law N° 2006/022 of 29th December, 2006: They are not functional (There is none on the ground). Only the administrative chamber is functional.

Evaluation of the performance of the administrative chamber

This evaluation of the chamber's performance cannot in any way be used as an instrument to advance law. Three indicators of this negative performance:

- *Procedure: It is hazardous, the main obstacle being the obligation to first seek an out of court settlement which is a necessary step for appeals to be received. Statistics of the 70's and the 80's show a 65% rate of unacceptability of appeals due to failure to seek out of court settlements or due to an out of court settlement request addressed to the wrong authority. This scenario exists in a situation where the judge himself does not appear concerned with the notion of the person competent to receive appeals for out of court settlements in a given case.*
- *An annoying tendency to over-protect the administrative arbitrator (The State is everything, the individual is nothing). Subjective decision making which reflects the social climate.*
- *The quality of intellectual services. Based at the Supreme Court which is equipped with people without training in public law, the intellectual quality of services is very poor. The inability to apply concepts of public law is evident. This judge is locked in an authoritarian conception of public law and seems ignorant of the fact that a good system of administrative justice or the entire body of public law issues are the cornerstone of the rule of law. According to Professor Maurice KAMTO, the poor*

quality of rulings stems from borrowing judges from another type of law, a legal dilution.

- *The slow process of justice, constituting denial of justice is legendary. For the sake of this paper, I have identified the duration taken to make a ruling on cases submitted before a lower court: Out of the 40 rulings issued, in 2008 and 2009, the average duration was:*

2009: 7 years 8 months
2008: 7 years 7 months

One also observes that the parties (the administered and the administrators) are often absent; the administered often quitting out of despair. The direct consequence, though less obvious is the increase in the levels of corruption among the administrators. The administered people wishing to lodge complaints opt to buy services that benefit-seeking administrators deny them illegally.

Ex: Land Cases, tax or social contributions

- *The fate of rulings made*

Favourable decisions
Following a procedure of expropriation conducted in 1991 and a decision to pay 50,000,000 in 1992, and following unfruitful procedures lasting 8 years, he took the matter to court in January 2000 and a ruling was made in 2009 to give him the same amount that was due in 1992, forgetting interest and the devaluation of the CFA which lost its value by 50% in 1994

IV. DECENTRALIZATION AND ADMINISTRATIVE LAW IN IVORY COAST: BY PROF. DJEDJRO MELEDJE, FACULTY OF LAW, UNIVERSITY OF COCODY, IVORY COAST

To pick up once more the synopsis terms of this conference, as presented by the Konrad Adenauer Foundation, in order to apply them to the problematic areas of decentralization and administrative law in Ivory Coast, it can effectively be said that since independence, this country has had, with relative success, her own experience with the concept of decentralization.

The decentralization did not begin today. Cote d'Ivoire, although late, but just like in the other French colonies underwent an experience of decentralization during the colonial period. This is the beginning of the municipalization process with the creation of three categories of municipalities, namely:

1. Mixed municipalities, with a Municipal Council, partly elected, partly nominated, and headed by mayors appointed by the regulatory authority (Grand-Bassam in 1914 and Abidjan in 1915).

2. Municipalities with limited powers, managed by elected municipal councils headed by mayor-administrators appointed by the central government (Abengourou, Agboville, Daloa, Dimbokro, Gagnoa and Man created in 1955)

3. Municipalities with full powers, administered by elected municipal counselors and mayors. In 1960, only the towns of Abidjan and Bouaké had this status.

Access to independence would not modify the organization put in place till then. The centralization of politics, the uniformization of spaces would be the logics around which the country's development is going to be created and built.

Much later, the decentralizing ideal emerged. The decentralizing phenomenon and the administrative law that follow it know cycles of evolution that correspond globally to the succession of political regimes, at least governments, and therefore to the perception that one has of political opening; but also – significant fact – to the stability of institutions.

Even if the general theme of this seminar is centered on territorial decentralization, it suffices to note that technical decentralization, through the creation of national public establishments, seems to register itself in the journey of a continuous evolution. This form of decentralization submits itself also to the pressure of a central administration, which, at least over the last years, is subject to political changes.

This being the case, territorial decentralization in Ivory Coast is marked by two ambivalent movements, which one may say are opposite to each other: On the one hand, a rise in the power of the phenomenon and a consecutive evolution of administrative law; and on the other hand, failure of territorial decentralization and erosion of administrative law.

I. Rise in Power of Decentralisazition and the Evolution of Administrative Law.

Despite the impression that one may have from the outside, especially from the chronic instability in which the Cote d'Ivoire has found herself for several years, territorial decentralization is a reality. It has, (a), a gradual evolution with a bright future and, (b), has become concrete at several levels through the putting into place of several collective categories.

(a) A gradual decentralization

Decentralization was not a government priority during the first decade of independence; and when it took shape, through its different phases (1) it was only to be characterized by a certain complexity (2)

1. The different phases of decentralization

Decentralization development in Cote d'Ivoire since independence revolves around a certain number of phases – four - that correspond globally to successive political regimes.

Phase one (1960-1980) corresponds to the period of authoritarian governance, ending finally with the emergence of a legislation that constituted the basis of the decentralization experimentation, at least of communalization.

Article 68 of the 1960 Constitution provided in effect the creation of territorial communities. But it was only in 1978 and in 1980 that this basic legislation was adapted, thus laying the basis for communalization (Law No. 78-07 of 9th January 1978 and Law No. 80-1182 of 17th October 1980).

An Ivorian author once remarked that "since the 1970 decade, the State in Cote d'Ivoire is in a process of public action reform. The major objectives of these changes are best analyzed in the cleaning up of State expenditure and the promotion of participation in social and economic development by the populations. There's a need in these reforms to result in the putting in place, in the Ivorian administration, of a system that puts emphasis on the importance of local decision, a system in which the local populations effectively and efficiently express themselves in order to create new mechanisms of coherently putting into place public action.

Consequently, the decentralization weakly put in place during the colonial period, will be revisited and presented on the economical, social and political plan, as an instrument of the said administration of development and of the new governance. In his message to the Nation, during the 11th independence anniversary of Cote d'Ivoire on 7th August 1971, the President Felix Houphouet Boigny, intended to promote an administration of development by a policy of effective decentralization (KOUABLE Clarisse GUEU-LOA, Law Doctorate Thesis)

Nevertheless, we must accept the reality that the one party and a certain idea of development do not accommodate each other well, or in any case, the idea of decentralization with difficulty.

Phase two (1980-1995) is the one that may be referred to as the period of take-off effective of the country's introduction of municipalities that is going to manifest itself by the creation and opening of municipalities and empowering them with financial means, human, technical and material, as well as administrative and judicial instruments. (notable law NO. 85-582 of 29 July 1985 bearing the transfer of State competences and decrees to the municipals).

These early laws of decentralization are going to supply the judicial arsenal that will permit the experimentation of a true decentralization with the creation of municipals and the election of local leaders and one that will see the emergence of an administrative decentralization law in Cote d'Ivoire.

It will be noted that this equally corresponds to the period of democratization the Ivorian way with the implementation of a semi competitive system to gain power within the one party, during the legislative and civic elections.

Phase three (1995-1999) is the period of attempts to broaden decentralization. President Henri KONAN BEDIE, in fact, proposed to spread decentralization not

only through complete municipalization of the national territory, including the creation of rural county councils, but constitutional and legislative modifications are even destined to facilitate the creation of new ones because henceforth law gives the principles and the regulatory power creates the municipalities.

Moreover, there is the implementation of a new category of territorial local authorities, the province. It seems that the donors were prepared to give strong financial support to this policy. This phase also marks the end of the rein of Felix HOUPHOUET BOIGNY and the constitution of a system of the dominant party in the Ivorian political scene. These factors may explain the two contradictory policies manifested in the willingness to open up to decentralization and the willingness to control the processes. It is probably the coup d'état of December 1999 which put this ambition on hold.

Phase four, in operation since 2000, and one that we experience today is one of a movement which is at the same time marked by a decentralizing explosion and even a decentralizing euphoria, and at the same time an approximation in the implementation.

Decree No2005-314 of October 2005 bears the creation of 520 municipalities/counties. A Decree No. 2008-15 of 6th March 2008 modifies and completing decree No. 2005-314 of October 2005 bearing the creation of 520 municipalities, bears itself the creation of 267 new municipaities. In total, from the year 2001 to 2008, 787 new municipals had been created. But, their first organs were not as yet in place. Today, the total number of municipals in Cote d'Ivoire stands at 984, of which only 197 are operational.

2. The different levels of decentralisation

In Cote d'Ivoire, the decentralized territorial local authorities are, in terms of the Constitution of 1st August 2000, the municipals and the provinces (see articles 119 to 121 of the Constitution) created as a result and by an act of law, the district and the location.

As for the town, it is still at the project level. One may then conclude that there are five categories, levels or types of territorial local authorities:

- The Municipal, made up of estates and villages (198 in existence),
- The Town, grouping together several adjoining municipalities; none existing legally for the moment. In the recent past, the town of Abidjan constituted a local authority operating along the same lines as the federal State. Plans are under way to set up the bigger localities such as Bouaké, Daloa and Korhogo in towns.
- The location, made up of sub-locations.
- -The districts composed of municipaities and of sub-locations. These are two in number - Abidjan created in 2001 and Yamoussoukro in 2002, the two economic and political capitals. They have a special status with an executive nominated directly (for the time being) by a Presidential decree with a ministerial post.

- **The Province** composed of locations (there will probably be between 8 and 12).

Thus, putting in place concentric circles of decentralized administration in Cote d'Ivoire, the implications of this operation are many and visibly important today.

(b) Implications of decentralization

Decentralization, as we know it, encompasses numerous issues. In Ivory Coast these stakes have real meaning. These issues are : 1, politics and, 2. economic and administrative.

1. Political issues of decentralization

The reality of political representation shared between central government to the hands of the political majority and territorial local authorities directed by opposition parties**.** The composition of collegiate organs at the occasion of the Linas Marcoussis Agreement and ever since the political crises takes into account the representation of political parties in the country at both the national and local levels.

2. Economic and administrative stakes

It is about allowing the populations through empowerment to take part in their own affairs. Decentralization is thus destined to permit the taking into account the aspirations of the local populations. The local disparities, the congestion of Abidjan, political capital *de facto* and economic capital may explain this.

On the administrative plan, one may observe that there exists a dynamic devolution which, in principle, is destined to better assure the development of administration. Tables showing the creation of administrative constituencies and local authorities show that there exists a link between the evolution of the two forms of town and country planning.

State of Ivory Coast's administrative structuring (1998- 008)

Number of Level of decentralization	**Number of level of devolution**	**Local authorities**				
		Level 1	**Level 2**	**Level 3**	**Level 4**	**Level 5**
5	3	Municipal	Town	Location	District	Province
Number of local authorities		**987**	**0**	**56**	**2**	**0**

ENTITY	**2002**	**2004**	**2005**	**2007**	**2008**

Sub location	247	256	235	335	390
Location	58	58	67	69	79
Province	19	19	19	19	19

Source : Ministère de l'Intérieur (DEPSE)

Decentralization in Ivory Coast seems to be full of vitality, and a bright future. A reality check currently shows that there is a certain degree of hopelessness in the decentralization and a decline of administrative law

II Decentralization, Hopelessness and The Decline of Administrative Law.

It can roughly be said that the political goodwill for decentralization ambitions in this domain exists. But it is, in same cases, the picture of an empty shell (A) or of an overfull shells (B).

A. Administrative decentralization: an empty shell?

Decentralization is partly an empty shell because certain institutions do not have legal or real existence (1); because they only exist on paper, certain authorities do not function at all. (2)

1. Non existent institutions

The province, much as it may have a constitutional base, does not as yet have a legal existence. To date, no law has been creaed, and it is not about to happen now. Law on transfers integrates the province in a complex scheme which makes this authority's existence dependent on the effectiveness of transfer to other authorities. It is as if we are on a quadrapture of a circle.

Municipalities continue to be created; yet their only existence is to feed the political ambitions and local battles among the local communities' elite. And even then, the perspectives of their operationalization are hardly felt.

None of the 787 new municipalities created between 2001 and 2008 are functional - their first organs not having been put in place. Today, the number of municipalities in Ivory Coast is 984 out of these, only 197 are still functional.

The feeling that one may get elsewhere is that decentralization is a means for the State to disengage itself from its obligations in terms of local development, by pushing all, through a non operational transfer of competences to penniless and struggling local authorities.

2. Non functional local authorities

Most of the local authorities do not have the means to carry out their policies. They do not have the resources which have however been catered for. It is about, for example, the different duties and taxes allocations thus their allocation key. This key has the objective to guarantee stable financial autonomy to the different local authorities. However, this allocation is not always adhered to, which naturally compromises this autonomy. Besides, the fiscal annexes 2007 made provisions for the transfer of the 40% land duties, originally allocated to the municipalities to the organ that will be charged with the management of all wastes. Thus, since the creation of the Town and Urban Public Health Ministries (ANASUR), a National Public Health Agency was created and receives 40% of land duties.

In comparison to the actual situation, the local authorities located in the zones referred to as Centre Nord Ouest (CNO) can not function due to the war. Today, cohabitation between the warlords and the local authorities is already very difficult. What can we say of the relationships between the small local warlords and the mayors in isolated places, with no means of resistance or means of action?

In a more precise manner, the planning and the transfer of power is impossible to achieve due to the possible crisis.

This shows that decentralization should always be put in relation with the state of the State, State and administrative stability. There is no decentralization without a viable governable State. The cohabitation of two States in the same State creates disparities in the space to be decentralized.

B. Administrative decentralization: a shell too full?

Decentralization saturation: Public policies often made in a hurry give way to the drawing up of decentralization schemes difficult to grasp by the administrative law. Thus, we witness the overlapping of decentralized entities which are located however at different levels 1). Moreover, the typology in what concerns certain authorities is not always done with clarity 2), without taking into consideration that sometimes we create new entities with old principles 3).

1. Overlapping between decentralized entities of different levels

It was possible to pick out from a study on the state of decentralization in Ivory Coast thus: "The decentralization levels sometimes overlap especially at the District and location levels, administrative constituencies. The District is composed of local authorities and administrative constituencies as the location. If the first has a special status with regard to geographical, demographical data and economic objectives (the District of Abidjan actually represents alone a third of the Ivorian population and takes up more than half of the country's economic infrastructure), and then of her strategic national position. Secondly, the location is but one classic local authority. To mark this distinction, the district's executive is nominated and that of the location is elected. Thus on the same territory, it is impossible to find at the same time a location

and a district whereas, it is validly possible to find within the same territorial limits, a municipal, a province and a district.

2. A typology that is not always clear

Sometimes we find it hard to understand the language of local authorities. We notice, for example, that the district is a local authority of a special kind due to its consistency which allies local authorities and administrative constituencies. That is to say a superposition of devolution and decentralization thus also a designation mode of the executive's nomination rather than election. The other local authorities are simply constituted with the understanding that the designation of the rural communities has not been retained by the legislation.

3. Making new with old principles

In most of the democratic States, the administrative law of decentralization especially in what concerns control over the regulatory authority has evolved well. This is effectively visible for all the decentralized local authorities in Ivory Coast, with the exclusion of municipals, where control is carried out *a posteriori* with the notable exception of the budgetary subject.

Concerning precisely the municipality, the local authority, the most important in number in the country, it is always the old law not as yet abrogated of 17 October 1980 that serves as the base, in a way that control continues in some sorts to take place *a priori*.

V. ADMINISTRATIVE DECENTRALIZATION IN SENEGAL AND ADMINISTRATIVE FEDERALIZATION IN GERMANY : EXPERIENCES AND PERSPECTIVES OF THE LAND, ENVIRONMENT, EDUCATION AND HEALTH SECTORS: BY PROF. HARTMUT HAMANN, FREE UNIVERSITY BERLIN, GERMANY AND DR. IBRAHIMA DIALLO, UNIVERSITY OF GASTON BERGER, SAINT-LOUIS, SENEGAL

Federal administration in Germany

I. Foundations

2. The State structure

a) The federal structure of Germany

"The Federal Republic of Germany is a federal State, democratic and social" (Article 20, al. of the fundamental law). In modern Germany, it is no longer in the first place about the preservation of the regional diversity. The modes of life in the German regions have largely been harmonized. The missions to fullfill are similar in all the regions. The federal structure of the State is an essential element of the general state

structure. It contributes to vertical separation of powers. This federal structure is manifest as much in the legislative power as in the executive and judicial powers.

The Federal Republic of Germany is made up of 16 Länder which are enumerated in the preamble of the fundamental law. Each Länder has its own constitution. The Länder constitutions must conform to the principles of the State republican, democratic and social law, art.28 al. 1, sentence 1 LF.

Below the level of Länders are the municipals. The fundamental law equally guarantees the auto-administration of municipals: "*To the municipalities should* be *guaranteed the right to settle, under their own responsibility, all the affairs of the local community, within, the framework of law* ", Art. al. 2, sentence 1 LF.

Municipals are local authorities (Gebietskorperschaften), autonomous local authorities of public law, otherwise called moral persons of public law. The municipals act by the basis of their organs. They base themselves on the laws in force. Apart from certain minimal differences, the legislations of the Länder provide two municipal organs. On the one hand, the mayor directly elected by the municipal population as the supreme executive organ which represents the municipal at the outside and on the other hand, representation of the municipal (municipal council, municipal council assembly or other similar denominations). This one is equally elected directly by the municipal citizens (including nationals of other State members of the EU who have settled here). (cf. p. ex. à cet effet Maurer, Allgemeines Verwaltungsrecht (*General administrative Law*), 16e éd., § 23 notes 8 et suiv.).
Concerning the allocation of competences between the Federation and the Länder, the Fundamental Law goes from the following principal:

"The exercise of state powers and the accomplishment of missions of the State comes from the Lander, unless that the present Fundamental Law does not dispose otherwise or admits another ruling", art. 30 LF.

"*Federal law triumphs over the law of the Land*", Article 31 LF.

Above the federal State level, the European Union takes an important growth. The LF deliberately provides the following on this point: "*For the edification of a united Europe, the Federal Republic of Germany competes for the European Union's development which is tied to the federal and social principles of the Rule of law and democracy as well as to the principle of subsidiarity which guarantees the protection of fundamental rights substantially comparable to that of the present fundamental law. To this effect, the federation may transfer sovereignty rights by a law approved by the Bundesrat", art. 23 al.1LF.*

The scale to which this is admissible and the details of its concrete realization are the subject of heated debates. They are thus diligently studied and co-decided upon by the German Constitutional Court.

b) Legislative power in Germany

The Germans elect members of the *Federal Diete or Bundestag* every four years**.** Furthermore, they elect in their Länder every five years the members of the Diete provincial or Landtag (p. ex. art. 30 of the Land of Bade-Wurtemberg constitution).

Next to the Bundestag, with its members elected by the people, there exists at the federal level a second chamber, the Bundesrat. It is through the intermediary of the Bundesrat that the Länder exercises their influence on the federal legislation. The Bundesrat is composed of members of government of the Länder. (art. 51 LF).

In the framework of their auto-administration, the municipalities may edict statutes. These are derived from the administrative framework and not legislative.

The EU has the right to edict within the framework of its competencies, regulations immediately applicable to state members. It adopts besides this directives which should then be transposed in the national law by the member states.

For all that which is legislative competence, the LF postulates as follows: "*The Länder have the right to legislate in the case where the present fundamental law does not confer the Federation the powers to legislate* ", (art. 70 al. 1 LF). It is henceforth however, the opposite in practice, the legislative competence of the Federation covers practically all the spheres of life. But a very large part of this federal legislation requires approval of the Bundesrat.

c) Executive power in Germany

Things are different at the executive level:

The LF stipules the following: *"Apart from dispositions contrary provided or admitted by the present fundamental law, the Länder execute federal laws at their own competences*." (art. 83 LF). This signifies that the federal laws also are executed by the *Länder* administrations, and it is "*at their own competence* ", that is to say in a large measure under their own responsibility. The *Länder* organizes in particular the establishment of administrations, art. 84 al.1, sentence 1 LF. But the Federation disposes of the right of control, art. 84 al. 3 LF.

Even when the Länder exceptionally does not execute the federal laws at their own competence, "by Federation delegation", the organization of administrations deliberately remains of the Länder competence (art. 85 LF). It notably is the case of foreign affairs and of the administration of federal navigable roads (art. 87 al. 1 LF).

In the case of application of European law, the later arises essentially from administrations of state members, thus in Germany in the first place from *Länder Länder* administrations.

d) Judicial power in Germany

The federal structure equally determines the organization of judicial power : "*the power to give justice is entrusted to judges ; it is exercised by the Federal Constitutional Court, by federal courts provided for by the present fundamental law and by the Länder tribunals"*, art. 92 LF.

Only the supreme courts are federal courts: the federal court of justice, the federal administrative court, the federal court of finances, the federal court of work and the federal court of social disputes (art. 95 LF). This means that all lower magistrate courts are put in place of the Länder. This is equally valid for the administrative tribunals and the higher administrative tribunals otherwise known as the two first magistrate courts of administrative justice. We note here as well that the federal structure represents before all else a state organizational principal.

2. Administration

a) Definition

Jurists, at least German jurists, love definitions. If a concise definition is impossible they attempt to bring out the specific characteristics of a notion. German administrative law mentions for that which is administration the following characteristics:

- Administration constitutes social organization. The objective of administration is social cohabitation within the community.
- Administration should be axed on public interest. Constitution and naturally the legislation help in its orientation.
- Administration is an organization actively committed in the future.
- Administration takes concrete measures to settle particular cases and to concretize certain projects (cf. for more details Maurer, Allgemeines Verwaltungsrecht (*General Administrative Law*), 16e éd., notes 9-12).

Next to the administration charged with order, whose objective is the preservation of security and public order by the prevention of imminent dangers, it is especially the administration as supplier of services which plays a central role in modern Germany. Its mission consists of guarantying and improving the conditions of life of the citizens for example by making available children's park, schools, hospitals and universities. Therefore, the German jurists talk of "*Daseinsvorsorge*", ("foresight for being-there"). The LF defines the FRG as a State of social law, art. 20. This has a great influence on the shape given to administration. It makes part of the essential missions of the German State, the guarantee of social security of all and the supply of services and organisms of foresight and of supplies of the population. (Maurer, *ibid.*, § 2 note 6).

b) Judicial foundations

The administration, the executive power, must respect the laws in use. The principle of pre-eminence of the law applies. The administration is bound by the dispositions taken by the legislator. It is put under the control of administrative justice. Any citizen may complain to the administrative tribunals to ask that the legality of these acts be authenticated. The LF brings out this element: " *Legislative power is bound by the constitutional order, the executive and judicial powers are bound by rule and law* ", art. 20 al. 3 LF.

To this is added the principle of administrative legality. In a simplified manner, the Federal Constitutional Court lets flow the democratic principal and the principal of the Rule of Law, as well as the fundamental laws, that the administration does not always have the right to act unless it has been authorized by law. Administration should then always base itself on a legal foundation. (See Maurer on this, & 6, notes 3 and following.).

c) Action by the administration

In Germany, the cause of administrative actions is regulated by a distinct law, the federal law relative to administrative procedures (*Verwaltungsverfahrensgesetz*). This law runs administrative procedures in a homogeneous manner. Laws equivalent to the Land level are applied in all the German Länder, whose content is identical to that of the federal law relative to administrative procedures. The law relative to the organization of administrative tribunals, which constitutes the regulation of administrative procedures, is also itself homogeneous at the federal level. Even if it is the Länder, which puts these tribunals in place, the code of procedure as defined by the federal law is applicable to all the tribunals. You now see how closely the Länder and the Federation are interlinked.

In the second part of my exposé, I intend to show, by taking the example of real estate, environment, education and health, how the between the Federation, the Länder and the municipals in the fields that are particularly important for the citizens in Germany.

II. Real estate

1. Land ownership

a) Judicial foundation and administration competent

In Germany the acquisition of landed property is regulated by the Civil Code (BGB, *Bürgerliches Gesetzbuch*), a federal law that came into operation in 1990. The important element in land acquisition is its registration in the Land Register *(Grundbuch)*. Each plot occupies a specific leaf in the land register booklet (leaflet of the land register - *Grundbuchblatt*). In German civil law, by plot we mean "*a limited part of the earth's surface registered in the land register as an independent piece of land*", art. 3 al. 1, of the German law on safeguarding land registers, Jauernig *in* Jauernig, BGB 13e éd. Before

Article 90, note 2). The land registers are held by the Land Registry Offices which are competent for the lands located in their districts according to the first article of the law on land registers. This law is also a federal law. The Land Registry Offices are part of the magistrate courts (*Amtsgerichte*). They thus arise partly from justice and not from administration. The organization of magistrate courts and the putting in place of their personnel comes from the competence of the Lander, art. 92 LF.

The objective of the land register is to give information with certainty on a piece of land in the field of civil law. The Land Registry Offices are obliged to keep the correct behavior concerning the land register. They have no right to proceed with registrations which would be contradictory to the law in operation (Legalitätsprinzip (*The principle of legality*), Demharter, Grunhdbuchordnung (*The law on the land register*), 26e éd., Introduction, note 1). The organs of the Land Registry Office are the judges of the land register and their subordinates (Demharter, *ibid.* art. 1er, note 6). The auxiliaries of justice subordinate to the land registry judge are themselves also objectively independent and uniquely linked by the law to their decisions as per Article 9 of the law on justice auxiliaries. This demonstrates the willingness to confine a mission of great public interest notably the correct keeping of the land registers to justice. The representatives of justice are especially protected against the influence of the executive power. They are under no obligation to conform to instructions from the executive; rather, on the contrary, they enjoy judicial independence. The decisions of the Land Registry Offices may be checked by ordinary civil jurisdiction.

Finally, the Land Registry Offices are organized and managed in all the Länder by the Länder, but in conformity with the Unitarian criteria to the level of the Federation. The legal materials which regulate the acquisition of real estate, just as the procedural law that must be applied by the Land Registry Offices, are federal laws.

b) Current problems

It is about the wholesomeness of a system maturely realized which does not present great difficulties. This can be explained by the fact that the German population is not growing but, contrary to this, is declining. There is, therefore, no great demand for real estate.

The passage of land registers to an electronic format is a reality. This passage is expressly provided for by the German law on the conduct of land registers in its article 126.

2. The construction of parcels of Land

a) Legal foundations and competent administrations

Public law on construction includes the rules of law which define the licit character and the limits of the utilization of soil for construction purposes especially the licit

character of the edification of buildings (Krautzberger *in* Battis/Krautzberger/Löhr, Baugesetzbuch (*The Urbanism Code*) 11e éd., Introduction, note 3). The legislative competence is shared between the Federation and the Lander.
The federal law of construction regulates the foundations of urban law (*Bauplanungsrecht*). The objective of the Urban Code is to guarantee an orderly urban development. One of its major elements is what is termed as urban planning (*Bauleitplanung*). (Hoppe/Bönker/Grotefels, Öffentliches Baurecht (*Public Construction Law*) 3e éd., art. 1er, note 6).

The development of urban planning comes back in the first place to municipals. Each municipal decides the manner in which their territory should be developed. This is parts and parcel of the municipal self-administration, art. 28 al. 2 of the LF. The municipals generally begin by adapting a master plan prepared in advance, that is, the plan of occupation the municipal's entire territory (*Flächennutzungsplan* – plan which decides on how the land will be utilized), art. 5 al. 1 sentence 1 of the construction code (*Baugesetzbuch*).

During the preparation for the occupation plan of the land, the municipal must present an outline for the entire territory on the type of usage of lands resulting from the projected urban evolution in order of the foreseeable needs of the municipal, art. 5 al. 1 sentence 1 of the construction code (*Baugesetzbuch*). The municipal may in particular feature the following in the lands occupation plan:

- The surfaces earmarked for construction;
- The municipals development equipment and installations for the community's benefit: schools, churches, games and sporting facilities, etc.
- Surfaces earmarked for road traffic;
- Surfaces earmarked for public services such as garbage disposal, recycling of water;
- Green spaces, sports fields, playing grounds, bathing places;
- The surfaces earmarked for rock extraction, land and underground minerals;
- The surfaces earmarked for agriculture and forest lands art. 5 of the construction code.

The picture shows the occupation plan of the lands of the town of Stuttgart.

To decide on the lands occupation plan, the municipal should take into account and weigh in equitable manner public and private interests. (art. 1 al. 7 sentence 1 of the construction code).

The citizens do not have access to direct appeal against the lands construction plan.

Nevertheless, the lands occupation plans must be approved by the regulatory administrative authority, (art. 6 of the construction code). These regulatory administrative authorities are land administrations.

On the basis of the land occupation plans, detailed plans are established for different sections of the municipal and are called lands development plans (*Bebauungspläne*), art. 8 al. 2 of the construction code.

Allow me to illustrate this by an example:

•We can see on the photo a parcel of land that is not built upon in an estate of Stuttgart, the town where I live.

If the owner of this land wishes to construct, he must first of all get permission to do so from the competent authority. (art. 49… of the Land building code (*Landesbauordnung*). The legal foundation of this procedure is the Land buildings code, the competent authority in construction law matters and in general the municipal, in this case the town of Stuttgart.

- The municipality of Stuttgart begins by confirming if there already exists a development plan for this parcel of land. Here you see:
    - The construction mode, the constructible surfaces or not of the parcels, the distances to be respected in relation to the neighboring parcels of land;
    - The number of authorised residential houses and buildings;
    - The surfaces that must be exempted from constructions;
    - The sectors in which certain measures of construction for the implementation of renewable energy, such as solar energy, must be taken into account during the edification of buildings;
    - Rules for the plantation of trees, shrubs and other plants.

It is not about some examples which show that the network of prescriptions is very tight and that the environmental aspects as well must be taken more and more into consideration.

In general, however, the citizen does not contest the entire development plan, but only a decision having opposed a total or partial refusal for a request for permission to construct.

- The competent administration examines whether the construction project conforms to the expectations of the development plan. It checks, in addition, that other directives of public law do not oppose the construction project. The permit to construct should be issued if none of the rules of public law examined by the authority charged with the construction are not in contradiction (art. 58 of the buildings of Bade-Wurtemberg).

- If our land owner does not agree with the eventual negative decision by the authority charge with construction, he may oppose it before higher authority. If he is still not satisfied with the decision of the higher authority (Land authority), he may seek redress from the competent administrative tribunal.

b) Current problems

One of the essential aspects of the current construction law is the protection of the environment. The interest of the individual land owner wishing to get optimal profit from his parcel of land is rarely in conflict but of the interest of the community to take into account environmental aspects. This holds also for the private construction of houses, when the municipal does not authorize certain surfaces for construction; but also for industrial constructions, whose authorization always demands an examination of the ecological criteria. Often it is difficult to weigh the pros and cons, in that in Germany, employments in the industry are a precious commodity and absolutely necessary for prosperity's preservation.

Besides this area of conflict, material interests, unfortunately, and by the nature of things, play a major role in public construction law. Information on the parcels of land that a municipal is intending to declare ready for construction is precious and may induce certain people to engage in corrupt measures. The same applies to the question of knowing whether request for a permit to construct, the examination of the conditions necessary is thorough or whether, sometimes, one turns a blind eye.

The fact that the German population is in regression influences also the construction law. In effect, there is no rise in housing demand, but to the contrary a decline. In certain regions of Germany, the necessity to demolish existing edifices consequently represents a major challenge to urban planning.

III. Environmental protection

1. Constitutional foundations

In its article 20a added in 1994 and modified in 2003, the law provides the following "*assuming thus equally its responsibility for future generations, the State protects natural foundations for life by the exercise of legislative power, in the framework of the constitutional order, and executive and judicial powers, in the conditions laid down by the rule and the law*".

The fundamental law defines thus the protection of the environment as a state objective. We are actually discussing a homogeneous environmental code, but it is not as yet a done deal. Such a homogeneous code would permit notably the implementation of a homogeneous procedure of environmental authorization (a project – an administration – a procedure – an authorization). But this is not as yet the case.

Nonetheless, the Federation has already made great use of its legislative competence in the environmental law, especially what concerns the protection of waters and of nature.

2. Legislation on water

The law on water management decreed by the Federation sets forth the legal foundations applicable to Germany's land waters, coastal waters as well as to the underground waters (art. 1 of the law on water management of waters). The guiding principle is the following: "*Waters must be protected as an element of natural balance and species of life for both animals and plants. They must be managed in a manner so as to benefit communal interest, and in conformity to this, special interest so as to avoid prejudices of their ecological functions and of land ecosystems and of humid areas whose water system directly is dependant on this, and to guarantee thus in a general manner durable development.*" (art. 1 a of the law on the management of waters). In principle, all water utilization requires administrative authority (art. 2 of the law on the management of waters). It is the administration of the Land which is in charge of the execution. The details are regulated by the laws of the Länder on the management of waters.

3. Federal law on the protection against pollutant emissions

The Federation enacted a law protecting the environment from harmful influences such as from impurities in the air, noise, vibrations and other similar factors. The objective of the law consists of "*protecting man, animals and plants, earth, water and the atmosphere as well as cultural heritage and other material goods against the harmful influences and to warn about the coming of influences noxious to the environment*". The installations highly susceptible to generate noxious influences for the environment are subjected to authorization under this law. The federal government defines by decrees with agreement from Bundesrat the installations subjected to authorization under the federal law on the protection against pollutant emissions. This list for example contains:

- Mining and energy production installations;
- Installations for the treatment of steel, iron and other metals;
- Installations for chemical products, pharmaceuticals, and petroleum refineries;
- Wood treatment installations;
- Production of agricultural products and food installations;
- Recycling and garbage disposal installations;
- Storage, loading and unloading such as gas depot installations.

Here too, the Länder and their administrations are charged with the execution of the law.

4. Federal law on the protection of nature – law relative to the protection of nature and to the preservation of the landscape

Federal law on the protection of nature contains clear rules on the manner to protect the nature and the landscape. In its first article, it defines thus its objectives : "*Taking into account their intrinsic value as a foundation for human life and of our responsibility for future generations, the nature and the landscape in the settled and non-settled areas are to be protected, maintained and developed and if necessary to restore so as to guarantee durability*

1. *Performance and the maintenance of natural balance,*
2. *The capacity to regenerate and durable exploitation of goods and nature,*

3. *the fauna and flora, including their places and species of life, and*
4. *Diversity, specificity, the beauty of nature and the landscape as well as their recreation value".*

This federal law makes provision equally for the Länder's obligations. Its execution arises in a large measure from the Länder. The Länder missions are made up notably of the creation of protected natural sites, in conformity to articles 23 and following of the federal law on the protection of nature. To this is added competences from the Federal Ministry of the Environment and to the Federal Office of the Protection of Nature, for example for that which is variety of animals and plants particularly protected or action taken against the trade in these protected species.

In the exact field of legislation in the environmental subject, an increasing number of regulations and directives of the European Union must be taken into account and transposed in the national legislation.

5. Current problems

The environmental aspects may conflict with the interests of the production industry. A company which does not get permission to build a new installation in Germany may be tempted to move its production to countries that are less restrictive in matters concerning environmental protection.

But on the other hand, protection of the environment may constitute a challenge and a motivation for the development of new technologies.

Whatever it may be, the EU could theoretically sonsider collecting custom duties on the importation of products made in conditions that did not observe respect for the environment.

IV. Education

1. Constitutional foundations

Art, scientific research and teaching are free. The freedom in teaching does not exempt it from the constitution (art. 5 al 3 of the LF). All school teaching falls under State control (art. 7 al. 1. Of the LF). In the fields of science and culture the Länder have relatively spread legislative competences which are based on art. 30 of the LF.

2. Children's play school

In Germany, children generally begin the first year of school in primary school at the age of six years. Children's play schools are provided for the period before that. Their legal basis is a federal law - book VIII of the social code. The latter accords a law more developed to place children's play school from the age of three years up to school going age (art. 23 of the social code SGB VIII). The organs in charge of children's play school are in the first place the municipalities. You see here a

children's play school in town. Attendance of this is not free, as each child makes a contribution, which does not however cover all the charges incurred by the municipality.

The building harboring the children's play school presented on this photo is the property of the town. The town of Stuttgart takes care of upkeep. The teachers are employed by the municipality of Stuttgart.

3. Schools

You can see on this photo the secondary school which my two daughters attend. The legal foundation is the school law of the Land of Bade-Wurtemberg, which is the Land where the town of Stuttgart is located. The school law regulates all the details concerning school teaching in particular the types of schools. Public schools are establishments of public law without *moral doctrines.* They accomplish their mission in the framework of a legal relation of the public law (art. 23 al. 1 of the school law of the Land of Bade-Wurtemberg). Material costs are supported by the organ responsible of teaching. It mostly is about municipalities, and in our case it is the town of Stuttgart.

Public school teachers are in the service of the Land and are remunerated thus by the Land (art, 38 of the school law of the Land of Bade-Wurtemberg).

The contents of the teaching are equally adapted by the competent Land authorities who establish strict school programs. The competent authorities are the Minister of Education and Culture of the Land of Bade-Wurtemberg and the supervisory authorities of school establishments under him (art. 35 of the school law of the Land of Bade-Wurtemberg).

Schooling is a must for children from the age of six years (art. 73 of the school law of the Land of Bade-Wurtemberg). Children must attend school for at least nine classes (art. 75 of the school law of the Land Bade-Wurtemberg). Teaching is free in public schools. The teaching material especially the books, is lent to the children, in other words is free (art. 94 of the school law of the Land of Bade-Wurtemberg).

Besides the public schools, there exist private schools which generally are not free. The majority of German pupils go to public school.

The school system is one of the rare areas whereby there are considerable differences between the Länder. On the background, these differences arise essentially from the question of knowing long the children must attend municipal schooling and from which year (from what age) branching off towards different types of secondary schools must take place, that is towards schools leading to an end of schooling diploma which allows registration in a university or towards schools that do not give this possibility.

4. Universities

Universities are also fundamentally competence of the Länder (art. 30 of the LF). You can see on the photo the free university of Berlin where I teach.

The university law of the Land of Berlin enumerates the state universities of the Land of Berlin (art. 1 of II of the universities law of the Land of Berlin). It defines the organization structure of the universities, the running of examinations and public authority over control of universities. From a legal point of view, the universities are constituted as public establishments endowed with *moral doctrine* (art. 2 of the universities law of the Land of Berlin). The university personnel, of whom the teachers, depend directly, be they civil servants or not, of the Land of Berlin, art. 92, 102 of the universities law of the Land of Berlin.

The universities to a large extend are managed by their own organs, (art. 51 ……. of the universities of the Land of Berlin).

But the Federation in this case also monitors to see that the major conditions are homogeneous throughout the country. The testifying text is the major law on universities, by which the principal unit conditions are imposed notably for the admissions criteria and for the final examinations.

5. Current problems

The issue at hand is, to what extend the Länder r can manouvre. The basic questions raised by the conservative and social-democratic parties play a role here. In the scenario, we find besides, questions linked to financing. In comparative tests carried out on the European scale, the relatively prosperous Länder schools controlled by a conservative government obtain better results than the schools of the other Länder**.**

Each modification of fiscal legislation in Germany gives forth a debate on the allocations of tax revenue, whether they increase or decrease, between the Länder on the one hand and the Federation on the other, and, at the close of account, equally to municipalities.

Another thorny issue is that of the difficult interaction between the self management of universities, the competence of the Land and the respect of federal unitary rules. In particular the question to know how to efficiently organize the administration without wasting too much energy is a fact that is not too easy to solve.

The entire educational system in Germany suffers from acute financial shortage in the state coffers, be it at the level of municipalities, the Länder or from the Federation. The repercussions from the world financial crisis and the heavy additional debts which resulted for all the European States, will without a doubt, lead to challenges of great dimensions in the next few years. The intention, though, is not only to maintain the quality of the educational system but to still improve it. In a country like Germany which no longer has raw materials, training of the population

is one of its key missions which permit the preservation of the chances for the younger generation's future.

V. Health system

1. Constitutional foundations

"*Every one has a right to life and to physical integrity*" (art. 2 al. 2 sentence 1 LF). From this flows the state obligation towards each individual to protect all property placed under the protection of the law that is life and body [see also Achterberg / Pütner / Würtenberger, Besonderes Verwaltungsrecht (*Special administrative law*) Vol. II, 2e éd. 2000, chapter 8, § 25 note 3, p. 768 ; decision of the Federal Constitutional Court 39, 1 (41)].

This obligation is manifested in different specialized federal laws. For example the code on foodstuffs dealing with, daily consumption products and foodstuff destined for animal feed, which guarantees that no danger emanates from foodstuffs and other goods of daily consumption to the population.

Book V of the German Social Code which is also a federal law, relates directly to the health system. It imposes an obligatory medical insurance (art. 5 of the social code SGB V).

2. Hospitals

The hospitals fulfill a mission of public service through the supply of medical services to the population; (see also Achterberg / Pütner / Würtenberger, Besonderes Verwaltungsrecht (*Special administrative law*) Vol. II, 2e éd. 2000, chapter 8, § 25 note 43, p. 792). The details are regulated by the laws of the Land.

The law on the hospitals of the Bade-Wurtemberg has as its objective "*to guarantee harmony in the present needs and to avail functional hospitals to the population, economically stable and functioning under their own responsibility, as well as the supply to the patient a sufficient level of medical and technical services" (*art. 1 al. 1 sentence 1 on the law of the hospitals of the Bade-Wurtemberg). The obligation to supply hospitals is the responsibility of the municipalities (art. 3 of the law on hospitals). The photo shows a hospital in the town of Stuttgart. The building belongs to the Stuttgart municipality (or if not the case to a company created by the municipality to this effect). The members of the hospital personnel are employees of the town of Stuttgart.

The organ responsible for the Stuttgart hospital is the town of Stuttgart. The hospital of Stuttgart is an autonomous establishment of the municipality. Its financing does not only come from the town of Stuttgart. It is divided among the Federation, the Länder and the municipality by the law on financing of hospitals in its articles 4, 8.

3. Health Insurance

To go into details of this issue will be complicated and will go beyond the scope of this presentation. But the highlights can be thus summarized: Each member must have a medical insurance policy art. 5 of the social code SGB V). The contributions for health insurance are remitted half by the employer and by the employee and are deducted directly from the salary. This means that the citizen does not receive this part of his income. It is the employer who remits the entire contributions to the health insurance office (art. 226 of the social code SGB V). When someone goes to see a doctor or to be treated at the hospital, he presents his health insurance card (art. 15 al. 2 SGB V). It is one of these cards that you see on the photo. The doctor or the hospital bills the health insurance directly for the services rendered. The insured does not get any bill. He at times must pay extra bills, for example if he desires to get a private room at the hospital. But in principle, his obligation to make payments is limited to his monthly deductions of a certain percentage of the revenue from his work which is directly transferred to the health insurance. This percentage stands actually at 14.9% since 1st July 2009. Medicines to a large extend at least, are equally financed according to the system. For this, the doctor gives a prescription with which the insured is able to get medicine from the pharmacy. The pharmacists bill the Health Insurance Offices for the medicines (art. 129 SGB V).

4. Current problems

The health system in Germany faces many problems. This comes directly from the fact that the population is aging and diminishing. The high level of aged persons entails a constant increase in costs for the health system. The number of young Germans, on the one hand, who work and contribute highly to the health system, and who on the other hand are hardly ever sick, continues to decline. The number of aged Germans who no longer work and only makes weak contributions to the Health Insurance, but who are often sick and incur high treatment costs continues to increase. The problems arising out of this situation are not as yet resolved. There is a risk that the quality of health system will decline considerably, together with the danger that in future certain parts of the health system will no longer be accessible to but a section of the population in a position to finance them on a private basis. It has not been possible up to now to organize the health system in a more efficient manner to guarantee, in the long term, the high quality standard that it currently presents.

VI. Conclusion

We can summarize in the following manner:

1. In the field of real estate, there are elaborate administrative systems dating from time back which still function well. As the German population regresses, we do not expect the arrival of major problems. Nothing pushes us to create new living spaces. It is however necessary, on the contrary, to demolish empty buildings in numerous regions of the country. It is especially between the indispensable economic development and the creation of employment in the industries on the one hand, and the protection of the environment on the other hand, where there is source of conflict.

When environmental rules cost too much, the companies tend to opt to move their production to countries where these rules are less stringent.

2. We come to the big problem at the heart of the protection of the environment. When a relatively small country like Germany implements harsh environmental measures, there is always the risk that it will lead to economic disadvantages, whereas, the positive effects of these environmental measures on the world scene remains weak if there is no international coordination in this area.

3. The education system in Germany is confronted by major challenges. It is important that our governments prove their courage to invest in this field, which is crucial to Germany's future. This will bring forth difficult discussions in the context of much reduced financial means.

4. The health system in Germany is also facing great difficulties. All will depend once more on the capacity of the political power to demonstrate courage and openness to implement the indispensable reforms.

5. In the four areas evoked, the competences of the municipalities, the Länder and the Federation are closely interlinked. No current policy in Germany fails to take this into consideration. The problems reside rather in the manner in which to organize this interaction to render them as efficient as possible, without bringing very high administrative costs or very complicated administrative procedures. The intervention of political parties, guided more by the will to conserve power more than that of treating issues on the background, often has negative effects.

DISCUSSION THESIS

1. When the administration is essentially organized by the Länder (provinces) and the municipalities, it may be possible to integrate all the regions in the State structure. Such an organization serves as a counter balance to the centrifugal forces.

2. An administration of federal or decentralized structure integrates the population in the State's edification and the administrative apparatus. "from the bottom to the top base ". It also reinforces all the citizens sense of responsibility.

3. In parallel, this type of state structure adds a vertical element to the separation of powers.

4. An administrative structure that integrates the municipalities and the regions and leaves them more responsibility encourages healthy competition between the regions.

5. The capability of a state to function in this way may not be guaranteed unless by a clear definition of the Federations competences (of the Central State). This should guarantee Unitarian principles in the interest of equal chances for all the citizens.

6. A federal or decentralized structure may besides contribute to the unification of the citizens to their state.

7. Nonetheless, all this may only function if the state makes available sufficient funds to all the levels.