

## FOREWORD

The articles contained in this volume of KAS African Law Study Library were written within the framework of the sixth seminar on the Rule of Law in the DRC organized in April 2014 at the University of Kinshasa. Indeed, organization of these seminars is part of the wide training and research program whose objective is to create synergy between Congolese and African lawyers with a view to sharing experiences on issues relating to the promotion of the Rule of law and regional integration in Africa.

This volume comprises of eleven articles which address different issues, five of which relate to political and civil rights, two on economic and social rights, and two on management of natural resources. The other two articles focus on constitutional review and international criminal justice respectively. The articles by Benjamin Bakadisula, Juslain Nsambana, Bobo Mulumba, Symphorien Kapinga and Mukiramfi Samba focus on political and civil rights specifically on freedom of expression, freedom of conscience, freedom of association and the right to vote. The articles of Camille Ngoma and Joseph Arseli concentrate on the right to health and the freedom of navigation in the Congo River Basin. The articles written by Joseph Cihunda and Paulin Punga touch on governance of mineral and forest resources. The one written by Balingene analyses the basis for constitutional review initiatives in the Democratic Republic of Congo while the one written by Prosper Djuma is dedicated to the trial of Thomas Lubanga before the International Criminal Court (ICC).

The article by Benjamin Bakadisula Kangoma is on « Freedom of expression in DRC under the Constitution of 18th February 2006 ». The author notes that freedom of expression is a part of the fundamental human rights enshrined and protected both at the national and international levels of states. In the DRC, its enshrinement in the Congolese Constitution of 18th February 2006 whose advent marked the realisation of the long transition and its tendencies is a strong sign of the country's walk towards a democracy based on fundamental freedoms. In practice however, the author deplors the differences between legal prescriptions and political actions on issues pertaining to freedom of expression. The unfortunate finding he shows is that, all the governments over the last years in the DRC, have embraced violence, often physical which has adversely affected the freedom of expression especially for those who do not share the opinions of the government in power.

Juslain Nsambana Bonkako focuses on the legal framework and limits of evangelical and revival churches in the DRC. This study was done based on interrogations related to the legal framework on evangelical and revival churches in the DRC vis-a-vis the extent and the limits of the freedom of worship. The author notes that in the DRC, freedom of worship and that of association as guaranteed by the Constitution of the DRC are, as pertains to revival churches, less organized and obviously less adapted. In the face of this lack of adaptation or total silence from the legislator, DRC is witnessing a multitude of revival churches in such a way that it is becoming very curious to envisage eventual liabilities of these churches in the event of abuse of duty. His analysis ends with the desire to see the Con-

golese legislator make laws which are adapted to the special circumstances relating to churches and religious associations so as to clean up this sector.

Bobo Mulumba Bululu reflects on issues pertaining to relations between the Church and the State, especially the Catholic Church and the ruling class in the DRC by defining its relations around their legal framework and the challenges in the current political context. This study raised questions such as, on what legal basis is the relationship between the Catholic Church and the Congolese State founded? On whose behalf and on what basis does the Catholic Church take a position in matters falling under social and political spheres? For the Church, it is in the name of its social doctrine that it finds legitimacy to intervene in everything where the fate of mankind is concerned. This taking of positions by the Catholic Church has often been the cause of tension between the Catholic Church and the Government of the DRC. The author is of the view that the Congolese crisis being above all ethical, accountability to mankind and the entire Congolese society take precedence over any change in society. Churches in general and the Catholic Church in particular, must work in this priority area by integrating into their activities civic education for their faithful and supporting religious leaders in their pastoral commitment.

The article by Symphorien Kapinga K. Nkashama tackles funding of political parties in the DRC. His study takes stock of the actual funding of political parties in the DRC, public funding of political party activities and transparency and balance guarantees in financing activities of political parties, in particular, during electoral campaigns.

On his part, Mukiramfi Samba reflects on the foundations and content of electoral assistance by MONUSCO. He questions the adequacy between the basis of the Security Council to confer to this mission such a mandate of electoral assistance and its consistency, given that this electoral assistance given by the UNO to states is a practice which has no basis whatsoever in its Charter. Moreover, following the dispute on the results mid-way, the author questions the conditions for the extension of the said mandate towards an international certification of the election results. The author observes that the certification is meant to address the chronic confidence crisis of the stakeholders in regards to electoral administrations in countries experiencing a crisis. The author supports the view that the certification is a double-edged sword. On the one hand, its implementation is much more difficult that its content must be stated in accordance with the socio-political context of each country in question. On the other hand, if put into proper use, the certification would efficiently contribute to the prevention and management of conflicts related to elections in the DRC, a country with a nascent democracy.

The article by Joseph Arseli Monga Mangala touches on the changes done in the health sector through public finance reforms in the DRC from 1998 to 2013. This study brings to bear to the Congolese state the relationship between a consumer and a fruit tree. According to him, a State governed by the rule of law is also the one where public services provided by it, grants the people an effective enjoyment of their fundamental rights, among them the right to good health. This study brings out the major challenge of the research dictated by such an interrogation which is that of being able to evaluate the performances and counter-

performances of the State in respect to enhancement, through public finance, of effective enjoyment of the right to good quality health care.

The article by Camille Ngoma Khuabi discusses the legal framework for navigation along River Congo Basin. In a positivist approach, the author proposes as objective the analysis of the legal framework applicable to navigation along River Congo Basin by presenting the status of its implementation in the DRC. He demonstrates that, this vast natural transport network has always been a subject of concern for states which would want to benefit from the natural conditions for movement of people, goods and services in a region surrounded by lack adequate road infrastructure. Cooperation efforts were undertaken by the states right from independence despite tensions on claims for sovereignty on the whole or part of the river. In the current international context, the DRC will have more interest in developing and enlarging its cooperation with all the riparian states in River Congo basin. If the aspects analysed within the framework of this study are only limited to the navigation sector, they are not the only ones which are of interest to the residents along the river. The most dramatic issues such as sharing of water quotas between the residents or those of inter-basin water transfer in regions which are already visibly threatened by impacts of climatic change would in future rely on a legal structure already developed and experimented on issues pertaining to navigation. Experts have already demonstrated the cost of non-cooperation concerning the management of international water courses regardless of the form of use.

The article by Joseph Cihunda Hengelela is entitled « Permanent quest of appropriate legal framework for the extractive industry in the DRC. Some reflections on the guiding principles behind the mining reform of 2002 ». The author emphasizes on the objectives of the mining reforms brought about by the mining code of 2002 and evaluates the realisation of these objectives. He notes that, in regards to these objectives, the Congolese legislator would like to attract investors in the mining sector with a view to increasing public income arising from this sector and accelerate development of the local population especially the population living in the mining areas. Twelve years later, these objectives are far from being realized. The author nonetheless demonstrates that the mining code of 2002 has succeeded in attracting investors but has not increased state's income and has not contributed to the envisaged community development. One of the obstacles to the realisation of the objectives set in the mining code is bad governance which characterises different governments of the DRC. To overcome this challenge, it is important to review the mining code and combine it with strengthening the democratisation of the regime in power.

The article by Paulin Punga Kumakinga is dedicated to the protection of tropical forests in the DRC. He notes that after being aware of the major role played by its forest ecosystem in biosphere balance, the Government of the DRC made a commitment to protect its tropical forests, by harmonizing its legislation in respect to international instruments which it had ratified previously. According to the author, protection of tropical forests of the DRC is more than a necessity in the current context characterized by threats generated by climatic change. The ecological and socio-economic functions which are performed by these Con-

golese forests fight inexorably for the conservation of resources which have become indispensable for planet balance. Against these threats, the author indicates that the Congolese legislator instituted mechanisms susceptible to fight against possible deforestation and forest degradation. However, the worry of seeing these mechanisms not efficiently contributing to the objective of protection remain, as long as the application of the law continues being selective, wide and complacent.

The article by Balingene Kahombo analyses the bases for review of the Congolese Constitution of 18th February 2006. The author examines the legal and political bases which revolve around the initiatives for the review of the Constitution of 18<sup>th</sup> February 2006. He notes that the constitutional law seems to resist the affirmation of the political power, which, would like at any cost, conform the legal rules to political practices. This explains the reason for the misuse of the constituent power provided by the Constitution of 18th February 2006. The consequences of such a misuse are numerous, and denotes who are the real targets. Their common denominator is constituted from the personalization of power and strengthening the role of the Head of State, leading to a sort of hypertrophy of the presidential function, mainly through presidentialization of derived constituent power, widening and enhancement of personal powers of the Head of State, the attempts to hinder democratic change of political power and interfering with the independence of the judicial power. The article explores some possible legal solutions for the protection of the rule of law by highlighting mainly the composition of derived constituent power for provincial assemblies and putting in place a compulsory control mechanism for the constitutionality of any law pertaining to constitutional review.

Guy Prospère DJUMA BILALI examines the trial of Thomas Lubanga Dyillo before the International Criminal Court. His analysis was essentially legal and touched on the following issues: What procedural incidents did it face, on what basis did it find Thomas Lubanga criminally liable? Did the ICC dispense with the matter or other matters remain in suspense? Lastly what is the impact of this decision on international criminality in the DRC? Pioneering work of the International Criminal Court, the matter of the *Prosecutor Versus Thomas Lubanga* goes into the annals of international criminal justice. But questions still continue to be raised on its impact on international criminality and on the outbreak of hostilities in the Great Lakes Region.

Jean-Michel KUMBU

Hartmut HAMANN

Joseph CIHUNDA HENGELELA