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ISSN 1727-3781



2012 VOLUME 15 No 2

<http://dx.doi.org/10.4314/pelj.v15i2.3>

CAN DECENTRALISATION CONTRIBUTE TO PROMOTING RULE-OF-LAW STRUCTURES? THE DEMOCRATIC REPUBLIC OF CONGO, RWANDA AND BURUNDI AS EXAMPLES^{**}

H Hamann^{*}

1 Introduction

This article asks if decentralisation can contribute to strengthening rule-of-law structures and – if so – what conditions need to be created to ensure that these are effective and stable. It will also address how this can be influenced by the actions of international players and raise questions on the interplay between international law, decentralisation and the rule-of-law.

I will start with briefly defining what I mean by decentralisation and the rule of law.

1.1 Decentralisation

This article takes a broad definition of decentralisation as a starting point. Decentralisation is defined as "the process of transferring powers from central government to subordinate levels of government organisation".¹

^{**} The article is the written version of a lecture given on 5 November 2011 at the annual conference of the African Law Society in Heidelberg. The text has been modified for this purpose. Legal details and legal literature have been added. At the same time the article maintains the structure of a lecture with an emphasis on the author's own thoughts. It does not constitute a complete scientific research of all of the legal details referred to.

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¹ Tilch *Münchener Rechts-Lexikon*, reference "Dezentralisierung".

For the purpose of this article I will confine myself to this general definition and not distinguish between different types of decentralisation such as political, administrative, fiscal, and sectoral decentralisation. I will not go into the French debate on *décentralisation*, *décentralisation* und *déconcentration* either.

1.2 *The rule of law*

I will also briefly define what I understand by the rule of law, without debating definitions.²

Any society needs rules. Without rules the law of the jungle prevails. In a state of law the rules which are binding for everyone are of a legal nature, not religious or moral in nature. Breaches of rules should not go unpunished but must trigger sanctions. Thus an institution is necessary which has the authority to make decisions in this respect. If it follows the principle of the rule of law, the monopoly on the legitimate use of physical force will lie with the state and the state will act in accordance with transparent criteria and control mechanisms. This includes, as part of the separation of powers, an independent, impartial judiciary. Thus, state structures which are able to act efficiently and implement sanctions are a necessity. In the context of decentralisation you can ask: when are decentralised state structures efficient?

Rules and the sanctioning of breaches of rules are not enough on their own. The principle of the rule of law includes the obligation of law to create justice and protect human dignity, individual rights and freedoms. The idea of justice forms and underpins all law. It binds and leads to compliance with all rules by those subject to them. In this light the principle of the rule of law is open to taking the history, culture, needs and wishes of the peoples in the countries as a starting point. In the context of de-

2 For further references see Hamann and Schroth 2011 VRÜ.

centralisation you can ask: when do decentralised structures encourage this element of the rule of law?

The general definition of decentralisation given above is broad enough for it to be adapted to the specific circumstances in the country concerned. At the same time, great care must be taken in determining the starting points and the targets of decentralisation in each given country.

Let me start by looking at two theoretical examples which enable me to consider the probable effects of decentralisation on the two elements of the rule of law to which I referred above: the need for rules and the need to protect human rights and human dignity.

Example no. 1: Let us make two basic assumptions: Firstly – that centralised power is inefficiently organised and secondly – that it is corrupt. What kind of powers will a state organised like this be willing and able to decentralise? Probably corruption and inefficiency. What implications does this have on rule of law structures? Inefficiency and corruption are the opposite of abiding by rules and the sanctioning of breaches of rules. Decentralising corruption and inefficiency will therefore not strengthen rule-of-law structures. Whether or not and to what extent human rights and human dignity are guaranteed depends on the power structure, but possibly also on the organisation of the civil society and cultural, historical and political factors. A state which is inherently corrupt and inefficient will not be able to make an active contribution to protecting and promoting human rights and human dignity – neither before nor after decentralisation.

Example no. 2: Now let us make the following two assumptions: Firstly – the centralised power structure is efficiently organised, and secondly – organised in a manner which is autocratic. Decentralisation will probably increase efficiency and the central power will control the decentralised units. In this second example the establishment of rules and the sanctioning of breaches are secured. Decentralisation will probably

make this even more efficient, because the entire country will then be organised right down to small units. However, it does not necessarily guarantee a genuine transfer of power and resources to decentralised units and may simply lead to more efficient administration which gives those who hold the reins of central power even tighter control of the country overall. In these circumstances, the respect for human rights and human dignity will probably depend largely on the goodwill of those in power and not on greater decentralisation.

Both of the above examples make different basic assumptions. These assumptions lead to different consequences on what decentralisation can achieve.

For an outside observer, just understanding the situation and circumstances in an African country in order to determine the starting points of decentralisation is extremely difficult. Indeed, in my experience it is impossible without the collaboration of reliable national colleagues and national co-workers. Even then, great care needs to be taken in developing the collaboration. This is a process which takes many years. Deciding on the targets of decentralisation is even more complicated. In my view this should be up to the national and the local population and not up to foreign players. Nevertheless, what can be done from the perspective of an external observer who has been working closely with African jurists and universities for a couple of years is to develop thoughts on what might help to strengthen rule-of-law structures in the context of decentralisation.

2 What can decentralisation contribute to promoting rule-of-law structures?

I assume that rule-of-law structures which really merit that name should serve the entire population and not just the ruling elite.

Structures serve our interests best if we are able to influence them. If all of us are able to exert influence, this means that we have to accept responsibility. Exercising freedom and assuming responsibility for decisions taken in the context of freedom go

hand in hand. In an ideal situation, we establish the rules which we need to live in our community and we ensure that the members of that community respect and live by those rules; each one of us – not only the president or the prime minister – from the bottom up, and not from the top down.

A village community can have a large degree of autonomy to organise itself. The inhabitants of a town can organise life in that town, the inhabitants of a province exercise influence at provincial level. The principle of subsidiarity can be applied systematically. If the government is organised from the bottom up there will be a sound basis for national structures and in the long term a basis for regional integration.

Decentralisation will make a contribution to establishing rule-of-law structures if the population concerned is given a genuine possibility of participating and if it strengthens the responsibility and accountability of the individual. This can happen only if

- those in power are willing to hand over some of the power;
- the population is willing to assume responsibility and invest time and energy in developing community structures.

Neither precondition can be taken for granted.

The willingness to assume responsibility will be greater, the more elements of local autonomy and federal structures are incorporated in the decentralisation process. Decentralisation is then not merely a shift in power away from central organisation but it provides the population with a genuine means of influencing the way the country is run from the bottom up. Decentralisation then becomes more than the decentralisation of government processes: it allows the population to take an active role in governing its own affairs. The motivation for taking personal responsibility makes a crucial difference. Should the population take an active – indeed a proactive – role in running its own affairs or should it merely be integrated as effectively as possible in the formal organisation of centralised state structures? The differences can and will depend on many details and many national, regional and local factors, which need to be identified before the process of decentralisation is started.

Starting points and targets can be established only in the country itself, through careful examination and with a long-term perspective. This is probably true for all countries, including the three chosen examples, DR Congo, Rwanda and Burundi.³

These three countries are chosen as examples because, on the one hand, they are neighbours, and on the other hand, they are very different, not just in terms of their size. In all three of these countries there are laws which deal with decentralisation. Whether or not these laws and their implementation mean that decentralisation contributes to strengthening rule-of-law structures is a matter to be decided by Congolese, Rwandan and Burundi jurists, as is the question of whether or not this is the intention. This article confines itself to a brief summary of the laws and the current status with regard to their implementation.

3 DR Congo (DRC)

3.1 Legal situation

3.1.1 Constitutional framework

Article 2 of the Constitution⁴ reads as follows:

La République Democratique du Congo est composée de la ville de Kinshasa et de 25 provinces dotées de la personnalité juridique.

Ces provinces sont: Bas-Uele, Equateur, Haut-Lomami, Haut-Katanga, Haut-Uele, Ituri, Kasai, Kasai Oriental, Kongo central, Kwango, Kwilu, Lomami, Lualaba, Kasai Central, Mai-Ndombe, Maniema, Mongala, Nord-Kivu, Nord-Ubangi, Sankuru, Sud-Kivu, Sud-Ubangi, Tanganyika, Tshopo, Tshuapa.

3 The author is working with universities in all three countries on a regular basis. Some of the research results of Congolese, Burundian and Rwandan researchers have been published in KAS Date Unknown www.the-rule-of-law-in-africa.com.

4 *Constitution of the Democratic Republic of Congo* of 2006 (as modified by law n°11/002 of 20 January 2011).

Article 3 adds:

Les provinces et les entités territoriales décentralisées de la République Démocratique du Congo sont dotées de la personnalité juridique et sont gérées par les organes locaux.

Ces entités territoriales décentralisées sont la ville, la commune, le secteur et la chefferie.

Elles jouissent de la libre administration et de l'autonomie de gestion de leurs ressources économiques, humaines, financières et techniques.

La composition, l'organisation, le fonctionnement de ces entités territoriales décentralisées ainsi que leurs rapports avec l'Etat et les provinces sont fixés par une loi organique.

The last constitutional amendment of 20 January 2011 includes two elements which are important for decentralisation. It adds a new Article 226:

Une loi de programmation détermine les modalités d'installation de nouvelles provinces citées à l'article 2 de la présente Constitution.

Moreover, the revised versions of Articles 197 and 198 now empower the president to dissolve the *assemblées provinciales*, the legislative bodies of the provinces and to dismiss *les gouverneurs*, the governors of the provinces, in the event of a severe and persistent political crisis.

3.1.2 Laws organising decentralisation

In the year 2008 *les lois organiques*, the laws complementing the constitution in this respect, were adopted:

- *Loi organique n°08/015 du 07 octobre 2008 portant modalités d'organisation et de fonctionnement de la Conférence des Gouverneurs de province;*
- *loi organique n°08/016 du 07 octobre 2008 portant composition, organisation et fonctionnement des entités territoriales décentralisées et leurs rapports avec l'Etat et les provinces;*

- *loi n°08/012 du 31 juillet 2008 portant principes fondamentaux relatifs à la libre administration des provinces.*⁵

In summary, the legal organisation is as follows⁶:

3.1.2.1 The provinces (*provinces*)

According to Article 2 of law n°08/012 of 31 July 2008 on core principles for the free administration of provinces⁷:

La province est une composante politique et administrative du territoire de la République. Elle est dotée de la personnalité juridique. Elle jouit de l'autonomie de gestion de ses ressources humaines, économiques, financières et techniques.

Article 43 of law n°8/012 also explicitly states that the budget of the provinces is distinct from the *pouvoir central*. Article 3 of the Constitution explicitly distinguishes between *les provinces et les entités territoriales décentralisées*, underlining the legal difference between those two entities.

The provinces are administered by two organs: a legislative organ, *assemblée provincial*, and an executive organ, *gouvernement provincial*.⁸ The *députés provinciaux* are elected in direct universal vote for a five-year renewable mandate; the *assemblée provinciale* deliberates about questions falling into the province's scope of competence, controls the *gouvernement provincial* as well as local and provincial public services (Article 7 of law n°08/012). The *gouvernement provincial* is composed of a *gouverneur*, a *vice-gouverneur* and *ministres provinciaux*. The *gouverneur* and the *vice-gouverneur* are elected for a five-year mandate by the *députés provinciaux* and vested by a presidential order. *Ministres provinciaux* are appointed and may be re-

5 A good overview on the decentralisation process in DR Congo and on the legal framework is given in Mantuba-Ngoma (ed) *Le processus de décentralisation*.

6 For more details see Kumbu ki Ngimbi "Le cadre légal de la décentralisation" 57 ff.

7 Law n°08/012 of 31 July 2008.

8 Article 6 Law n°08/012 of 31 July 2008 and a 195 of the *Constitution*.

moved from office by the *gouverneur*. They also might be removed from office individually or collectively by a *motion de censure* or a vote of *défiance* by the *assemblée provincial* (Articles 23 and 28 law n°08/012).

Due to its dual status of political and administrative authority, the province is submitted to a double set of rules. As the head of an administrative body, "*le Gouverneur de province représente le Gouvernement central en province. Il assure ... la sauvegarde de l'intérêt national, le respect des lois ... et veille à la sécurité et à l'ordre public*" (Article 63 of law n°08/012). As such, he is accountable for his actions to the central government, which can cancel or modify his decisions (Articles 65 and 66 of law n°08/012). As a political body, the province enjoys exclusive competence in some matters enumerated in the Constitution (Article 204 of the Constitution).

Articles 19 and 20 of law n°08/012 provide that the President of the National Assembly and the President of the Senate might acknowledge the dissolution of the provincial assembly and report it to the President of the DRC in the event of a persistent institutional crisis as defined in Article 19.

Since the last constitutional amendment of 20 January 2011, Articles 197 and 198 of the Constitution have been revised, empowering the President to dissolve the *assemblée provinciale*, and to dismiss the *gouverneur* of the Province in the event of a severe and persistent political crisis.

3.1.2.2 The decentralised territorial entities (*Entités territoriales décentralisées*)

In accordance with Article 3 paragraph 4 of the Constitution, law n°08/016 of 7 October 2008⁹ determines the composition, structure and function of decentralised territorial entities and their relationship to the state and the provinces. The Legislator distinguishes two categories of decentralised territorial entities (DTE): entities without

9 Law n°08/016 of 7 October 2008.

legal personality (*entités territoriales déconcentrées*) as the *territoire*, the *quartier*, the *groupement* and the *village* and territorial entities which are granted legal personality: *ville*, *commune*, *secteur* and *chefferie* (Article 5 of law n°08/016 of 7 October 2008).

Each DTE with legal personality is administered on the same basis by two organs: a legislative organ (the *Conseil*), and an executive organ implementing the decisions of the legislative organ.¹⁰ Members of the *Conseils* are elected (Articles 8, 48 and 70 of law n°08/016); after their election, the *Conseils* representatives are appointed.¹¹ *Conseils* are empowered to take all administrative decisions and police regulations required by local interest, and permitted by the law.¹² The executive organ is in charge of implementing the council's decisions.¹³ Members of the executive organ are elected by the *Conseillers*, and vested either by the *Ministre de la République ayant les affaires intérieures dans ses attributions* or by the Governor of the Province (Articles 30, 56 of law n°08/016).

The preamble of law n°08/016 contains a provision about the DTE's autonomy: it asserts the principle according to which executive bodies of DTE both represent the State and the province within their respective administrative districts.¹⁴ They are un-

- 10 In towns *villes*, the deliberating council is called the *Conseil urbain* and the executive organ the *Collège exécutif urbain* (a 7 Law n°08/016 of 7 October 2008); in municipalities *communes*, the deliberating council is called the *Conseil communal*, and the executive organ the *Collège exécutif communal* (a 47 Law n°08/016 of 7 October 2008); in *secteurs* and *chefferies*, the deliberating council is called the *Conseil de secteur ou de chefferie*, and the executive organ the *Collège exécutif de secteur ou de chefferie* (a 69 Law n°08/016 of 7 October 2008).
- 11 *Maire* and *maire-adjoint* in *villes* (a 29 Law n°08/016 of 7 October 2008): *bourgmeestre* and *bourgmeestre-adjoint* in *communes* (a 55 Law n°08/016 of 7 October 2008); *Chef de secteur* in *secteurs* and *Chef de chefferie* in *chefferies* are appointed according to the tradition (a 67 Law n°08/016 of 7 October 2008).
- 12 *Conseil urbain* (aa 11 and 13 Law n°08/016 of 7 October 2008); *Conseil communal* (aa 50 and 52 Law n°08/016 of 7 October 2008); *Conseil de secteur ou de chefferie* (a 73 Law n°08/016 of 7 October 2008).
- 13 *Collège exécutif urbain* (a 28 Law n°08/016 of 7 October 2008); *Collège exécutif communal* (a 54 Law n°08/016 of 7 October 2008); *Collège exécutif du secteur ou de chefferie* (a 78 Law n°08/016 of 7 October 2008).
- 14 *Principe de la représentation en même temps de l'Etat et de la Province par les autorités exécutives des entités territoriales décentralisées*.

der the trusteeship of the Governor of the province who supervises *a priori* and *a posteriori* the executive bodies' decisions.¹⁵

In accordance with the principle of self-government and self-management of their human, economic, financial and technical resources stated in Article 3 of the Constitution, the law provides for financial resources separate from those of the *province*.¹⁶ Art. 115 of law n°08/016 states that DTEs are entitled to 40% of the national financial resources granted to the provinces.

3.2 The real situation and disputed aspects

There has been debate for a number of years on decentralisation and if DR Congo would not be better served by federal structures.¹⁷ Current issues include:

3.2.1 The existing structure

In reality there are still only 11 provinces. The reorganisation of the state territory has not yet taken place.

The new Article 226 of the Constitution in effect indefinitely postpones implementation of the programme contained in Article 2 of the Constitution, i.e. the whole idea of dividing the country into 25 provinces as a major element of decentralisation.

The dual position of the Governor as head of the province on the one hand and as the representative of the central government on the other hand becomes more delicate having the revised versions of Articles 197 and 198 of the Constitution in mind,

15 *L'autorité exécutive d'une entité territoriale décentralisée est placée sous la tutelle du Gouverneur de province. Il s'agit d'un contrôle a priori ou a posteriori sur les actes.*

16 Article 104 Law n°08/016 of 7 October 2008: *Les finances d'une entité territoriale décentralisée sont distinctes de celles de la province.*

17 See for example Matthiesen *Demokratische Republik Kongo*; Mantuba-Ngoma (ed) *Le processus de decentralization*; Hamann 2005 ZaöRV 467 ff.

which do not define when a severe and persistent political crisis actually exists. This revision enlarges the power of the central government and casts doubt on whether or not there is a genuine desire to transfer powers.¹⁸

A look at Congolese daily life reveals that the administrative structure is still largely centralised. For example: The state companies S.N.E.L (*La Société Nationale d'Electricité*) and Regideso (*Regie de distribution d'eau*) are solely responsible for the energy and water supply in the entire country. Both of them are under the management of the Ministry for Energy and the Ministry for the Portfolio.¹⁹ *Les recteurs*, the Presidents of the state's universities, are nominated and revoked by the President of the DRC. Judges and public prosecutors are also appointed centrally.²⁰

3.2.2 Traditional elements

Integrating traditional elements in the political administrative and judicial structure can help to anchor state organisation in the population.²¹ Respecting and developing traditional elements might help to build up effective structures from the bottom up. Of course this requires a close look at the details and a sound understanding of such traditional elements in the various – very different – parts of DR Congo.

3.2.3 Democratic participation or central control?

18 Mufundji Tshinat-Karl "La décentralisation"; Kanya Kabesa "Des contraintes liées à l'application"; Punga Kumakinga "Problématique de la Conformité" 93 ff.

19 Ordinance n°78/196 of 5 May 1978.

20 Articles 150, 152 of the Constitution; for further information see Mutonwa Kalombe "De l'organisation" ..

21 An example is a 67 Law n°08/016 of 7 October 2008: "*La chefferie est un ensemble généralement homogène de communautés traditionnelles organisées sur base de la coutume et ayant à sa tête un Chef désigné par la coutume, reconnu et investi par les pouvoirs publics*"; for the role of traditional courts see Mastaki Namegabe "Le droit au juge" 7 ff.

Maires and *bourgmestres* are appointed by the President. Local elections have not taken place. Elections at a local level are planned for the year 2013.²² Ethnicity may also have to be taken into account.

Open questions are: When and with which effect will democratic elements exercised through local elections strengthen decentralised structures? Is there a political willingness to establish such structures? KumbU ki Ngimbi comes to the following conclusion:²³

Une prise de conscience voire une révolution mentale doit autant caractériser toute la population congolaise vis-à-vis des options levées dans le cadre de la gestion de la chose publique congolaise. Elle doit, toutes appartenances politiques confondues, revendiquer par le biais légal les droits qui sont les siens et qui lui sont soit confisqués soit détournés à d'autres fins. La survie de la Nation en dépend.

Mabiala Mantuba-Ngoma adds:²⁴

Pour acquérir la culture de la décentralisation et les performances nécessaires à sa gestion, on a besoin d'une éducation permanente des cadres administratifs et des citoyens en général.

3.2.4 Economic issues

To balance central and regional powers it has to be kept in mind that many of the provinces of DR Congo are very rich in minerals and other natural resources. In addition, the country's energy and food supply also stems from the provinces, not from the capital. This does not make it easy to find the right balance between central power in the capital and decentralised power in the provinces and smaller decentral-

22 For details on the legal framework for the elections see Law n°11/003 of 25 June 2011 – *modifiant et complétant la loi n°06/006 du 09 mars 2006 portant organisation des élections présidentielle, législatives, provinciales, urbaines, municipales et locales*; Law n°11/014 of 17 August 2011 – *portant répartition des sièges par circonscription électorale pour les élections législatives et provinciales*; Law n°06/006 of 9 March 2006 – *portant organisation des élections présidentielle, législatives, provinciales, urbaines, municipales et locales*.

23 Kumbu ki Ngimbi "Le cadre légal de la décentralisation" 83.

24 Mantuba-Ngoma (ed) *Le processus de decentralization* 54.

ised entities. Organising independent financial resources of the provinces and other decentralised entities is part of the challenge.

3.2.5 The vertical balance of power

The economic issues referred to above do not facilitate the balance of power between the central state, the provinces, and other decentralised entities. The history of DR Congo does not make the task easier.

4 Rwanda

4.1 The legal situation

4.1.1 The constitutional framework

The Constitution of 4 June 2003 states the following:

Article 3

The territory of Rwanda is divided into provinces, districts, cities, municipalities, towns, sectors and cells.

The law determines the number, boundaries, organization and functioning of provinces, cities, municipalities, towns and districts.

Article 167 adds:

Public administration shall be decentralized in accordance with the provisions of the law. Decentralized organs shall fall under the Ministry having local government in its functions.

Districts, municipalities, towns and the City of Kigali are decentralized entities with legal status and administrative and financial autonomy and are the foundation of community development.

They shall be entitled to become members of national and international organisations which promote development through decentralisation.

A law determines the establishment, boundaries, functioning of and collaboration between these organs and various other organs which have a role in the administration and development of the country. A law shall also determine the manner in which the Government transfers powers property and other resources to decentralized entities.

4.1.2 Laws organising decentralisation

Several laws and presidential orders have been enacted in accordance with the Constitution in order to implement decentralisation:

- Organic law n°29/2005 of 23/12/2005 determining the administrative entities of the Republic of Rwanda;
- law n°01/2006 of 24/01/2006 establishing the organisation and functioning of a province;

- law n°08/2006 of 24/02/2006 determining the organisation and functioning of a district;
- presidential order n°57/01 of 15/10/2006 determining the structure and functioning of village, cell and sector.
-

Rwanda's administrative system follows a pyramidal structure: The state is divided into provinces, subdivided into districts and composed of sectors; each sector is constituted of cells which are themselves divided into villages.

4.1.2.1 Provinces

The province "is an entity of the administration of the Republic of Rwanda. Its administration represents the State authority. It has financial autonomy in executing its budget" according to Article 2 of law n°01/2006 of 24 January 2006 establishing the organisation and functioning of a province. Provinces are administrated by three organs, the Coordination Committee, the Governor, and the Executive Secretariat. Article 16 of law n°01/2006 states:

The Governor of the Province is the representative of the Central Government in that Province and is in charge of coordinating the implementation of the Province's responsibilities. The Governor of the Province is answerable to the Minister in charge of Local Government.

Article 17 of the same law pursues:

The Governor of the Province is appointed by a Presidential Order upon approval by the Senate. He or she is removed from office by a Presidential Order upon approval of the Cabinet.

The composition of the coordination committee is described in detail in Article 7. The executive secretary is appointed by an order of the prime minister (Article 29).

The description of the province's missions is rather vague. According to Article 4 of law n°01/2006, the province is responsible to "coordinate planning related activities

in the Districts; supervise the implementation of the national policy in the Districts making up the Province; ensure the security of people and property". This broad scope of responsibilities gives provinces the right to interfere in the districts, i.e. in the local governments. Article 13 of law n°01/2006 stipulates that the Coordination Committee's minutes have to be submitted to the Minister in charge of Local Government, "with a copy thereof to the President of the Republic and the Prime Minister". The Coordination Committee's decisions are enforceable only after 30 days without hearing from the central government (Article 13).

4.1.2.2 Districts

According to Article 2 of law n°08/2006 determining the organisation and functioning of the district:

The District is an autonomous administrative entity with a legal status with administrative and financial autonomy. Like other administrative entities, the District is an entity for the promotion of democracy and a basis for socio-economic development.

It shall "support activities in which the population participates. In elaborating development activities, the District shall endeavour to take its people's wishes into account and shall immediately coordinate all development activities in the District" (Article 6).

The district is governed by 3 organs: The District Council, the Executive Committee and the Security Committee. Members of the District Council are – among others – Councillors elected at the level of sectors (Article 10 paragraph 1). Members of the Executive Committee are elected among the Councillors by the Councillors themselves (Article 12 paragraph 2). Article 17 of law n°08/2006 introduces a mechanism of participative democracy of the population:

In case the local residents find that the councillor does not fulfil his or her duties effectively, they may forward it to the Council of the Sector for examination. Such a request is made in writing containing at least two hundred (200) names and, signatures of the residents of the Sector with voting rights. Where he or she finds it grounded, the Chairman of the Council of the Sector forwards it to the District

Council which examines and thereafter takes a decision. The councillor may also be suspended on his or her duties if requested in writing which is submitted to the Chairman of the District council. In that case, suspension of the councillor is conducted in accordance with provisions of article 16 of this law.

On the other hand Article 19 of law n°08/2006 states that "Members of Parliament have the right to attend District Council meetings and deliberate but without voting rights". Although members of the Parliament are not allowed to vote in District Council meetings, their simple attendance may have an effect on local leaders.

According to Article 78 of law n°08/2006 "The Chairperson of the Executive Committee who is the Mayor of the District represents the State in the District". The wording is similar to that used to describe the Governor of the province.²⁵

4.1.2.3 Sectors, cells and villages

The organisation and the functioning of villages, cells and sectors are determined by presidential order n°57/01 of 15 October 2006 determining the structure and functioning of villages, cells and sectors.

Each village has a Council and an Executive Committee (Article 5). The "village council is comprised of all citizens residing in that village who are at least 18 years old" (Article 7). This village Council elects the Executive Committee (Article 8 paragraph 1).

Each cell has a Council, an Executive Committee, an Executive Secretariat and an Evaluation Committee (Article 26). "The Cell Council shall comprise of all residents of the Cell who have at least eighteen (18) years of age" (Article 27). The Cell Council is the Supreme Cell Organ. It elects members of the Cell Executive Committee and may remove them (Article 28). Article 28 further states:

25 Article 16 Law n°01/2006 of 24 January 2006: "The Governor of the Province is the representative of the Central Government in that Province".

All decisions taken by the Cell Council must not contradict existing laws, Orders or Regulations or decisions taken by superior organs.

A sector also has a Council. Sector Council Members "shall be credible persons of integrity whose services shall be voluntary" (Article 58 paragraph 1). They shall be elected for a mandate of five years (Article 58 paragraph 2).

The Sector is bound to the District as far as its budget is concerned. Article 83 of Presidential order n°57/01 states that "the District allocates a budget from its annual budget for each Sector within the District to enable the Sector to achieve its responsibilities".

Immediately after the elections, members of the various Executive Committees shall take oath in front of the electorate.²⁶ This procedure, as well as the fact that those Executive Committees members may be removed from office by a "vote of no confidence" by the electorate²⁷ makes them directly accountable to the local population.

According to Article 87 of Presidential order n°57/01, "the Minister holding local Government within his/her responsibilities may issue instructions or assign other duties to administrative entities provided for in Article One of this Order with a view to enhancing good governance".

26 Article 17 (Villages), a 33 (Cells), a 59 (Sectors) Presidential Order n°57/01 of 15 October 2006.

27 Article 19 (Villages), a 49 (Cells), a 69 para 4 (Sectors) Presidential Order n°57/01 of 15 October 2006.

4.2 The real situation and disputed aspects

4.1.1 The existing structure

The country is divided up in accordance with the above-mentioned requirements of the associated laws complementing the Constitution regarding the organisation and role of administrative entities. The structures in place are in line with the legal provisions.

4.1.2 Traditional elements

"Imihigo" agreements: The districts and the central government conclude performance agreements on an annual basis. This enables the central government to closely monitor the realisation of the measures set out in the annual plan. It also makes sure that responsibility is taken seriously.

In these agreements the districts undertake to implement the agreed measures on schedule. Whether and, if so, to what extent a district receives funds depends on – among other things – the extent to which it meets its obligations.

Failure to achieve the agreed aims generally means that the person responsible is removed from office.²⁸

It is interesting to see that Rwandan administration refers to traditional means. This may help to anchor administration in the population and to create a feeling of responsibility and participation. Details are difficult to judge from the outside.

4.1.2.1 Democratic participation or central control?

28 For more details see Scher *Promise of Imihigo*.

Once again it is difficult to judge from the outside. It is up to each country and its population to find the right mix between bottom-up elements and control mechanisms. It will be interesting to monitor the effect of the population's participation in decision-making on the level of decentralised units and the consequences this may have on superior structures.

From an external perspective, some of the detailed rules seem to be quite complicated. How this will work in practice in the long run may also be an open issue.

4.1.2.2 Economic aspects

As always, sound judgement requires sufficient facts. This is not the purpose of this article. Nevertheless, the question of how the central state and its decentralised entities will finance themselves is central. What will the economic base of decentralised entities be in the long run, especially when aiming to become independent of foreign donors? What is the economic basis of each decentralised entity on the one hand and the central state on the other hand?

4.1.2.3 The vertical balance of power

Rwanda is a relatively small country. The size of the country is therefore not an argument for federal structures. A challenge may be how to balance the development of the capital Kigali and the development of rural areas.

5 Burundi

5.1 The legal situation

5.1.2 The constitutional framework

The Constitution²⁹ does not expressly proclaim the decentralised nature of the Burundian state but states the following in Article 3:

Le Burundi est subdivisé en provinces, communes, zones et collines, et toutes autres subdivisions prévues par la loi. Leurs organisation et fonctionnement sont fixés par la loi. Elle peut en modifier les limites et le nombre.

Article 88 adds:

Les élections sont organisées de manière impartiale au niveau national, des communes et des collines, ainsi qu'à d'autres niveaux fixés par la loi.

Article 138 states:

Le pouvoir exécutif est délégué, au niveau provincial, à un Gouverneur de province chargé de coordonner les services de l'administration œuvrant dans la province.

Le Gouverneur de province exerce, en outre, les pouvoirs que les lois et les règlements lui attribuent.

Followed by Article 139:

Le Gouverneur de province doit être burundais civil, natif, établi ou ressortissant de l'entité territoriale qu'il est appelé à administrer.

Il est nommé par le Président de la République après consultation avec les Vice-Présidents de la République et confirmation par le Sénat.

29 Constitution of Burundi of 2005 (Law n°1/010 of 18 March 2005).

Articles 262 to 265 provide for the organisation of the *collectivités locales* and refer to an additional *loi organique*. The *commune* is explicitly described as a decentralised administrative entity (Article 263).

5.1.3 *Laws organising decentralisation*

The Burundian administrative organisation is ruled by the Constitution and law n°1/016 of 20 April 2005³⁰ modified by law n°1/02 of 25 January 2010³¹ organising the communal entities.³²

5.1.3.1 The Provinces

According to Articles 3, 138 and 139³³ of the Constitution, Burundi is divided into *provinces*, each ruled by a Governor in charge of coordinating the central government's activities within the *province*, through a delegation of the executive power. He is appointed by the President.

5.1.3.2 The Communes

Article 1 of law n°1/016 of 20 April 2005 modified by law n°1/02 of 25 January 2010 states:

La commune est une collectivité territoriale décentralisée, dotée de la personnalité juridique, de l'autonomie organique et financière.

30 Law n°1/016 of 20 April 2005 .

31 Law n°1/02 of 25 January 2010 revising Law n°1/016 of 20 April 2005 organising the communal administration.

32 For more details see Ngabonziza "La décentralisation communale au Burundi" 46 ff.

33 Article 139 al 2 *Constitution of Burundi* of 2005: "Il est nommé par le Président de la République après consultation avec les Vice-Présidents de la République et confirmation par le Sénat".

The Burundian *communes* are responsible for managing local interests and administering public services.³⁴ The following bodies assist the *communes* in fulfilling its tasks:

- *The Conseil municipal*

Members of the *Conseil municipal* are elected by direct universal suffrage for 5 years. A *Bureau* responsible for getting the *Communes* business done (voting on the budget, creating and organising local public services, etc.) is composed of a *Président*, a *Vice-Président*, and a *Secrétaire* (Article 9 of law n°1/02). After their elections and at its first meeting the members of the *Conseil municipal* elect the *Président*, the *Vice-Président* and the *Administrateur communal*, who is *de jure* the Secretary (Article 11). Article 15³⁵ organises a participative democratic mechanism: the *Conseil communal* holds twice-yearly meetings with representatives from the *collines* and local associations, where they expose the political, social and economic situation of the *Commune*, and where each participant can ask questions and propose solutions. According to Article 18³⁶, the Governor of the province is free to attend any meeting of the *Conseil communal* and to be listened to. The *Conseil communal* has to address every decision to the *Administrateur communal* and to the province's Governor (Article 21).

- *The Administrateur communal*

According to Art. 25 *et seq*, the *Administrateur communal* represents the *Commune*. As such, he takes all of the decisions required in order to implement the decisions of the *Conseil communal*. But at the same time, the *Administrateur communal* also rep-

34 Article 5 Law n°1/02 of 25 January 2010: "La commune est chargée de la gestion des intérêts locaux de la population de son ressort. Elle assure les services publics répondant aux besoins de cette population et qui ne relèvent pas, par leur nature, leur importance ou par détermination de la loi, de la responsabilité directe de l'Etat. L'Etat peut lui déléguer la gestion ou l'exécution, sur le plan local, de certaines des missions qui lui incombent. Dans ce cas, il met à sa disposition les ressources humaines, matérielles et financières nécessaires."

35 Article 15 Law n°1/02 of 25 January 2010: "Le Conseil communal organise au moins deux fois par an des rencontres ouvertes aux conseils de collines et aux représentants des associations œuvrant dans la commune pour les informer de manière transparente sur la situation politique, sociale et économique prévalant dans la commune et les perspectives d'avenir. Les participants ont droit de poser des questions et de proposer des solutions au Conseil communal."

36 Article 18 Law n°1/02 of 25 January 2010: "Le Gouverneur de Province, le Maire ou leurs délégués peuvent assister aux séances du Conseil communal sans voix délibérative. Il doit être entendu chaque fois qu'il le demande."

resents the central government (Article 26). As such, he has a general policing power and a supervising power upon agents of the central government appointed in the *Commune* (Article 27).

According to Article 96, decisions of the *Commune* are first controlled by the Governor of the province, and then by the Minister in charge of the local administration.

5.1.3.3 Further entities

According to Article 3 of law n° 1/16, the *Commune rural* is subdivided into *zones* and *collines de recensement*. The *Commune urbaine* is subdivided into *zones* and *quartiers*.

5.2 *The real situation and disputed aspects*

5.1.1 *The existing structure*

The structures provided by the laws described above have been put in place.³⁷

5.1.2 *Traditional elements*

I asked a Burundian colleague: do the communes follow traditional structures? The answer was "no". The way the provinces are divided into *Communes* has been decided in the capital. It does not necessarily follow traditional, historically grown structures. The law expresses this in Article 1 paragraph 2 of *loi n°1/02*: in providing that *Communes* are created through "*une loi organique qui en fixe la dénomination, le chef-lieu et les limites*".

37 For more details see Ngabonziza "La décentralisation communale au Burundi".

Although this is just a detail, it is – to my mind – an important detail because it shows that it is essential to take a very close look when trying to understand the structure of the country from the outside. If the process were based on traditional structures the population would be more likely to accept the process and be more willing to take an active role in it.

Among the topics often discussed you will find "Ubushingantahe," which is a traditional means of organising society.³⁸

The question is if and how traditional principles of organisation and traditional values can be used to develop modern structures which are solidly anchored in Burundian society.

5.1.3 Democratic participation or central control?

Given the capacity of the central state and the provinces to influence decisions at a lower level the question remains as to how much room for self-administration and democratic initiative will remain for the population.³⁹ In this context it can also be asked if the election law in place helps democratic participation at a decentralised level or not.⁴⁰

Another topic to ponder is impunity. Is there a link between impunity and establishing rule-of-law structures? Most of the ethnically motivated crimes committed in Burundi in the last decade have not been punished. This seems to be an obstacle to open-minded self-organisation at all levels of the state structure.⁴¹

38 Ngabonziza "La décentralisation communale au Burundi" 53; Nindorera *Ubushingantahe..*

39 For more details see Ngabonziza "La décentralisation communale au Burundi" 57 ff.

40 Ngabonziza "La décentralisation communale au Burundi" 60.

41 See Hamann and Berger "Burundi"; Niyonkuru "L'indépendance du pouvoir judiciaire Burundais" 1 ff.; Didier Nibogora "La place du droit pénal" 66 ff.

Nevertheless, Désiré Ngabonziza comes to the following conclusion:⁴²

Comme nous venons de le voir, la décentralisation est un mode de gouvernement des communes au Burundi et elle est en marche. Elle connaît certes des difficultés de fonctionnement dues en partie à la nouveauté de ce système. En effet, à la manière d'un enfant qui naît et qui apprend progressivement à marcher, avec beaucoup de difficultés, le système marche et évolue.

5.1.4 *Economic issues*

Are there sufficient financial resources for the decentralised structures?⁴³ And are there sufficient financial resources for the state as a whole? How are these resources allocated? Among the major exported resources of Burundi are coffee and tea, which are produced in the rural areas and not in the capital. This economic issue is part of a larger problem: in the long term, how will Burundi assure its independence from donor money? Ethnic and political rivalry for access to resources may also be an issue.⁴⁴ Corruption is also an issue: Burundi is placed 172 out of 177 on the Transparency International Index 2011, far behind Rwanda (place 49) and worse than DR Congo (place 168).⁴⁵

5.1.5 *The vertical balance of power*

Like Rwanda, Burundi is a relatively small country. Finding the balance between the capital where all important decisions are made and the rural areas where products for export are produced and which supply food and energy might not be easy.

42 Ngabonziza "La décentralisation communale au Burundi" 64.

43 For more details see Ngabonziza "La décentralisation communale au Burundi" 56 ff.

44 For more details on ethnically motivated elements of the Burundian Constitution see Manirakiza "L'approche consociative" 91 ff.

45 Transparency International 2011 www.transparency.org.

6 International law and decentralisation

The article confines itself to a couple of questions.⁴⁶

6.1 *Looking in from the outside*

6.1.1 *International organisations*

The World Bank/IMF/UN generally communicates with governments, i.e. with central powers. Do they – in so doing – reinforce a centralised system of government? Can they or could they bring pressure in such a way that a centralised power would hand over part of its power?

Can or could they have sufficient influence so that the population would take the initiative itself and assume more responsibility for running its own affairs? Is that the intention?

6.1.2 *Regional integration*

In Africa, regional communities are playing an increasingly important role. For the three countries which I am using as examples – DR Congo, Rwanda and Burundi – the East African Community (EAC), the Southern African Development Community (SADC) and the African Union (AU) are of special importance. Regional integration will be sustainable only if it has the support of the population concerned. This presupposes that the population can identify with the structures to which it is submitted. This will work better if people are able to influence it. Once again: structures which do not work at local, provincial and national level have little chance of international success. Establishing decentralised government structures at local, municipal and

46 For more details see Hamann and Schroth 2011 VRÜ; Hamann "Great Lakes Region, Africa".

provincial level can encourage acceptance if these decentralised structures have the support of the population concerned and if people have a say in how they are run.

6.1.3 *International cooperation*

There are good reasons why German development policy fosters decentralisation. The definition of decentralisation used by the German Ministry for economic co-operation is not all that different from the definition which I have used above. German development work defines decentralisation as the transfer of tasks, responsibilities, resources and political decision-making to the middle level (e.g. provinces, districts, regions) and the lower level (towns, communes, villages).⁴⁷ As soon as an external agency or organisation influences the decentralisation process the funds provided by these external players will have an effect. The effect of a measure of this type depends on numerous details which determine the situation in which the resources are used. In my experience this can be achieved only gradually and with great patience by collaborating with partners on the ground. It is not easy to find an answer to the question of what should be achieved. Are such measures meant to encourage and strengthen a sense of responsibility and participation among the local population from the bottom up? This involves the political will to do so in the first place, and a willingness to trigger a process of change and follow it through. Measures which simply cement an unconvincing status quo are contra-productive. To my mind, preserving such a *status quo* is the opposite of development.

6.2 ***Looking at the situation from the inside***

As a European I have no right to speak on behalf of Africans. An African country's view of the measures and funds provided by the World Bank/IMF/UN organisations and donor countries must be formulated by the African country itself. Over the past one-and-a-half years I have had a number of opportunities to work with groups of

47 Bundesministerium *Dezentralisierung* 4.

young African diplomats from 20 to 25 different African countries. I have also had a number of opportunities to work with postgraduate students from many African countries. At these events whenever I asked: *What do you expect of Europe?* I always got the same answer:

- A fair economic partnership; not in addition to but instead of the usual development aid;
- Support in developing production and technical know-how and good training opportunities.

I realise that these statements are not necessarily representative. But they give me the opportunity to express some thoughts on decentralisation and economic development.

- Development presupposes a sound, independent economic basis. An economic basis must evolve within the country itself, first and foremost in food production and energy supply. In both of these fields the potential nearly always lies in the provinces and not in the capital city, i.e. in decentralised structures.
- A country's independent economic basis can be developed only from the bottom up. In countries where the average age of the population is very low, it is essential to use the enthusiasm and energy of these young people. Probably there is also an important link with decentralisation: if decentralisation really does mean a genuine shift of power away from centralised organisation and towards greater personal responsibility and involvement, it can also provide economic impulses. In other words: a rural village community which organises its own power supply, water supply and infrastructure and which can intensify and expand agricultural production and trade in the products which it generates will create an economic basis which will make economic growth possible. Establishing production facilities to process natural resources in order to create added value within the country will also have to take into account the geographical position of such natural resources which in general are not found in the capital.

7 Conclusion

Decentralisation can make a positive contribution to reinforcing rule-of-law structures if it is genuinely wanted and actively promotes individual initiative, responsibility and accountability among the population.

Existing structures can be developed or changed only where there is a thorough understanding of the existing structures, including customs and traditions.

Development means change. If decentralisation is to encourage development there must be a willingness to change. This willingness to promote and accept change must exist within the country itself but also among decision-making authorities from outside.

An essential element in processes of growth and change which will be initiated by the people themselves is an economic basis. Self-sufficiency in energy supply and food production is an important factor and is based not in the capital city but in the provinces. The use of the natural resources of a country in the interest of the whole population is another major factor.

If outside agencies wish to provide funding and support projects to encourage and promote decentralisation and rule-of-law structures, they should also have the courage to foster processes of change.

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List of abbreviations

DR Congo	Democratic Republic of Congo
DTE	Decentralised territorial entities
IMF	International Monetary Fund
KAS	Konrad-Adenauer-Stiftung
Regideso	<i>Regie de distribution d'eau</i>
SNEL	<i>La Société Nationale d'Electricité</i>
UN	United Nations
VRÜ	Verfassung und Recht in Übersee
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

**CAN DECENTRALISATION CONTRIBUTE TO PROMOTING RULE-OF-LAW
STRUCTURES? THE DEMOCRATIC REPUBLIC OF CONGO, RWANDA AND
BURUNDI AS EXAMPLES^{**}**

H Hamann^{*}

SUMMARY

Decentralisation can enable a country's population to exercise political influence at regional and local level. This presupposes a willingness to assume responsibility. It also presupposes that those in power are willing to hand over some of the power. Together these two factors can foster rule-of-law structures.

This paper describes the constitutional and administrative framework for decentralisation in DR Congo, Rwanda and Burundi. It also explores the actual situation in those countries with reference to legal literature from those countries.

^{**} The article is the written version of a lecture given on 5 November 2011 at the annual conference of the African Law Society in Heidelberg. The text has been modified for this purpose. Legal details and legal literature have been added. At the same time the article maintains the structure of a lecture with an emphasis on the author's own thoughts. It does not constitute a complete scientific research of all of the legal details referred to.

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In addition, it raises questions regarding the effect of instruments of international law on the decentralisation processes (international organisations, regional integration and international cooperation).

KEYWORDS: Congo, Rwanda, Burundi, decentralisation, rule of law, international law, regional integration