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Land, law and politics in Africa: mediating conflict and reshaping the state

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Land, law and politics in Africa

Land, law and politics in Africa:

Mediating conflict and reshaping the state

Edited by
Jan Abbink & Mirjam de Bruijn

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In memory of

Gerti Hesseling



[Photo: Dick Schuijt, 2007]

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Introduction: Land, law and conflict mediation in Africa

Jan Abbink

This volume presents a wide selection of original studies on issues of law, land disputes and conflict (mediation), and the role of state agents and local actors in Africa in these matters. The focus is not on problematizing contestation and conflict in Africa as such but on analyzing how citizens, state institutions and other concerned (inter)national actors are working to find solutions to social disputes and threats to (violent) conflict that are part of socio-political life everywhere. The antagonisms and inequalities of class, religion and ethnicity in Africa are still serious and repeatedly generate violent conflict. Despite the continent's recent economic growth and development dynamics, these antagonisms are not only a source of enduring struggle, abuse and personal drama, they also engender transformative political and socio-economic processes. The growing body of scholarly studies that highlight these phenomena of conflict and their wider societal and political impact has greatly enhanced our understanding of the historical, cultural, psychological and socio-economic conditions involved. Academic research aims not primarily to offer 'ready-made solutions' to the recurring disputes and conflicts that (inter)national development policies and donor countries in the developing world are so obsessed with and want to fix as quickly as possible but to promote in-depth understanding of the nature of the generative factors that produce conflicts. While a lot of knowledge in the form of facts and case descriptions of the number and extent of conflicts is now available, understanding may need to be promoted to call for and realize behavioural, educational and judicial-legal change among the actors involved, from state elites, international players and donor countries to local people. The views and interests of local citizens could be highlighted much more, and this would be enhanced by more democratically structured accountability systems, and legal checks and balances.

We plead here for a more holistic perspective on law, (land) conflicts and their mediation as well as on development policy in general. The authors have approached the subject from a variety of disciplinary angles: Political science, anthropology, law, sociology of development and human geography. And the title – *Land, Law and Politics in Africa: Mediating Conflict and Reshaping the State* – reflects the issues at stake: Land access and issues of land use, state politics and the effects of democratization, the relationship between constitutional/state law and customary law, cultural representations relevant to the political process, the changing nature of conflict in African rural and urban settings, border conflicts and their mediation, the autochthony debate, and conceptions of (human) rights. They interlock at various levels and are shaped by antagonistic economic interests between groups and elites, demographic pressures, resource competition and hierarchical state policies that have not devolved power to lower levels.

It is apparent from the various case studies that discrepancies between African state politics and law-making on the one hand, and local-level political and community life on the other are significant. ‘Local knowledge’ and socio-cultural representations structure daily interaction, struggles for survival and community relations, notably those centered on land: Land as a means of livelihood, as (national) territory with specific borders, or as ethnic patrimony. Regarding the first, we will see that what is usually known as ‘customary law’, namely law that has emerged in practice and is based on engrained local representations and values, is still widely popular and relevant (cf. Fenrich *et al.* 2011; Joireman 2011), and is maybe still the first form of dispute resolution for the majority of Africans. It should therefore be seen as a prime resource and not as a hindrance to the development of modern conflict resolution measures and state judicial development and law enforcement. The enduring challenge is for governments and donor countries to work towards a productive integration of the two streams. However despite legal pluralism, there is not necessarily a contradiction between underlying principles of law and justice between ‘local’ and ‘universalist’ conceptions of what justice is and what rights are (cf. Hesselning 2006: 35, 39). What needs to be recognized though is the dynamic and flexible nature of legal conceptions and conflict solutions offered, rooted in power struggles between state elites and competing socio-political actors, and impacted on by the mobility of people and means of communication eluding state frameworks. That durable solutions are often hard to come by is connected to the often problematic and incomplete nature of the state itself: Models of the state in Africa differ and do not necessarily resemble a Western bureaucratic-legal edifice with a claim to the legitimate monopoly on the means of violence and the right to taxation. Many regions in Africa are not under the control of

state-like structures¹ and, furthermore, those that exist often lack sufficient legitimacy and representativeness.

Before highlighting the three major themes that organize the contributions gathered in this volume, we will discuss the background to this bilingual collection.

Background to the book

This project was envisaged as a testimony to the inspirational legacy of Professor Gerti Hesselning (1946-2009), the Dutch legal scholar and Africanist who had a successful career as a scholar of constitutional and land law, focusing on West Africa. She was also Director of the African Studies Centre in Leiden, the Netherlands, from 1996 to 2004. She contributed greatly to the development of African Studies in the Netherlands in both research and publications as well as in social-science policy and scholarly collaboration in Europe and Africa, forging new links between the two. From 2006 until her death in March 2009,² she was a research professor in human rights and peace building studies at Utrecht University.

Her work³ touched on many of the topics discussed in this book, and several of the authors have taken up themes and ideas from her various studies. Gerti contributed much to the debate on law, constitutionalism and land issues in Africa, both in scientific and policy circles. Though a lawyer by training, she saw herself in her later years as a legal anthropologist as she developed a keen interest in the wider social and political contexts of law-making and land law application. She saw law as a 'living tradition', thus developing an eye for the facts and the policy challenges of legal pluralism. In her later work, she devoted a lot of attention to 'capacity building' in Africa (for example, through teaching and publishing in collaboration with African colleagues) and from 2004 onwards she outlined new directions for research and teaching in her work in Utrecht on human rights and peace building in Africa, most notably in her inaugural lecture in 2006. Unfortunately she was never to bring all these plans to fruition.

While the number of Gerti Hesselning's publications is not vast (and she always said that she was no theorist and did not want to make speculative

¹ It is evident from studies in the book edited by Carothers (2006) that the promotion of the 'rule of law' is no easy matter and will not find resonance if local elites and legal traditions are not receptive. In addition, a dogmatic approach to its application or implementation often generates resistance and is not productive.

² For an obituary, see the ASC website:
www.ascleiden.nl/Pdf/InMemoriamEnglish.pdf.

³ For a complete bibliography, see Appendix.

claims), her work covers a significant range of subjects and she had an abiding interest in accurate empirical detail to depict social and legal problems in African societies. She took great care to write with style and clarity. Her first work bore the stamp of her legal training, and her early publications in that field included a legal dictionary and a study of the judicial aspects of the relationship between language and the state in Africa. Her PhD thesis (published in a French translation in 1985) on the political history of Senegal was an important example of her interest in socio-political issues, although her legal training showed in her thorough treatment of legal and constitutional issues, which is a well-developed tradition in (former French-ruled) West Africa.

Much of Gerti's work can be interpreted as a contextual and increasingly critical analysis of the study of law in Africa. She gradually shifted from studying formal, positive law – as proclaimed and issued in constitutions, legal directives and jurisprudence – to the study of the *practice* of law in Africa and its embeddedness or entanglement in social life and power relations. Her monograph on the application of land law in the urban setting of Ziguinchor, Senegal (Hesseling 1992) and her programmatic paper of 1994 are good indications of this (Hesseling 1994). In her 1992 study she noted that:

l'application effective du droit foncier étatique dans une communauté urbaine, est soumise à certaines contraintes d'ordre politique et socio-économique présentes dans la communauté en question. Les seuls instruments juridiques ne suffisent pas à y remédier. Et une approche purement juridique ne permet pas de saisir la problématique foncière dans toutes ses dimensions ... (Hesseling 1992: 189-190)

It would be no exaggeration to say that this core observation applies *a fortiori* in rural communities in Senegal, and in Africa more generally. In addition, law in Africa in settings where the state is not omnipresent is 'appropriated', translated and instrumentalized in different ways and contexts, not just in the rural areas. Law-making is not only a prerogative of state institutions – although they will have to recognize and incorporate these laws – but is decentered and can emanate from local actors and agents, such as pastoralist groups and their agricultural neighbours.⁴ It thus refers to local traditions and value orientations. In general, the study of law in Africa has made a shift from discussions about positive law in the immediate post-colonial era to contemporary legal pluralism. In no field is this more evident than in that of land rights and land use.

⁴ Many current problems among such populations come from state rule imposing its laws and political-economic regimes on local populations without taking into account the local legal cultures, which are seen as backward or a hindrance to economic exploitation.

Other issues have gained in importance besides land law. There are many schools of thought on conflict studies, conflict resolution and mediation studies, as well as a new, intensive focus on social justice and human rights. The latter has emerged from discussions on constitutionalism and ‘good governance’, a concept that was annexed by policy discourse in the 1990s and has acquired a strong normative tinge but also has roots in theories of democracy and distributional justice. It was evident from Gerti Hesseling’s inaugural lecture in 2006 that the challenges to human-rights law in Africa have been greater than ever in the past few decades. The increasingly prominent activities of the International Court of Justice and the International Criminal Court since 2002, with important cases from Africa under scrutiny, are another indication of this.

Gerti was also interested in influencing the public policy debate on the basis of research results and adopted many practical steps to further this. In this context, she not only regularly carried out consultancy studies but constantly made the effort, usually successfully, to forge active collaborative links with scholars and academic institutions in Africa. In a more personal chapter following this introduction, Jean-Pierre Olivier de Sardan and Mahaman Tidjani Alou highlight this in a recollection of Gerti’s commitment to the LASDEL Institute in Niger.⁵

In the chapters that follow, the themes in Gerti Hesseling’s work are taken up in varying forms, some take direct inspiration from certain of her arguments and case studies while others touch only tangentially on her work and go in a different direction. In an empirical sense, the chapters all connect to either the countries or to the legal-anthropological issues that Gerti herself was interested in. We make no apology for the healthy diversity evident here as both generalists and specialists on the topics and countries discussed will find interesting, state-of-the-art contributions to current African Studies debates in this volume.

The chapters

The themes treated in this book can be grouped in three major domains: Historical aspects of African political culture; issues of land access, land use and resource competition; and democracy, human rights, constitutional law and legal pluralism. The last two are especially closely linked to the work of Gerti Hesseling, although she was also very active, in word and deed, on issues of development and international scientific partnerships and exchange. While she often made the case for doing basic research and publishing in the proper

⁵ For more personal testimonies of the impact that Gerti Hesseling had as an academic colleague, especially her extensive network and her personal commitment, see the appendix to the book that came out posthumously and describes her life and travels (Hesseling 2009b: 111-112).

scientific forums, she had a strong interest in policy dialogue and in the application of knowledge, but only when it was well grounded in the practice of empirical and theory-based research. This was quite evident during her time as ASC director when research and publications as well as contacts by research staff with the wider policy and media world were intensified.

In the first part of this book, four authors address the pertinent historical and cultural backgrounds of features related to African politics and authority, without claiming their full determinism or universality. However, as recent comparative studies on politics and culture – if not political culture (cf. Inglehart 2005) – have often demonstrated, national political systems and styles differ markedly, also in modern, highly industrialized countries (cf. Daloz 2003, 2009). Walter van Beek's chapter highlights the representations and cultural associations that have shaped notions and practices of power in Africa. His approach, combining symbols, economics and social relations, has several precedents (cf. Schatzberg 1993) and illuminates some remarkable socio-cultural templates that recur in political behaviour and elite self-presentation. The role of cultural and religious values in politics is also obvious beyond personal leadership styles, in certain militant movements that (ab)use religion or ethnic allegiance as a foundational political ideology, usually to the exclusion of pluralism and accommodation. As van Beek suggests, his typology would need inter-cultural testing.

The chapter by Wim van Binsbergen explores a specific tradition of indigenous discourse of rights and highlights the presence of embedded human- and social-rights conceptions as found in the traditions of the Nkoya people in Zambia. This study, which is based on intercultural philosophy, shows that a rigid and normative distinction between certain Western rights and traditions and African ones cannot be maintained because common underlying concerns are evident and challenge eventual hegemonic perspectives on human rights.

In a further development of the comparative argument on rights, traditions and their historical and cultural roots, Peter Geschiere offers an interpretation of African and European discourse on autochthonous ('born from the soil') and democratic rights, based on a fascinating comparison of Ancient Greece, Europe and African cases. In what is not meant to be an historical but more a sociological argument, he suggests that through the study of discourses on land and belonging, one can reveal the current tensions (and paradoxes) in conceptions and practices of democracy, national identity and citizenship.

These three studies by anthropologists are followed by conceptual reflections by political scientist and Africanist Patrick Chabal on the eternal challenges of 'development' in Africa, a term over-layered with so many interpretations and paternalistic prescriptions that no one knows any longer what it exactly means. He calls for a rethinking of common concepts and methods used

to appraise and implement development, as well as a rethinking of presumed causalities, thus making the case for an historically informed approach to development issues regarding Africa that would match realities on the ground and recognize the specifics of the continent.

The second part of this collection addresses land issues and the economics of land and resources, which were core themes in Gerti Hesselings' work. The chapter by Senegalese economist-sociologist Abdou Salam Fall proposes a challenging programme of economic rethinking for Africa that would alleviate the drawbacks of purely market-oriented global economics, which in his view could have beneficial effects for development in the wider sense. It takes up elements from a discussion started in the 19th century (notably by Claude de Saint-Simon, Charles Fourier and Robert Owen) and ties in with emerging debates on sustainability and well-being that tend to qualify the fixation on GDP growth alone.

In their restudy of land conflicts in Senegal, Mayke Kaag, Yaram Gaye and Marieke Kruis note that urbanization and pressure on land due to rapid population growth in conditions of scarcity enhance land conflicts, a phenomenon that is fairly general across Africa. They provide interesting case studies from three locations that reveal that, in contrast to the mediating role of customary law and some degree of local flexibility or accommodation in the past, the rising commercial value of land in recent years, which has been recognized by outsiders, is leading to a decrease in the effectiveness of customary law and local rights of access, and to more conflict. Large-scale agricultural investment schemes backed by powerful outsiders will increase the tenure insecurity of local farmers. The problem of large-scale land acquisitions that we see emerging here is visible in many other African countries as well.

The study of urban agriculture by Romborah Simiyu and Dick Foeken is a nice account of the paradoxes of a phenomenon that 'should not exist' according to town administrators, namely urban crop cultivation and the raising of livestock in towns. Using Eldoret in Kenya as a case study, local inhabitants and authorities are seen to be struggling with expanding urban farming practices that are profitable but were not foreseen in urban master plans and are problematic in the legal and policy framework (for example, 'General Nuisance' laws). The authors emphasize the positive aspects of urban farming for the local inhabitants' livelihoods – including the municipal officers who claim they want to prevent it – and call for recognition of evolved land-use patterns and a more supportive overall policy.

The chapter by Piet Konings on the Nigeria-Cameroon border conflict is about contested territory: The oil-rich Bakassi Peninsula. This dispute over land was resolved by a decision by the International Court of Justice in favour of Cameroon that was, remarkably, accepted by both countries in the spirit of the

‘rule of law’. However it is argued that due to neglect of two local stakeholders, the mostly Nigerian population in the area and an Anglophone secessionist movement within Cameroon that claimed it was not heeded by the ICJ, the ruling may create instability.

The third part of the book has four chapters on issues related to constitutionalism and politics in three specific countries, namely Ethiopia, Senegal and Mali, as well as a general study of the role of a reinvented constitutionalism in Africa. Jan Abbink offers a study of the difficult and contested electoral processes in post-1991 ethno-federal Ethiopia and reconsiders the ambivalent role of donor countries. His chapter revisits the African democratization debate and notes that this has now been eclipsed by other concerns in the international community such as economic growth, MDGs and new global investments in infrastructure and agricultural land that seem to be relegating issues of redistributive law and the civic freedoms of the population to the margins. Either international donors or partners do not have an answer to the problems of re-emerging authoritarianism and human-rights abuse or they are afraid of missing out on the new economic dynamics (if not ‘scramble’ in the case of the large land leases) and are thus unwilling to push political points. This has no doubt had a negative effect on the emergence of a constitutional/rule-of-law state (Boeckmann 2011; Tronvoll 2011; Human Rights Watch 2011).

Professor Boubabar Kanté’s contribution offers an overview of the development of constitutional law in and for Africa. The process of improving constitutionalism is decisively influenced by the internationalization of law that has been stimulated by international institutions, as we also see in the field of criminal and humanitarian law (for example, the establishment of the ICC in 2002). Kanté, however, makes the case for rooting this process in the realities of African politics and society, and for not transplanting an abstract form of constitutionalism devoid of local resonance into Africa. Part of this regionalization exercise is to recognize that elections are not to be seen as the only criterion for the democratization of African polities: The institutionalization of respect for human rights is just as important.

In a solidly juridical study, Fatima Diallo considers the changing role of the constitutional council judge in Senegal in the process of constructing and maintaining a rule-of-law state. While this idea of rule-of-law is beset by many problems (and not only in Africa), it is nevertheless pursued as a regulative idea, although not a priority for donor countries and newly emerging business partners in Africa. It also reflects the quest for justice and a respect for the rights of the ordinary citizen, with the judge playing a role in this, albeit not a perfect one. She presents a lengthy and thorough case study on the situation in Senegal where, besides having respect and impact, the constitutional judge in her view is also in danger of excessive formalism and domestication by political forces,

which may lead to a decline in his/her role and importance, and prevent him/her from meeting the challenges of constitutional instability that seem to have emerged in the country.

The final chapter in this section is by Malian scholar Moussa Djiré who questions whether administrative decentralization in Mali can lead to more land-tenure security in conditions of legal pluralism. Decentralization in Mali was proclaimed by law in 1993 and has always been seen as a means of realizing more democratization and local autonomy in rural communities. Djiré looks at the issue from the perspective of ‘living law’, i.e. the dynamic local tradition of law-making and judgements/decisions within communities, which is often not reconcilable with state law. On the basis of case studies, he finds that village leaders and councils, which are also faced with the demanding legal framework of the state, have not yet been contributing much to the institutionalization of democratic practices, autonomy and land security for the majority of their citizens. In this sense, decentralization, which was partly meant to remedy this, has not yet been successful.

The last part of this collection brings together three essays on conflict studies. Janine Ubink provides a fascinating study of the successful mediation of a conflictuous custom in Namibia, namely ‘widow chasing’ which occurred when married women who had lost their husbands found themselves and their livelihoods threatened due to the loss of personal rights and status. This ancient problem of the vulnerability of widows – for which the Bible made provision in Exodus 22 and Deuteronomy 24 and 26 – has been partly redressed since 1993 by the introduction of legal decisions that modified customary law that had traditionally prescribed this chasing of widows back to their family of origin. Here, incidentally, we see that glorifying customary law as beneficial and just would be a mistaken approach. However we also note that it is capable of rapid change too. With the ‘Customary Law Workshop’ held by a group of elders in Uukwambi, Namibia, the debate on these customary law traditions led to modifications and progress in line with national laws and these have also effected normative and behavioural change.

Han van Dijk, in his account of donor-induced decentralization in the deeply conflict-ridden country of Chad, shows that a process has been at work since 2000 to reinforce the central state’s grip on local society and undermine local power bases in the villages as well as enhance changes in land-tenure practices and, indirectly, religious affiliation (with the decline of traditional religion). Chad’s conflict dynamics are deeply engrained and the result of decades of civil war, with the concomitant threats to the civilian population and the ongoing imposition of Islam on local people by northern insurgent movements. Renewed conflict since about 2003 has not led to improvements in the decentralization process, let alone to any democratization. The new administrative units that

were created have also led to more ethnic antagonism and may enhance local conflicts even further.

In the final chapter, Mirjam de Bruijn and Egosha Osaghae report on the experiences of the conflict research programme Consortium for Development Partnerships (CDP) and, in their programmatic approach, plead for a new perspective on conflict study, recognizing the ‘mobility’ of conflict in West Africa *vis-à-vis* the state. The state tends to present a rigid structure in law and policy and has had difficulty developing flexible answers to the problems of (armed) conflict. CDP research projects in West Africa have shown diversity in the unfolding of conflicts and the problematic response of the states in the region, which have not yet succeeded in controlling or monopolizing the violence that has taken on a fundamentally trans-border character. In this light, the authors re-evaluate the call for reinforcing the constitutional state in Africa and note that it is perhaps too optimistic.

Conclusion

This volume presents elements that can lead to a new research agenda on legal/constitutional, conflict and political studies on Africa. A part of conflict dynamics and (constitutional) law-making is generated by the perennial problems of land use and land access, and it has been demonstrated that (land) governance and judicial security in Africa are profitable areas of research. The theme of land governance, treated as a core issue in Gerti Hesseling’s work, is currently taking a new turn with the massive investments in Africa’s so-called ‘empty’ or ‘unused’ lands being made by domestic and foreign investors alike. Among the former are political elites and big businessmen, while the latter include a growing number of foreign companies and national governments or state companies (notably from India, South Korea, Saudi Arabia, Malaysia and China) that are buying up or leasing huge areas of land in Africa for commercial export agriculture. The many problems that this new phenomenon, which gathered speed after the 2007-2008 rise in world food prices, has brought about are not discussed here but the implications for land governance, local use rights, customary law and, last but not least, ecology and the environment are going to be enormous.⁶ This issue is also connected to governance and political rights because African governments, many for short-term gain and a strengthening their power position, are tending to privilege investors and bypass the, for them, politically unimportant local producers (cf. Hesseling 2009a: 244, 268).

We now come back to the constitutionalism and rule-of-law issues that Gerti Hesseling pertinently called attention to in her inaugural lecture in 2006. One

⁶ For new developments on this: <http://farmlandgrab.org>.

can recognize that Africa has a tremendous variety of political systems, leadership styles and state structures and that the persistent problems in transitional ‘ungoverned spaces’ (for example, southern Somalia, DR Congo, Central Africa and the Sahel) and the complex conflagrations of political and economic interests will not easily yield orderly, Weberian-type states. Despite some progress in democratization and constitutionalism, the political problems in Africa are as challenging as ever before. Nor will the general concern among ordinary people about rebuilding livelihoods, improving well-being, ending corruption⁷ and gaining respect for property, land and political rights go away. In fact, it is surprising how little these concerns figure as a point of departure in research and policy on Africa and the world in general. But they will continue to fuel the emergence of social movements, political claim-making and state reconfigurations, and are not likely to be eclipsed by the much-vaunted prospect of economic growth alone.⁸ The new partnerships or deals that African governments and business circles have been able to conclude with new foreign players have economic advantages but have also buttressed the powers that be, including autocratic governments. The political dividend of these new deals is still invisible. In addition, the African Union’s NEPAD framework (2001-2010) and its political peer-review mechanism did not, despite its best efforts, deliver on what it set out to do, at least not on the ‘peace, security, democracy and political governance initiatives’ (NEPAD 2011: 16-18).

Concluding that African populations have not been able to benefit sufficiently from the continent’s economic upsurge and are having difficulty realizing their rights and their economic and political agency, there is ample need for renewed research on the core issues that are discussed in this volume and that are close to what Gerti Hesseling (2006, 2009a) advocated: Land issues and (customary) land law, decentralization and democratic reforms, conflict mediation structures, and the promises and limits of constitutionalism. Gerti pleaded for an *interactive* approach to these fields of study (Hesseling 2006: 45) so as to grasp the relevance of formal state structures and laws, as well as the role of cultural and religious values or representations and local people’s versatility in the shaping of law and justice.

⁷ See for instance, the paper by Ambraseys & Bilham (2011).

⁸ It is likely that the *global* problem of environmental destruction in the face of unrelenting population growth is going to be acutely manifested in Africa as well. Biodiversity on the continent, as in Asia and South America, is declining fast (cf. Gilbert 2010; Rockström *et al.* 2009; Vörösmarty *et al.* 2010) and will soon pass the point of no return. This quite alarming phenomenon qualifies the jubilant voices about Africa’s economic growth and requires new global partnerships that are barely evident today. For demands for an environmental policy as an integral part of development, see Sen (2009: 48, 248-249).

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Partenariat et interdisciplinarité: La voie alternative de Gerti Hesseling et du LASDEL

Jean-Pierre Olivier de Sardan & Mahaman Tidjani Alou

Ce chapitre offre des réflexions sur le partenariat scientifique et l'interdisciplinarité dans le champ des études africaines en mettant en exergue l'exemple de Gerti Hesseling, ancienne directrice du Centre d'Études Africaines (Leyde), et en montrant comment elle exerçait ses fonctions de présidente du conseil scientifique du centre de recherche LASDEL au Niger, dans une pratique de collaboration scientifique et d'engagement. Le rôle qu'elle a joué a marqué les chercheurs au LASDEL – comme en témoignent en particulier les réponses positives de la jeune génération – et sa conception ouverte, confiante, et chaleureuse du partenariat contraste avec bien des pratiques d'autres partenaires, marquées souvent par la méfiance et le paternalisme institutionnel. Le partenariat, qui a pu être parfois un slogan masquant des relations « dures » et des malentendus profonds, était, avec Gerti Hesseling, une réalité. Par ailleurs, elle qui était juriste de formation, en ce domaine également s'est montrée atypique, en s'ouvrant aussi aux sciences humaines et à l'anthropologie sociale. De ces deux points de vue – partenariat ouvert et constructif et interdisciplinarité scientifique – ses activités étaient un modèle d'inspiration et ont laissé un héritage très positif.

Introduction

Les sciences sociales en Afrique restent fondamentalement marquées par une crise persistante. Des faiblesses multiformes les caractérisent et entravent leur développement. Loin de considérer cette situation comme un verdict sans appel, certains chercheurs, mais aussi quelques institutions de recherche et d'enseignement, s'activent à la juguler en inscrivant leurs démarches dans la dynamique d'une construction de capacités scientifiques en Afrique même¹. Evidemment, le défi est immense et sa prise en charge ne saurait se limiter à des actions éparses, ni même à la définition de « bonnes politiques ». Encore faut-il que celles-ci soient endossées par des acteurs résolument engagés dans de telles entreprises, qui sont fastidieuses, souvent incertaines, et difficiles à stabiliser.

Gerti Hesseling, nous semble-t-il, fait incontestablement partie de cette catégorie rare de chercheurs, non orientés exclusivement vers la production de leur carrière scientifique personnelle, mais intéressés aussi au devenir des sciences sociales en général, et en Afrique en particulier. Les pays africains ont été l'un de ses terrains privilégiés mais qui n'excluait nullement des démarches similaires vers d'autres continents : Les sciences sociales ne se distribuent pas de manière uniforme dans le monde.

C'est pourquoi nous souhaitons évoquer ce laps de temps, sans doute inconnu de beaucoup, que Gerti Hesseling a consacré au LASDEL (laboratoire de recherche en sciences sociales nigéro-béninois) au cours de ses dernières années. Au regard de tout ce qu'elle a réalisé dans sa vie professionnelle, son passage au LASDEL a été plutôt bref. Mais il a été intense.

Gerti Hesseling a été présidente du conseil scientifique du LASDEL depuis ses débuts, en 2001, jusqu'à ce que sa maladie l'oblige à démissionner.

Rien ne prédisposait les jeunes chercheurs du LASDEL à la connaître. Ils n'étaient pas juristes et ne s'intéressaient pas vraiment au droit public. Beaucoup se sont posés des questions sur cette grande dame, exubérante dans la parole, affable dans le geste, dotée d'une gentillesse extraordinaire. Elle était présente au LASDEL chaque fois que nous la sollicitions, et cette présence était une vraie présence.

C'est donc en tant que chercheurs du LASDEL que nous souhaitons ici témoigner. Bien sûr, nous avons été sensibles, comme tous ceux qui l'ont connue, à la chaleur de sa personnalité, à sa générosité, à son exceptionnelle écoute. Mais elle incarnait aussi un certain militantisme, comme nous allons essayer de le montrer.

Quelques témoignages recueillis auprès des chercheurs et du personnel du LASDEL qui l'ont connue sont révélateurs :

¹ Sur l'analyse de cette crise, et sur la tentative du LASDEL pour y faire face, cf. Programme scientifique du LASDEL ; Tidjani Alou 2009 ; Olivier de Sardan, 2011.

« Je l'ai toujours prise pour une mère qui encourage à la recherche et qui avait toujours du temps quand on l'abordait. Je ne l'ai pas vue se fâcher mais en même temps, elle était très rigoureuse dans ce qu'elle faisait » (un doctorant)

« C'est une femme sage, assez aimable et engagée pour atteindre les objectifs du LASDEL »

« Elle a été gentille, toujours souriante, et elle a toujours quelque chose à me dire pour me remonter le moral » (une secrétaire)

« Je retiens surtout sa gentillesse, sa disponibilité, attachante et sympathique » (une chercheure)

« Elle a participé à la construction du LASDEL. C'était une amie et une conseillère. Elle s'est personnellement investie » (un chercheur)

« Elle avait le contact humain facile. Une autre dimension de sa personne, c'est l'humilité. Elle est aussi très attachée à la rigueur scientifique. Elle était très disponible pour promouvoir le LASDEL » (un chercheur)

« Je l'ai côtoyée au cours d'un conseil de direction du LASDEL. C'est une personne apaisante, rassurante, maternelle. Elle inspire confiance. Elle cherche à booster » (un chercheur)

Ces témoignages posent d'une certaine manière les contours du personnage. Présence et disponibilité, gentillesse, rigueur scientifique, et engagement pour le développement de la recherche en Afrique. Pas de tapage mais une grande constance dans l'action comme le montre son séjour de trois semaines à Niamey au cours de la première université d'été du LASDEL. Elle était là pour les étudiants, discutait beaucoup avec eux, les écoutait avec beaucoup de patience, mangeait avec eux, et n'hésitait pas à répondre à leurs invitations.

Mais au-delà de ces témoignages élogieux et fortement empreints de sincérité, c'est d'abord et avant tout le type de partenariat qu'elle incarnait, et au service duquel elle mettait ces qualités, que nous voudrions évoquer. « *Partenariat* » est pourtant un mot usé jusqu'à la corde. Nouvelle vulgate du monde du développement, et censé exprimer des relations plus équilibrées entre le Nord et le Sud, il recouvre tant de malentendus, véhicule tant d'injonctions masquées, dissimule tant d'arrogances à peine contenues, qu'on pourrait le penser complètement démonétisé.

Et pourtant, avec Gerti, ce mot devenait miraculeusement vrai et retrouvait une fraîcheur qu'on croyait à jamais disparue.

Il est un autre mot-valise, issu, quant à lui, du monde de la recherche, et devenu lui aussi un slogan bien plus qu'une réalité, qui, avec Gerti, se mettait subitement à « sonner juste » et, comme « *partenariat* », arrivait grâce à elle à s'extraire de ce pâteux vocabulaire standard des langues de bois : « *interdisciplinarité* ».

Mais il nous faut d'abord, avant de décrire comment Gerti restaurait la dignité perdue des termes *partenariat* et *interdisciplinarité*, dire quelques mots du conseil scientifique du LASDEL et du LASDEL lui-même.

Le LASDEL, son conseil scientifique, sa présidente

Créé en 2001 à Niamey, le LASDEL est un laboratoire de recherche en sciences sociales, de forme coopérative, de statut nigérien, avec un site à Niamey (Niger) et un site à Parakou (Bénin). Il comporte aujourd'hui 24 chercheurs sur ses deux sites, et mène des recherches empiriques concernant pour l'essentiel le fonctionnement pour le public des services et biens publics ou collectifs en Afrique, en recourant à des enquêtes de terrain qualitatives, de type socio-anthropologique. Divers axes déclinent cette orientation à travers des programmes nationaux et internationaux : Services publics, pouvoirs locaux, Etat local, décentralisation, systèmes de santé, foncier ... Le LASDEL a bénéficié jusqu'en 2006 de l'appui d'institutions de recherche du Sud et du Nord² qui constituaient son conseil de direction (présidé par le recteur de l'Université Abdou Moumouni de Niamey) et à qui il rendait des comptes. Depuis que le LASDEL est devenu une ONG nigérienne à caractère scientifique, et que nos partenaires du Nord ont cessé leur appui, le conseil de direction n'existe plus³. Par contre, le conseil scientifique international constitué dès nos débuts pour accompagner les orientations scientifiques du laboratoire et évaluer sa production existe quant à lui toujours. Il comportait initialement douze personnalités scientifiques de douze pays différents (six pays d'Afrique, six pays d'Europe) et Gerti Hesseling avait accepté d'en assurer la présidence⁴.

D'autres qu'elle auraient sans doute attaché une importance minimale à cette fonction, peu gratifiante symboliquement pour un chercheur européen déjà largement reconnu et par ailleurs surchargé (Gerti dirigeait le Centre d'études africaines de Leiden), et se seraient contentés d'assister aux quelques réunions dudit conseil (faute de moyens financiers, nous n'avons pu le réunir que deux fois en sept ans). Or, non seulement Gerti a pris très au sérieux sa tâche, et a animé ces réunions avec maestria, mais, surtout, elle s'est investie beaucoup plus largement que son cahier des charges ne l'exigeait dans l'accompagnement du LASDEL, en participant comme « observatrice sympathisante » à plusieurs de nos conseils de direction, ou en assistant presque intégralement à l'une des sessions de notre Université d'été.

Les réunions du conseil de direction ont parfois été vives, en particulier parce que les chercheurs du LASDEL maîtrisaient mal les procédures de gestion

² Universités Abdou Moumouni de Niamey (Niger), de Cotonou et de Parakou (Bénin) ; CNRS, EHESS et IRD (France) ; IUED (Suisse).

³ Plus aucune des institutions du Nord qui figuraient dans notre conseil de direction ne nous accorde de subvention depuis 2005 (nous bénéficions toutefois du prêt d'un terrain appartenant à l'IRD). Seule l'Université Abdou Moumouni de Niamey nous a par la suite versé une subvention.

⁴ Aujourd'hui il est réduit à 8 membres, et présidé par Thomas Bierschenk (Université de Mainz, Allemagne).

et de comptabilité, et que notre professionnalisation en ce domaine s'est faite très progressivement. Mais aussi parfois parce que certains de nos partenaires du Nord assortissaient leur soutien (par ailleurs extrêmement précieux à nos débuts) de conditionnalités que nous ne partageons pas. Nous n'avons, en de tels cas, jamais cédé, et, au bout du compte, nous sommes restés bons amis avec ces partenaires. Dans ces diverses circonstances, Gerti a toujours été de notre côté, plaidant notre cause avec discrétion et efficacité.

Un partenariat pour une fois « pour de vrai »

La conception du partenariat qu'avait Gerti était de l'ordre de l'accompagnement : On marche aux côtés d'un ami, sans lui indiquer la route à suivre, sans jamais se mettre au premier rang, en restant même plutôt en retrait, présent, disponible, mais sans traîner derrière ni quitter la route.

Nous avons maintenant une expérience de dix années de relations avec des partenaires du Nord, bien au-delà des seules institutions scientifiques qui nous ont appuyés au sein du conseil de direction. Nous avons en effet bénéficié de financements provenant d'institutions de développement ou de recherche très diverses, issues de nombreux pays (Suisse, France, Allemagne, Danemark, Belgique, Royaume-Uni, Canada, Union européenne), selon des procédures très diverses, avec des interlocuteurs multiples et changeants. Le bilan est sans détour : Le partenariat dans sa version Gerti reste rarissime, et donc d'autant plus précieux.

Les « partenaires » ne manquent pas, qui ont voulu nous imposer leur vision des choses, leur méthode, leur rythme, et nous reléguer au statut d'exécutants salariés de leurs propres choix.

Les « partenaires » ne manquent pas, qui ont voulu planter leur drapeau sur nos activités, nous cantonner dans un rôle de faire-valoir ou de comparse local, voire même s'approprier notre expérience collective comme si elle était leur œuvre et que nous étions leurs supplétifs.

Les « partenaires » ne manquent pas, qui, derrière les sourires et les affabilités, pensent qu'une institution africaine, fût-elle de recherche comme la nôtre, doit relever d'un registre nécessaire du soupçon et de la méfiance, et qu'il faut contrôler sur une carte d'état-major jusqu'au nombre de kilomètres que nous avons déclarés pour une mission de terrain à Zinder ou à Tahoua.

Les « partenaires » ne manquent pas qui, après avoir enclenché une collaboration avec nous afin de développer un programme de recherche, ont stoppé en plein vol ledit programme, sans tenir leurs engagements, simplement parce qu'entre-temps leur responsable avait changé et s'employait à prendre le contre-pied de la politique de son prédécesseur.

Les « partenaires » ne manquent pas qui, après nous avoir félicités pour avoir mis en évidence dans nos travaux les dysfonctionnements des administrations africaines, ne supportent pas que nous fassions de même pour leurs propres institutions.

Nous pourrions multiplier les constats de ce genre, et fournir pour chacun divers exemples, parfois grotesques, souvent attristants. Les mondes du développement et de la recherche, dont les discours sont si louables, si empreints de bonnes intentions, sont en fait des mondes durs, impitoyables, opportunistes, où les patriotismes et les chauvinismes institutionnels (et nationaux) le disputent aux stratégies carriéristes et aux lâchetés professionnelles.

Dans de tels mondes, Gerti était une incroyable bouffée d'air frais.

Certes, la peinture ne doit pas être par trop caricaturale. D'autres acteurs appartenant à d'autres institutions nous ont aussi appuyés de façon désintéressée. Nous avons d'autres photographies dans notre galerie mentale d'amis du Nord. Mais celle de Gerti reste la plus vive, la plus lumineuse.

On peut se représenter le partenariat « réel » comme un continuum entre deux pôles. A un pôle, les attitudes arrogantes, paternalistes, accapareuses, soupçonneuses, auxquelles nous avons été trop souvent confrontés. A l'autre pôle, Gerti. Et entre les deux pôles, parfois plus du côté Gerti, parfois plus du côté opposé, nous pourrions situer les nombreux acteurs avec lesquels le « partenariat » nous a fait collaborer.

Autrement dit, chez tous ceux auxquels nous sommes reconnaissants de nous avoir traités avec confiance et respect, il y a comme un parfum de Gerti qui rôde.

Une interdisciplinarité vécue

Le registre de l'interdisciplinarité est moins chargé d'enjeux que celui du partenariat, ne serait-ce que parce qu'il se limite pour l'essentiel aux frontières du monde académique.

Mais il connaît aussi d'innombrables hypocrisies. Tout le monde est pour, personne n'ose s'y opposer, mais, dans les faits, les barrières et les égoïsmes disciplinaires dominent largement.

On vous somme de montrer un passeport académique, de faire allégeance à une théorie, à un système interprétatif, à un maître-penseur.

L'engagement quasi obstiné du LASDEL pour l'enquête, sa forte orientation empirique, appuyée en cela par son conseil scientifique, restent une spécificité de ce laboratoire. La prévalence du terrain lui donne sans doute sa marque de fabrique.

Bien entendu, ces options de politique scientifique ont suscité diverses inquiétudes : Quelles affiliations occultes cela peut-il bien cacher ? Être piloté par

le terrain plutôt que par une appartenance disciplinaire ou paradigmatique, n'est-ce pas suspect ? Les thèmes de recherche du laboratoire relèvent en effet de la science politique (analyse des politiques publiques, sciences administratives), de la santé publique, de la sociologie des organisations, du néo-institutionnalisme. Les méthodes utilisées le plus souvent renvoient plutôt à l'anthropologie, ainsi qu'à la sociologie dite « qualitative ». Il s'y mêle parfois quelques pincées de droit, d'économie, d'épidémiologie. On pourrait préciser ces différents contours.

Gerti, issue des sciences juridiques, convertie à l'anthropologie du droit (Supiot 2005), responsable pendant plusieurs années d'un laboratoire africaniste profondément inter-disciplinaire, était comme un poisson dans l'eau au regard de l'approche pragmatique du LASDEL. Sa vie professionnelle était réglée par le même principe d'éclectisme théorique que le nôtre. Elle s'est engagée dans cette entreprise de construction de capacités de recherche au Niger sans s'occuper des statuts disciplinaires de ses collègues qui venaient d'horizons très divers (anthropologie, histoire, santé publique, sociologie, science politique). D'ailleurs, il faut reconnaître que le droit est faiblement présent dans le débat sur le développement, et que quand les juristes s'y engagent ils ne font guère montre d'innovation. Par conséquent, l'ouverture tentée par Gerti Hesseling et certains de ces collègues pour orienter leurs travaux sur des terrains comme le foncier (Hesseling 1992) ou la réforme de l'Etat (Hesseling & Oomen 2001) est d'autant plus remarquable. Evidemment, cette position reste encore embryonnaire dans les milieux des études juridiques en Afrique, où les chercheurs peinent à s'ouvrir aux problèmes sociaux qui les interpellent et pour lesquels leurs outils restent largement insuffisants. Les travaux de Gerti, au contraire, tentaient d'ouvrir le droit au terrain, à la recherche empirique, à la vie.

On pourrait à ce niveau évoquer un autre cadre de travail, proche, à la même époque, qui montre mieux encore les orientations de Gerti Hesseling. En effet, dans la foulée de la création du LASDEL, au début des années 2000, elle a joué un rôle actif dans un programme de coopération juridique associant, au Mali, la Faculté des sciences juridiques et économiques, la Faculté des lettres, des arts et des sciences humaines, et l'Institut national de formation judiciaire avec, aux Pays Bas, trois centres de l'université de Leiden, le Centre d'études africaines, l'institut Van Vollenhoven pour le droit, la gouvernance et le développement, et le Centre pour la coopération juridique internationale (Hesseling, Djiré & Oomen 2005 : 6). C'était une expérience novatrice qui aboutit à la rédaction d'un ouvrage important sur le droit en Afrique. En fait, derrière ce titre générique, se cachait un réel travail d'anthropologie juridique, porté aussi bien par des chercheurs maliens que néerlandais, et provenant d'horizons pluridisciplinaires. Ce travail qu'elle a coordonné avec un collègue malien et une collègue néerlandaise témoigne de son ouverture vers d'autres thématiques et d'autres

disciplines. Les éléments introductifs du livre qu'elle rédigea avec Barbara Oomen sont assez atypiques provenant d'un juriste. Déjà, les chapitres du livre sortaient du classicisme habituel qu'on reconnaît volontiers au droit, et s'intéressaient à des thèmes bien peu accrocheurs pour les spécialistes de sa discipline d'origine. Elle n'hésitait pas avec sa collègue à reconnaître « les tâtonnements des juristes » sur ces thématiques et la nécessité de redécouvrir le droit autrement. Il s'agit d'une approche ouverte, où le droit, souvent absent des terrains ruraux africains, pourrait trouver des pistes fécondes pour lui permettre de se renouveler et de prendre sa place dans l'analyse des dynamiques et des pratiques sociales en Afrique. Face à cette impuissance du droit moderne, Gerti Hesseling n'hésite pas à utiliser les approches de l'anthropologie pour comprendre les pratiques juridiques. A propos des chercheurs engagés avec elle dans cette démarche, elle parle d'« anthropologues-juristes », dont elle esquisse le cahier de charges pour aborder ce champ du droit vivant.

Conclusion. La salle Gerti Hesseling

Cette démarche initiée et mise en œuvre en terre malienne a été concomitante à l'engagement de Gerti Hesseling dans le conseil scientifique du LASDEL. Cela a coïncidé aussi avec ses fonctions de directrice du Centre d'études africaines de Leiden.

C'est forte de cette dernière expérience qu'elle nous a donné une aide très appréciable dans le domaine de la gestion du laboratoire, pour lequel nous n'étions pas formés. En effet, elle a toujours tenu à participer aux conseils de direction du LASDEL, en qualité d'observateur, ce qui ne figurait pas dans son cahier des charges initial. A ce titre elle a soutenu avec une grande efficacité notre plaidoyer pour que nous puissions recruter un professionnel de la gestion. Pour elle, ce n'était pas le rôle des chercheurs de s'occuper de ce type de questions, et ils n'ont en outre pas la compétence nécessaire. Son argumentation a été décisive. Depuis, après quelques tâtonnements, le LASDEL dispose d'un système comptable et de gestion fonctionnel, largement apprécié de nos partenaires.

Disponibilité, implication et chaleur ; vrai partenariat (aussi rare que précieux) ; fort engagement pluridisciplinaire et empirique ; coups de main jusque dans la gestion : Ce sont toutes ces raisons qui ont fait que nous avons donné le nom de « salle Gerti Hesseling » à notre salle polyvalente. Pour ces raisons aussi, l'étranger de passage sera immanquablement surpris de voir accrochés aux murs de la salle Gerti Hesseling des reproductions de peintures de Rembrandt qui ont fort peu à voir avec notre aride et plat environnement sahélien. Mais l'idée, vite adoptée par tous les chercheurs du laboratoire, a été de chercher ce qui pouvait symboliser Gerti et évoquer son pays d'origine. Elle

apportait souvent à Niamey, lors de ses passages, à titre de souvenirs, des calendriers illustrés de reproductions de toiles de grands peintres.

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HISTORICAL AND CULTURAL ASPECTS /
ASPECTS HISTORIQUES ET CULTURELLES

Cultural models of power in Africa

Walter van Beek

Africa has a wide array of polities that are characterized by extremely diverging leadership styles. How can the same continent house a Mugabe and a Bokassa, but also a Nyerere and a Mandela? Based on the Bourdieu notion of types of capital as the basis for inequality in society, this study sketches the cultural models that underlie African variations in power configurations that are set in a model founded on three power bases: Symbols, economics and social relations. From there, it formulates six basic types of power in Africa: The 'icon', the 'elephant', the 'executive', the 'pater familias', the 'lion' and the 'patron'. Polities and politicians move through these models in the course of their lives, which gives the model its dynamics. Finally, the six types show four major commonalities that inform African cultural thinking about power: power as a personal attribute; the use of the kinship discourse with all its ramifications in politics; the link with the spiritual world; and neo-patrimonialism and exploitation. In combination, they provide a portrait of African power relations where the major characteristic is the ready translation of the three capitals into each other.

A typology of power

The central question in this contribution took a long time to emerge and stems from my lasting fascination with the ways people in Africa define their interpersonal relations. The immediate stimulus for developing the model presented here was a series of lectures on 'Secular States, Religious Societies' that was organized by the African Studies Centre in 2003. The view presented here is that of an anthropologist who works mainly at the local community level and considers national systems of power in Africa 'from below', from the viewpoint of the village. Present-day Africa has been witnessing many examples of abuses of power, corruption, dictatorship and forms of 'criminalization of the state' (cf.

Bayart *et al.* 1999), but also democracy, leadership and serious attempts at decentralization (Hesseling & van Dijk 2005). I want to take the discussion away from these categories and reflect on the cultural bedding of power configurations. My general notion is that power anywhere consists of the transfer of agency by many to a few, and that the way of transfer depends on cultural definitions of power, i.e. on the cultural models people have of and for power, in this case African models. These models must be shared to some extent by both power holders and the populace in order to be viable and have some stability.

The thrust of this chapter is to develop a typology of power applicable to Africa that is based on general notions from Bourdieu's sociology of difference, and which then leads into some generalities and commonalities of African notions of power. To arrive at my model, I have disregarded the formal aspects of African nation states in favour of the African discourse on power. African nations have inherited the notion of the nation state from their colonial past (Davidson 1992) and all national polities have in principle comparable constitutional arrangements due to a shared history as well as pressure from international and donor organizations. The guiding question is what the underlying notions in African politics are. Of course, the problems behind this question are all too clear: African countries rank very high on the list of failed states and have shown some of the worst abominations of power in human history, but have also produced statesmen with unsurpassed charisma. What processes and dynamics have led to one continent producing a Bokassa and a Senghor and a Nyerere and not only a Mobutu and a Mugabe but also a Nelson Mandela?

My typology is meant to apply to Africa but is not restricted to the continent alone, as the transfer of agency resulting in power configurations is a fundamental aspect of human interaction anywhere. Nor do I subscribe to an 'African exceptionalism' because processes of power imbalance are universal and any fundamental process of the construction of power does not depend on a locale. However, even if the power bases and processes are recognizable elsewhere, their specific configuration may have an African slant, influenced as they are by the models of interaction people share, i.e. by culture.

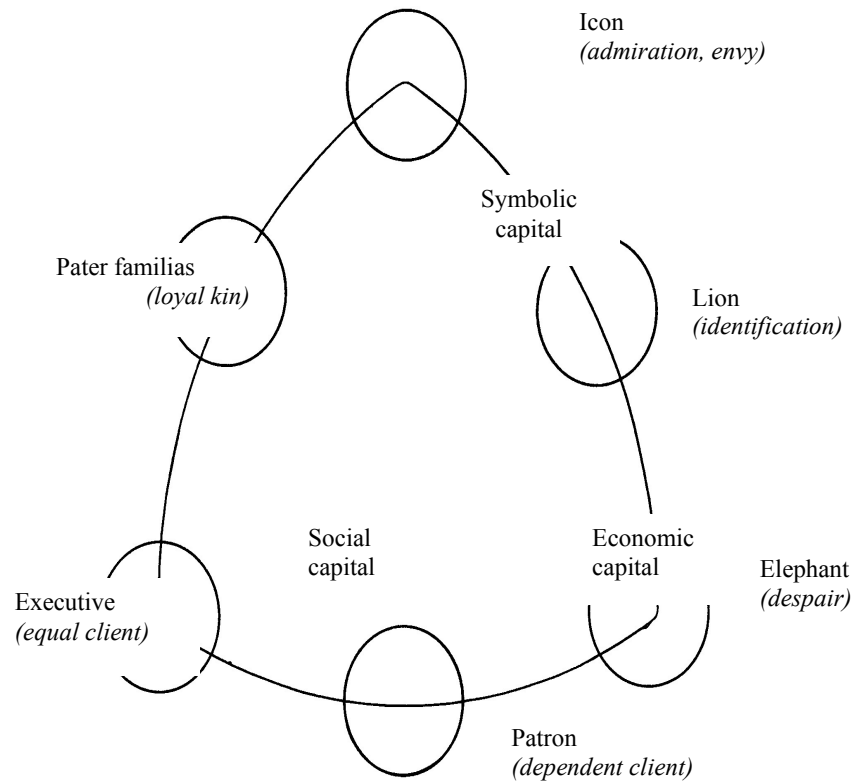
My main inspiration is the Bourdieu perspective on the variety of power bases in a hierarchical configuration, i.e. his theory on forms of capital. Though his theory is primarily aimed at social stratification and class distinctions, his thrust is the internalization of power and 'difference'. The main idea is that cultural and/or symbolic capital play a pivotal role in the reproduction of social structures of domination. After all, one major factor in the construction of a legitimate power imbalance is what he calls 'symbolic violence', i.e. the capacity of the dominating party to ensure that the contingent character of the social order is not explicitly recognized by the dominated other. The role of the various capitals in constructing a viable power imbalance is crucial.

Concepts of economic, social and symbolic capital are used here. Economic capital is the form of entitlement that is rapidly and easily converted into money, and most readily seen in terms of property rights. Social capital is the network of social obligations and connections that an agent enjoys and his/her nodal position in a network of social exchange relations (Anheier *et al.* 1995: 871; Bourdieu 1984: 248).

The notions of 'cultural capital' and 'symbolic capital' are quite similar. Cultural capital resides in education and the other cultural qualifications of the agent, while symbolic capital relates to prestige, honour and the public exposure an agent is endowed with. In European society where educational differences are eminently important, this distinction is surely apt in the field of education and in the arts, a central concern of Bourdieu. In the African situation, as in the Kabyle culture that he studied, the distinction between cultural and symbolic capital is less relevant because the various fields are less separated, power differences rely less on education, and culture tends to be shared by all the players in the political field. So I will subsume both as 'symbolic capital', also to include religious aspects in power definitions as power in Africa always bears some relationship to the supernatural world (Ellis & ter Haar 2004: 51).

To arrive at a model of power relations, three notions are crucial. First, power can be defined as the transfer of agency. Power as such means nothing if not in an exchange between two parties, which suggests that there is always an aspect of a (skewed) relational balance. All of these capitals, in the end, reside not in the ruler but in the ruled, as the ruler's power 'is always based upon an intricate and fragile structure of human and institutional relationships ... All rulers are dependent for their position of power upon the obedience, submission, and cooperation of their subjects' (Sharp 1980: 24). The typology of power configurations I give below may be read as an overview of leadership styles but only if one looks at the upswing in the balance. Each power configuration has a concomitant style of agency transfer at the bottom, which is part and parcel of the model. Second, any typology has to be accentuated to be enlightening, producing 'ideal types' and logical configurations of factors that reinforce each other, thus producing a coherent picture. Third, mixed types dominate the field. The model is a triangle of circles in which all three starting points, namely the corners, are at an equal distance from the whole plane. This signals that the capitals are of similar weight, and reliance on the various capitals is, to some extent, mutually exclusive. For instance, reliance on symbolic capital as the crucial power base means that the power holder will not base his power primarily on wealth. Power has a signature and the model is exactly that, a series of 'faces of power'.

Figure 3.1 A model of power relations



Following Bourdieu's typology of capitals, this signature of power relates first of all to the type of capital that is the principal power base. Some of the types of power encountered in the African political field have been given an 'African' label, although most have a more general name, reflecting the fact that this is not 'just about Africa'. The three types at the corners represent the clearest ideal types – the 'icon', the 'elephant' and the 'executive' – each drawing its power mainly from one capital. In between are the three mixed types that balance two capitals, the 'lion', the 'patron' and the '*pater familias*' models of (and for!) power that we find well represented in African politics.

In this model the six main types of power – or leadership styles – are indicated in normal typeface, and the correlated attitudes of the followers are in italics. For an explanation and illustration of this model, I first deal with the

ideal types at the corners, namely the icon, the elephant, and the broker, and then the mixed types: The lion, the patron and the *pater familias*.

One proviso is needed, however, as any model seems static. These types are cultural notions that serve as recognition points but politicians move through them in their careers, starting from one power base before accruing other types of capital. The various types of capital can translate into one another, which is a crucial aspect of Bourdieu's approach.

Power and the sacred: The icon

The power type that relies on symbolic capital more than anything else has been dubbed the icon. The best example today is Nelson Mandela, but the main discourse here is on power and the sacred. In all political systems over the ages, power and the sacred are intimately linked. Political regimes almost routinely use the trappings of religion, as do the secular ones and even the self-proclaiming atheist ones, and rulers readily clothe themselves in sacred robes. But here I am concentrating on the use of the sacred as a source of power, not just an expression. A close connection with the supernatural world is a major type of symbolic capital, also in Africa. Schatzberg (1993: 449) calls it 'the ambiguous permeabilities between the spiritual and the political'. Here I mention three types of relationship between the sacred and power, 'celestial', 'earthly' and 'charismatic'. Later, a fourth will appear: 'The alien'.

The first is the classic notion of the king as a representative of heaven. Sergio Bertelli (2001) has produced a beautifully written study on the king and the sacred in early Europe that highlights the *religio regis*, the worship of the king and his place in Christian worship, with a focus on the body of the king. In Europe, the primary link seems to be between the king and the supernatural world. Both are to be worshiped in tandem by the population, which has no function in the celestial theatre of state other than that of admiring audience and more or less willing contributor sandwiched between the powers of the church and the state.¹ The notion of the celestial king is by no means restricted to Europe in the past, but can be found in all the major empires from Egypt to China and Japan. I will come back to the celestial icon at the end of this section.

The classic African sacred king, though, is of an earthly type, and has been at the heart of long and intense anthropological debate ever since the publication of Frazer's *The Golden Bough* (1922). The main difference with the celestial one

¹ In his monumental study on 'old regime' political culture in Europe, Blanning (2002) shows how a public sphere (the neutral space between the ruler and the ruled) gradually developed in the 17th and 18th centuries in Europe as a space that increasingly mediated and mitigated power. But for my purposes here, the king in early Europe offers an apt comparison.

is the close link in Africa between the well-being of the king and that of his country. If the king fails in health or fertility, the country will suffer in the same way: The fields and the women will be barren, rain will not fall and disease will scourge the people. This cultural discourse on the health of the king reflecting the health of the people is a major African theme.² Throughout Africa's history, local and regional rulers have been associated with fertility and health, which is often voiced in the most direct ecological expression of well-being, namely rain. Rain and power are intricately linked in many African societies, even in the more acephalous ones (van Beek 1997; Abbink 1997). Likewise, the virility of the ruler is defined as emblematic of the fertility of his people and the land, as is testified by tales of kings or chiefs who had to commit suicide if they were impotent (Jacobson-Widding 1990). This is not unique to Africa and may be found elsewhere too, but it is a dominant feature in Africa.

On this there is consensus. The debate centres on the tale of a failing sacred king who was killed, either in battle or in sacrifice. Frazer's interpretation is no longer used – kings as dying gods on earth – but Africa furnished him with his best examples, such as Seligman's description of the Shilluk in Southern Sudan (Frazer 1922: 351). For Frazer, the killing was essential, for Seligman it was quite probable but for Evans-Pritchard (in his famous 1948 Frazer lecture), the myth of king killing was a discourse on political strife and rebellion, and thus a metaphor. Gluckman (1967) would later take this as a central case for his rituals of rebellion. And Evans-Pritchard's interpretation of regicide as metaphorical dominated social anthropology for a long time but the tide seems to have turned again. A spate of authors³ have stressed that the discourse could not be just a myth but had to be grounded in actual killings or sacrifices, not just rebellions. One dominant inspiration is the work of René Girard (1972) on the scapegoat, and in his slipstream Schnepel (1991) and especially Simonse (1992) interpreted the killing as a consensus-generating mechanism.

My angle here is in terms of the power of the discourse. Vaughan (1968) mentions the awe the Marghi Dzirngil from Nigeria inspired in the eyes of their neighbours: 'They kill their kings'. Among these neighbours are the Higi/Kapsiki, my own fieldwork terrain, and I can personally bear witness to the tall tales such a discourse inspires about the 'other': Stories of regicide are signposts of a powerful people. Long ago, Thomas Hobbes wrote: 'Reputation of power, is Power ...' (cited in Ellis & ter Haar 2004: 106), and, indeed, the discourse on

² In a comparative study, Henry Claessen identified this as part of a typically African cluster of the following elements: The ruler's health equals his people's well-being; the immobility of the ruler; lasting attributes of kingship; ritual doubles and the ruler's avoidance of actual warfare.

³ Simonse (1992), Schnepel (1991), Vaughan (1968), Young (1966), Abelès (1981) and Muller (1981).

the sacrifice of the sacred ruler is extremely powerful in itself, as it first defines, then constructs and finally 'celestializes' the present configuration of power.⁴

The question then is not whether tales of regicide are fact or metaphor, but how many actual killings, for whatever reason, are needed to keep up such a discourse. The answer is 'very few', and then the differences between a consensual sacrifice, exile, suicide and a rebellious killing become irrelevant. Imagined violence is quite real, as MacGaffey (2000) argues in the BaKongo case.⁵ So the relationship between the practice of sacred kingship and the discourse on regicide is never straightforward and in all probability no king was ever killed for just one reason.

If the European king was an icon of heaven, the African sacred ruler was an icon of the earth and the people. In Europe, the people were needed to have the king live, while in Africa the people needed the king for survival. I mentioned Mandela as the obvious present-day example. He represents the third type: The 'achieved sacredness' due to charisma and the contingency of history. He is quite easily the most charismatic head of state Africa has ever seen and still retains that charisma in retirement, or has even increased it. His arrival at the closing ceremony of the World Cup in 2010 is a splendid example: The sudden lights-out, the hush, the silence and then the golf cart transporting a frail old man: Nelson Mandela! His appearance, also because of his very fragility, was enough to send shivers round the world. His saint-like status has been evoked time and time again (van Kessel 2010) and is undisputed. His handling of power ensured this: He stayed in power no longer than his elected term, he worked on the international peace scene (even if not highly successfully) and he avoided any subsequent power struggles in South Africa. Other than the sacred king, Mandela's status as an icon does not really depend on his achievements but much more on his charisma, his history as a victim and his media appeal, even his very frailty. But an icon he is, a symbol in his own right, his charisma easily translating into images of 'Saint Nelson' (van Kessel 2010).

The example of Mandela shows that one's type of capital may change. During his first public appearances he was considered a terrorist by the ruling minority government as well as by at least some parts of the international community. He became an international and national icon much later, after going

⁴ MacGaffey's (2006) analysis of the 2002 killing of the Dagbon king offers a good insight into the complexities of these political processes and their symbolic representation.

⁵ The 'killing discourse' itself offers symbols galore in the way of purported killing: either in great stealth, or strangled in public, either incarcerated or squeezed between hinged doors, either a throat cut during a stolen hour of sleep or squashed under the combined weight of all the women in the village (Simonse 1992), the notions of stealth and collectivity eliminate all individual responsibility.

down the long political trajectory of the struggle for freedom and international support. However, charisma does not walk alone, and the ANC's public relations strategy that consciously projected Mandela's image as the face of the struggle was a result of conscious planning (van Kessel 2010).

What about the followers? The sacred king enjoys his power exclusively through the faith of his subjects. Simonse (1992: 37) relates how the relationship of the followers with the 'sacred ruler' is quite ambivalent but is, at the same time, formal and close. Sacredness may be venerated, generating awe and admiration but the African sacred ruler was bound by a complex network of kinship ties with his followers, he was a 'family icon' as well, with all the ambivalence that reigns in large families. The point is that the African sacred ruler – 'king' is often too much – is tested on a clear and unambiguous measuring stick: The health of his people, animals and crops and, above all, rain. These are things he effectively has no control over so the discourse on sacredness entails a discourse on a measured and judged performance.

The charismatic type commands admiration and identification. However, some ambivalence remains. First of all, he will never deliver according to his reputation as followers have inflated expectations of his reign and a begrudged envy often sets in, especially among the second tier of political leaders as they continue to operate under the long shadow of the icon. And his successor will have a hard time building up a loyal following (Stols 2002).

Power and consumption: The elephant

At a conference in 1985,⁶ Johannes Fabian reported a revealing incident concerning the division of a chicken in Zaire. As a courtesy, he was offered the chicken for sacrifice and insisted on sharing it with those present. The remark of one of his Congolese colleagues was '*le pouvoir se mange entier*' (power is eaten whole). One does not share power, one eats it all. Here the elephant is the core symbol and, for Africans, the animal is the epitome of eating, and eating it all. So the one who has power is an all-consumer and, inversely, whoever eats a lot surely has power. The president – who is often 'president for life' – is the 'eat-all', the great digester. In practice, he is the accumulator of wealth, for himself mainly, and he is also ruthless against adversaries, disposing of justice as he see fit. In the worst-case scenario, his exertion of power is capricious and also very visible as ruthlessness and cruelty are not hidden. Parties are either non-existent or there is one nominal party.⁷

⁶ 'Religion in Africa', Provo, Utah, US (see Fabian 1994). This was later incorporated into Fabian (1990). See also Schatzberg (1993).

⁷ By the way, Fabian gave the chicken to his Congolese colleagues and they ate it together.

Ellis & ter Haar (2004: 105) offer a fundamental insight into present-day relations with this kind of ruler in modern Africa: 'A fundamental conviction about the nature of heads of state, namely that they are basically aliens'. This is the fourth type of relationship between power and the sacred, and the most ambivalent one. Genealogies are constructed linking the ruler with 'divinely inspired strangers' and myths are formed about their origins. The power of the elephant tends to be defined in religious terms but of a more sinister kind: Marabouts, magicians, witchcraft and the 'politics of the belly' as described for Cameroon by Bayart (Bayart *et al.* 1999; Geschiere 1995). These stimulate 'personality cults of the old one-party states – that the head of the state is the repository of great mystical power that originates elsewhere' (Ellis & ter Haar 2004: 105).

Examples are disconcertingly easy to find in Africa. The most extravagant example was Jean Bedel Bokassa ('the First'), the former, self-styled Emperor (1977-1979) of the Central African Republic. I was in northern Cameroon during his reign when the atrocities and repression in the country were already quite clear and was astonished at the level of admiration Bokassa had in northern Cameroon, probably not because of intimate knowledge of his rule but due to the printed cloth with his portrait on, which was very popular. People spoke of him with great admiration and he was seen as a hero of decolonization, which was ironic considering his dependence on French symbolism (as *empereur*), his emotional attachment to de Gaulle (who he called *Papa*) and his reliance on France under Giscard d'Estaing (Titley 1997). His generation spawned more elephants: Mobutu in Congo (1965-1997), F.M. Nguéma in Equatorial Guinea (1968-1979) and Idi Amin in Uganda (1971-1979). Their reigns never lasted until they died though some enjoyed an *exil doré*. Bokassa was deposed by France and ended up as Christ's self-proclaimed thirteenth apostle, a telling example of the conflation of power and sanctity, but in this case after the fact (Venter 1999). All these elephants left their countries in great debt, which is proof of the adage that no one politician can build a country, but he can certainly destroy it.

Under the power of the elephant is the essential 'other' and the state is 'not us' (van Beek 1986), which has important consequences for any relationship with followers. The elephant creates a similar deep despair among his people. The examples of a super-rich president presiding over a poor people are, indeed, easy to find. Often the resource curse, i.e. easy access to and a monopoly over plentiful mineral or other natural-resource wealth, is in operation here, which implies that the power holder does not need the support of his people. Through oil, diamond or coltan money he rakes in substantial wealth and can pay his military or police force as well as his cronies and family, leaving the general population to struggle. Elections may be held to keep up appearances internationally, as no country is an

island any longer, but the chances of political change are slim. President Nguema of Equatorial Guinea, himself part of a budding dynasty, is on record as stating that he sees himself as the guardian of his people's recent oil wealth, keeping the money safe until the population has a sufficiently high standard of education to use it profitably. It is, of course, safe in a Swiss bank account. He can always defend his policy by pointing to the fact that his people hardly pay any taxes. *Le pouvoir se mange entier*. Indeed from 'below' there seems to be a basic understanding of his position and this is just 'what elephants do'. Schatzberg mentions the silent rage elephants generate when they transgress the norms of their followers, and 'power and politics in African society have often more to do with consumption than with transformation' (Schatzberg 1993: 446). However there seems to be a moral matrix based on cultural notions of the 'fatherhood' of the nation that limits greed and accumulation. When rulers transgress these norms, rage, resignation and despondency set in. However, this may be tinged with admiration for someone who has really made it.

In 2006 I drove with a few draughts friends past a huge mansion in Yaoundé, which they said was the house of the president of Cameroon Airlines. They were obviously proud-by-proxy, happily pointing out someone who had made it big time. I was less impressed by the sumptuous building as I had personally just experienced the company's performance in providing air transport, which was 'less than perfect'. In addition, one of their planes had been grounded in Paris for three months after being considered unsafe for travel due to lack of maintenance.

Wealth in Africa should be displayed, and elephants are very visible and very visibly rich. Subjects feel powerless but have, as an escape, a limited form of identification, so their feelings of despair and unhappiness may be somewhat alleviated.

Social capital exclusively: The executive

African models of power are interwoven with a kinship discourse, which is evidence of a dominance of social capital over all other forms of capital. Social capital, as will be shown, is crucial in all the examples cited here, but exclusive in almost none of them. The executive is a figure much more present in Western than African politics: S/he is the wheeler-dealer, someone who lacks first-order resources but relies on his/her links with people who do have other forms of capital. This is the broker who links up extensive networks of people.

Not an African, but a Melanesian example fits the bill here: The classic 'big man'. At the local level, this social entrepreneur mobilizes his kinship and alliance networks to produce a huge amount of surplus food. When stocks are plentiful, he invites a big man from another locality and presents an overwhelming gift to his neighbouring rival. He thus creates a huge debt on the

other side, which will eventually be reciprocated by an even more voluminous counter gift. The main mechanism for advancing in life is thus the redistribution of wealth that the big man himself does not in fact own but can dispose of through his clever handling of kinship ties and obligations. Such an executive leads his peers in constant rivalry with other executives, trying to gain a competitive edge through efficiency and reliability. He does not engage in the making of a dynasty and his position will not be inherited on his death, only taken over by a competitor. A leader is unknown at the local level in Africa, but also in Melanesia big men operate only at the local level. Many chiefdoms engage in redistribution, as is evidenced by the patron-client system, but on the basis of position and wealth.

The clearest African example at the national level is Botswana, especially President Festus Mogae who led his country from 1998 to 2008. After his two presidential terms he received wide international acclaim⁸ and is currently the Special Envoy of the UN Secretary-General on Climate Change. He had a typical executive leadership style and ran the country like a company, with clear goals, development plans and an unusually large measure of accountability. He had some political experience under his belt when he was elected but was mainly known as a 'consummate technocrat' (Werbner 2004: 87). He was educated in the UK (with degrees in economics from Oxford University and Sussex University) and his speeches demonstrated how interested he was in achieving his goals, with the technocrats passion for successfully projecting numbers, thousands and millions recited in almost hypnotic detail, as an index of increasing progress and a sign of the good life that could be lived in this capable state' (Werbner 2004: 89). He was succeeded by his vice-president, Ian Khama, who has a fundamentally similar leadership style.

Social capital in Africa quickly and easily translates into economic capital as leaders not only get rich, but are also expected to become wealthy. The image of a political boss handing out emoluments that are not his but belong to 'friends' is not an easy one and is therefore rare in Africa. In addition, its hidden character does not fit in well with African political culture, which thrives on visibility. Werbner's (2004) book entitled *Reasonable Radicals and Citizenship in Botswana* is in fact a lengthy explanation as to why this model of power was feasible and possible in Botswana and points at factors such as the high level of education, the free press and judiciary, the country's ethnic composition with one dominant group and a few significant minorities, and finally some cultural

⁸ He was awarded the Grand Cross of the *Légion d'Honneur* by French President Sarkozy for his 'exemplary leadership' in making Botswana a 'model' of democracy; the Mo Ibrahim Prize for Achievement in African Leadership with a very generous endowment for life; and was extensively praised in person by former UN Secretary-General Kofi Annan for his work in the fight against HIV/AIDS.

specificities, such as the Kalanga definition of elderhood. Mogae is a Kalanga, a significant ethnic minority that since colonization has set out to advance through the new channels of upward mobility, education and wealth. With its economic dependence on diamonds, Botswana could very easily have become a client state of its powerful and rich neighbour, South Africa, or have suffered from the resource curse, but instead it has focused on accountability, redistribution and education for its citizens.

Examples of this type are numerous in the North, for example most prime ministers in the Netherlands exude an aura of the executive, the present incumbent included, but executives with excellent communication skills. Why are there so few in Africa? First, this is the way most African rulers rose to power in their early days (van der Veen 2004). An executive is someone who already has contacts with other people and, through apt handling his social ties, wins access to power as a nodal point in a political network. When they start out in their political careers, they do not usually command personal riches or symbolic capital. It is once in power that their social capital and their new position quickly translate into economic capital, changing their leadership style and power configuration too. So the type is important, actually as a model *for* more than as a model *of* leadership.

The corollary is one of clients who are, in principle, the equals of the executive. Bureaucracies can generate executives, such as lobbyists and power brokers, but stable bureaucracies are not exactly the hallmark of Africa. The executive needs to be a sharer, dividing the spoils as evenly as possible among his client contacts who are, in turn, competing among themselves for first-order resources that have to be traded. Such a type sit uneasily on African soil, as they work best in an economic situation with a large variety of different resources accessed by an array of people with diverging skills. This is not the case in Africa, as most wealth is of a very primary form, such as minerals that are accessible to anyone in power. So the executive type has to be a conscious choice, a 'divide-and-rule' based on sharing, and can only be envisaged in a relatively rich country with a small, homogeneous population with a definite ideology of sharing and accountable or even 'transcendental' leadership (Werbner 2004: 138-140).

Charisma plus connections: The *pater familias*

Kinship is a dominant discourse in African interpersonal relations and the *pater familias* is based on this discourse. The central figure in this model, usually a president, remains aloof from national politics, running the government through personalized links with parties after establishing a fund of general acceptance and personal charisma. He aims at generating consensus, even if his own voice

counts for a great deal. Examples are the President of Mali, A.T. Touré, and his predecessor A. Konaré, and also former President Ahidjo of Cameroon who was reported to run his government like an old-time Fulbe chief, as the father of a large extended family. In a similar way, President Wade of Senegal is trying to cast himself as a historical figure in the decolonization process. Personal status helps here and former President Kenyatta of Kenya is a good example. Political parties are important as a rallying force for elections and a way to link government with the general population, but they all relate to the president. There is no real opposition with the leaders of the various parties aiming for agreement more than debate. Elections can run smoothly and the sheer number of political parties, which are often highly personalized, gives the impression of a divided country, while in practice this is not the case.

Let us take an example. When talking to a breakaway faction of the ADEMA party that brought Konaré to power in Mali, I asked the leader of the new party how his programme differed from ADEMA's. He was astonished: 'Of course there is no difference. It is all about development and democracy, what else?' Wrong question! I then realized that Mali has a host of political parties, all with names that juggle the same terms: Democracy, people, *rassemblement*, development, association, progress and liberty. It has become quite difficult for a new party to find a name to distinguish itself from the others. The root cause of all these political parties is that each has a patron, an important, rich man who is seeking political fortune in the national arena with the help of his clients in order to become the *primus inter pares*. And the few parties with a more ethnic slant have exactly the same general principles and use similar names (van Beek & Fofana 2005).

This type of leader has to have a certain personality and be not a fighter but a unifier. Michael Schatzberg (1993; 2001) uses the idiom of the African father who has several basic duties, namely to provide and nourish, to raise his children to adulthood, to eat well himself, and to protect his women. We saw the elephant transgress these norms: The *pater familias* type tries to live up to them. Such a definition of power also requires a general culture in which consensus is important, harmony should prevail, and political legitimacy is crucial and is based on a clear sense of a shared political and social history. In some colonial discourses, traditional chiefs were called 'natural rulers' (Wiredu 2001), aiming at – and hoping for – a consensual authority that would surpass the divisions of ethnicity (Hinz & Gatter 2006).

The corollary is that of the loyal kinsman. The (extended) kinship discourse is in full force here, with a clear focus on its unifying aspects: 'All brothers and sisters' and 'one family'. In Mandé culture, differences are expressed in relative age, older brother versus younger brother, with sometimes surprising denotations such as when the younger brother is considered to retain the power, not the

older one. Anyway, kinship is a flexible discourse, well fitted to the notion that the political arena in effect is one major extended African family, the favourite expression of African chiefs when confronted with demands for democracy (Fokwang 2009). In their study of grassroots views of politics in Mali, Bratton *et al.* (2002) found that people were in favour of democracy but do not participate much in it: They like consensus more than competition and national unity more than a real political arena. So the main strategy for followers is to join the bandwagon of their patron, profiting from the successes and wealth of their distant kinsman, or to redefine their relationship with the successful leader in terms of kinship. In the end, they like a large government with numerous patrons, as it is not opposition but consensus that brings emoluments.

African rulers like to portray themselves as fathers or, in Southern Africa, as 'the exemplary uncle' (Werbner 2004: 150). So, as van Walraven remarked, a gathering of African leaders is a meeting of *patres familiae*. This is evident throughout the history of the Organisation of African Unity (OAU), which is an organization of dignified fathers who respect each other's families in exchange for similar respect. Dignity and respect form the main melody, overplaying any counterpoint of criticism (van Walraven 1999). This renders decision-making slow and laborious, as consensus among the *patres* is deemed more important than the result of their actions. Whatever action there may be is usually called silent diplomacy, and it is fuelled by the hope that the wayward other 'father' will behave in the face of subtly expressed disapproval among his peers. However, some rulers may portray themselves as fathers of their country but are, in fact, cut from a different cloth. The powerlessness of the OAU against Mugabe and the failure of Mbeki's silent diplomacy towards his neighbouring rogue state are good examples. Mbeki was not dealing with a father after all but with a different African phenomenon: The lion.

Resources and symbolic power: The lion

The lion combines economic and symbolic capital: The means and the meaning. For the lion, power is a personal attribute and his governance is private property. The lion owns his polity for a variety of reasons, often as a result of his country's political history. Two subtypes are discernible. The first is the *liberation hero*, the one who liberated the country. He is the 'Father of the Fatherland' but only in a very literal fashion and, having wrestled dominion from the former colonizer, he is the *genitor* and little else. Robert Mugabe is the clearest example today. He inherited a country with a secular state that was governed by law and had, on the whole, a functioning infrastructure. He did not abolish Parliament but came to dominate it with the ZANU-PF claim that the country was 'theirs' by rightful conquest. The multiparty system was subsequently easily

dominated by the party that had fought the independence struggle. The historical notion of revolution is crucial in this model.

The first appearance of a lion is greeted with great enthusiasm, but this enthusiasm erodes quickly, though they do, as in the case of Mugabe, retain a considerable following at grassroots level even when they accumulate dictatorial characteristics. They are extremely reluctant to retire and, if need be, change the constitution or the voting rules. Their political support is based on close well-remunerated cronies, a system that then turns to using violence against internal opponents, while denying responsibility for it. Norman (2008) sketches Mugabe's pathway from 'teacher, revolutionary' to 'tyrant', and in his analysis of 'Comrade Bob' Meredith (2008) tracks Mugabe's pathway from the hope of interracial Africa to a blighted country plundered blind and beset by violence and intimidation.

The second subtype is the *Grand Old Man* (GOM), the 'Father of the Independent State'. These are the liberators of old but those without the fierce struggle behind them that characterized the independence of front-line states. Nkrumah, Houphouët-Boigny and Senghor are obvious examples of this type. They dominated politics before and after the 1960s, often as presidents for life. Such a president cannot envisage his country without his own presence, and neither can the country – for a while. In short, the president owns the country, which identifies totally with him, as an official Ghanaian presidential portrait of 1961 jubilantly declared:

Kwame Nkrumah is our father, our teacher, our brother, our friend, indeed our very lives, for without him we would no doubt have existed, but we would not have lived; there would have been no hope of a cure for our sick souls, no taste of glorious victory after a lifetime of suffering. What we owe is greater even than the air we breathe, for he made us as surely as he made Ghana. (Meredith 2005: 179-180)

Almost inevitably, viewing our exposé of the sacred king, Nkrumah drew Messianic claims for himself. And when he was ousted in 1966, placards on the streets appeared claiming: 'Nkrumah is NOT our Messiah' (*Ibid.*: 192).

GOMs can become old lions, already ousted by younger competitors and, if they come back, they are an embarrassment, like Banda in Malawi. When a new male alpha lion takes over a pride, he kills off all the cubs sired by his predecessor. The whole pride has to be his: This is ownership in *optima forma*. The 'cubs of the lion' may have a hard time, especially when a new lion arrives as one has to be part of the ruler's 'brood'. The lion generates identification as the only way for follower survival. The GOM-type lion is so closely identified with the newly independent country that opposition is difficult to envisage and easily dismissed as unpatriotic. So one major transfer of agency is through patriotism, and is interpreted as the personal identification of the followers with the leader. His renown,

his wealth, his many wives and his prowess reflect directly on the definition of self at the core. The pride of the nation is reflected in follower patriotism.

The other type of lion, the liberation hero, generates similar identification but – at least if we take the Mugabe example as being paradigmatic – this identification wears thin more quickly. The Zimbabwean struggle was more collective, was bloodier and more people suffered severe losses, so a more collective ownership of the country came rapidly to the fore. The new regime thus generated high hopes but these were quickly shattered. Civil strife between two or more liberation heroes is a ready option, sometimes lasting just until one of them is killed, as in the Angola example with Savimbi's death. The lion has to be alone and peace is only assured when the rival is eliminated. Viewing the fleeting nature of national gratitude, this type easily slides into despotic rule, whereby the law, the constitution and especially election rules are adapted to suit the old lion. Mugabe, through a complex set of measures, still retains power, keeping the new young lions at bay, while verbally repeating the worn-down anti-colonial slogans that brought him to power but that no longer apply. There is a desperate increase in 'state theatrics' (Werbner 2004: 189) in order to repeatedly revive the receding history of liberation. In his case, despotism made identification possible for a coterie of cronies only, while the general population can only wait 'till God does His work', as a Zimbabwean refugee told me in South Africa.

Relations and resources: The patron

Patron-client relations are deeply rooted in Africa. In fact, some of the classic cases of patronage stem from the continent, notably from the client kingdoms in the interlacustrine area. The stratified society in these regions rested upon an unequal exchange of cattle for political and military support or labour, an exchange producing permanent links of dependency between patron and client. The many varieties of this exchange are found in the permanence of patron-client relations, the number of duties involved and the definition of the rights of the client.⁹

However throughout, the patron commands resources and distributes them or, in many cases, redistributes them after collecting them from his clients. He thus generates a layer of dependents through personal links, which are financed by private or public means. So patronage, a topic very much in fashion in anthropology in the 1980s, involves a lasting vertical relationship between two persons. It is traditionally many-stranded as both parties share not just one

⁹ The classic description is Maquet's (1961, 1971), which led to a spate of interpretations (Mair 1974) and debates on African feudalism. See, for example, Mafeje (1991).

sphere of life but also meet each other in other capacities, either as kinsmen, in-laws, political partners or just friends (Grishow & McKnight 2008).

Patron-client relations are, first and foremost, social relations that persist over time between unequal partners. The main discourse here is again based on kinship, providing an idiom for differences between people (age, generation, lineage) while stressing the interdependence of all concerned: 'We are all family'. The apparent identity of 'being the same family' obfuscates the fact that no two family members are the same and that all relations within the family are on a footing of gentle inequality. The pervasiveness of the kinship idiom therefore provides a ready framework and legitimacy for patron-client relations. But the dynamic is not only top down. Putting oneself up as a client creates a patron, and thus creates the reciprocity a patron has to live up to. In exchange for the support and loyalty of the client, the patron has to take care of his client and bear his well-being in mind, but then in such a way that they do not become independent (Aidoo 2006).

The corollary is that patronage both creates and is supported by subaltern clients, people who define themselves as depending on the patron. As the anthropologist Jan van Baal once told me: 'Paternalism presupposes an amount of filialism'.¹⁰ While the executive acts among equals to work his way up, the patron has to take care of dependents. Such an attitude of dependency both supports and seeks to generate patrons, so the two attitudes, patronage and clientelism, reinforce each other. Client dependency stems from a calculation of profit but also from a sense of insecurity. Receiving benefits from one's patron in return for political support and services is an efficient way of making money in an economy where production does not pay well (van der Veen 2004). But, just as importantly, the insecurity of life renders an independent existence precarious, and life without the umbrella of a powerful figure over one's head is daunting. Clientelism in such conditions is a security arrangement, costly in individual pride but efficient as a productive use of one's social capital. Especially in times of social disruption, having a patron is of great importance (Chabal & Daloz 1999; Power 2001). For a client, their patron is an important figure, someone on whom one can rely: They are wealthy, generous and influential, but with a good memory for services rendered. An example from my own experience is as follows:

West African sports organizations are shot through with client-patron relations. The *habitus* of the 'West African official' is rooted in neo-patrimonial relations and people like to define themselves as clients to influential kinsmen, politicians and foreigners. When dealing with me, West Africans often used the expression *Tout dépend de vous maintenant* ('Everything depends on you now'), implying that both the success of our joint work as well as their own well-being lay in my hands. I did not

¹⁰ Personal communication.

like that, as I did not want to be in a patron-client relationship with them, but it was hard to avoid. When I tried to explain in the CAJD that when they dealt with European officials this expression did not work well, they tried hard to understand what I was saying but I often wondered if they really got the message. Both as FMJD president and as EVP for Africa I tried to avoid these tangled obligations although it was not always easy. Africans expect a president to be wealthy, of course as long as he is generous: Money should not be a problem for him. When I – occasionally – used money to solve a problem, the Africans beamed: *Un vrai président* ('a real president'). Of course I handed out the pictures to all involved, as a patron should. (van Beek 2011)

Generalities

What commonalities are to be found in these six models of African power? Four general notions emerge. The first is power as a personal attribute, as part and parcel of one's personality. Power is not so much in the relationship, and definitely not in the delegation of agency from below, but is inherent in the psychological make-up of the 'top dog'. This relates closely to the general idea that the fief belonging to his realm is his personal property, inalienably belonging to the power figure, and is his to rule, his to profit from and his to appropriate. I once heard a government employee from Zimbabwe defend the Mugabe regime using exactly this notion: 'We [ZANU] liberated this country so the country is ours to do with as we wish'. And that is just what they are doing. The fact that this Zimbabwean was quite young, too young in fact to have witnessed let alone participated in the struggle, makes the cultural relevance of her remark all the more poignant. The notion of ownership is not exclusive to the power holder but shared by his subalterns, and is founded on a bedding of cultural agreement. So if the fact of being in power is an aspect of the individual, and the fief a personal property, then the idea of an indivisible power is almost inescapable. Such power cannot be shared but has to be 'consumed in one', the same way as a personality cannot be divided. This personality-oriented notion of power also explains why power holders so very seldom step down of their own accord. Of course, power is addictive everywhere, but relinquishing power after one's term is over – or after a scandal – is extraordinarily difficult in Africa. A few positive examples stand out, like Mandela in South Africa, Mogae in Botswana or Konaré in Mali, but an African president who ends his reign when his constitutional time is up is still rare. Instead, they prefer to hold on through skewed elections or by denying having lost at the ballot box (as Gbagbo recently tried to do in Ivory Coast), to manipulate the electoral system (as in Zimbabwe and Ethiopia) or to change the constitution (as happened in Namibia and Uganda).

The same holds for much less lucrative positions as well, like in sports administrative bodies, as I can confirm from personal experience. The president of the Senegalese draughts federation once ran into serious trouble due to his unstinting support

for a particular grandmaster. His protégé ruined the Senegalese team's results and was later imprisoned in Italy for drug trafficking. Even then it took huge pressure to get the president to abdicate: 'Am I such a European that I would step down?' was his first reaction.

The second general notion relates to the discourse on power and the conceptual tools used when talking about the relationship between leaders and followers. The most important one is, again, the kinship discourse. As already mentioned, kinship provides a ready-made idiom for both identity and difference, a versatile linguistic tool for expressing unequal but interdependent relationships. But in Africa, the idiom is more than a linguistic tool and more than just an idiom: It is an ideology in its own right. The notion of kinship is first and foremost of a bond, and its extension into the political realm is part of the specificity of African politics. The large African extended family is the model for national unity, an ideology that happily ignores the fact that such a family is often anything but harmonious. The ideology of the family presupposes a shared interest and mutual assistance, as well as material sharing and collective guardianship. Reality can be quite different in large polygynous families where the sons of one mother habitually compete with their half-brothers, co-wives are classic rivals for their husband's affections, while the fathers of the family routinely complain that their sons do not heed their advice and do not have the interests of the family at heart. New material wealth should be shared but increasingly this obligation is seen as a hindrance and something to be avoided as far as possible. And the monetarization of wealth and its easy flow across borders make this possible. The tension between ideology and practice thus makes for a flexible discourse, an indication of unity as well as difference, of shared identity versus mutual dependency, of harmony as well as hindrance, and of coordination versus exploitation.

The third general notion is the link with the spiritual world. Across Africa, power has a supernatural aspect and is part of symbolic capital. Sacred kingship is one example, but so is the link between power and witchcraft (Geschiere 1997), as a ruler must have 'power in the belly'. Rumours such as the cannibalism of Bokassa add to this idea, illustrating the ambivalence of supernatural power. After all, this kind of ambivalence also characterizes political power. Power is feared and definitely not liked; power is courted but kept at a distance; and power is used but avoided. The symbolic capital of the spiritual world is erratic and ambivalent.

The fourth notion is neo-patrimonialism and its excesses, exploitation and corruption. Often the kinship discourse serves as an excuse, as Khadiagala (1990: 355) remarked for the 'blatant defense of authoritarianism through the thesis of African exclusivity'. It is a defence both by the power holders and, according to Khadiagala, by many analysts. But the kinship discourse is no

guarantee against either exploitation of kin by power holders or inordinate demands by kinsmen on an office holder. African politics relies on social capital that, combined with kinship, easily provides a tool for patron-client relations. Neo-patrimonialism is a dominant characteristic of almost all African polities, though in different fashions and colours (Médard 1996). The recent literature on neo-patrimonialism bases itself on Weber's classic analysis, acknowledging the inherent problem in distinguishing between the legitimacy of redistribution and the illegitimacy of corruption (Lawson 2009; Taylor & Williams 2008). After all, African polities cover the whole gamut from empowerment to exploitation, and from sharing to kleptocracy (Bracking 2003: 32), the latter term being coined for Africa, or more specifically for Mobutu. It is this sliding scale from redistribution to stealing a country blind that is bedevilling Africa when it comes to building up good governance (cf. Ellis 2006; Mwakikagile 2006; Power 2001), a process that is sometimes clothed in academic euphemisms such as 'goal displacement' (Bongyu 2003).

A major problem in Africa is the social gap between the level of family and community on the one hand, and the national level on the other. Despite attempts at doing away with the level of the ethnic unit in a range of countries, this has remained an important socio-political frame of reference in Africa, and is returning with a vengeance in some areas. As the largest level at which the notion of kinship can still operate, ethnicity precludes the formation of national identity and identification, leaving a conceptual gap between kinship and the state. Neo-patrimonialism is one mechanism by which ethnic politics appears on the scene (Berman *et al.* 2009) and that to some extent distributes wealth but precludes systems of power sharing and any channelled delegation of agency (Hesseling & van Dijk 2005; Mehler 2009; Médard 1996). Neither the political parties nor civil society can fill this gap.

So far, I have followed Bourdieu in distinguishing between the various forms of capital in Africa as well as elsewhere in the world. One proviso for Africa is that its cultural capital is not very distinctive, as power holders and their subjects tend to share the same culture: There is no elite culture in Africa, no language of high art or patronage of the arts or the sciences. The super-rich have enormous mansions and huge bank accounts but do not start a museum or a zoo nor, for that matter, do they set up their own NGO to solve their country's problems. What distinguishes elite and commoner is just elite consumption, with the elite buying the very commodities their followers crave for in vain. The three remaining powers – symbolic, economic and social – share some general characteristics in Africa. First, social capital is of supreme importance, both in accreting power and in retaining it, with the dominant idiom of kinship colouring relations and cultivating social ties being a major priority. Second, social capital tends to convert very quickly into economic capital. This is because of

the relative dominance of social ties over others and, just as importantly, because of the nature of economic capital. What we have seen as economic capital in the three models of the lion, the elephant and the patron is based on access more than on ownership, and then it is more about access to basic resources than about a position in a configuration of production. African wealth, at least for politicians, mostly resides in primary materials and not in production or distribution, and definitely not in services. This makes African polities very vulnerable to the resource curse, as can be seen in increasing numbers of countries, such as Gabon, Angola, Chad, Equatorial Guinea, Nigeria, Central African Republic and Congo, and with many others following close behind.

To conclude, African economic capital is about access, which underscores the importance of social capital, and the various capitals are not independent of each other. Symbolic capital seems to be more so, based as it is on local and regional notions of sacredness. However, the notion that power always has a supernatural aspect is clear in African thinking, as is the reverse: Supernatural elements always have an aspect of power too. The spectacular example of sacred kingship might shield the observation that, on a lower plane, all traditional forms of power in African societies have some link with the 'other world'. Here, as with the other capitals, ambivalence reigns: Power in Africa is always constructive (often voiced as 'fertility') and destructive (in the form of witchcraft). In the end, what might characterize African models of power most is the limited distance there is between the three forms of capital, as African political resources quickly translate into each other, together making an intoxicating cocktail of that most heady of all human potions, namely power.

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Human rights in the traditional legal system of the Nkoya people of Zambia¹

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From a naïve transcontinental perspective, the challenge surrounding human rights amounts to mediating and vindicating a North-Atlantic cultural product outside the North Atlantic in contexts that initially appear to be alien and inimical. From this perspective, human rights in Africa are part of the wider problematic of the continent's reception of North-Atlantic constitutional law. However, intercultural philosophy exposes this naïve view as inherently hegemonic for attributing the monopoly of something that could, alternatively, be considered an inalienable achievement of humankind as a whole to the North-Atlantic region. This approach is disqualifying for persons outside the North Atlantic as it makes it more difficult for them to adopt human-rights thinking as potentially universal and as resonating with their own local concepts of personhood, integrity and freedom. The present argument challenges the hegemonic approach to human rights. On the basis of a study of the human-rights thinking in the traditional legal system of the Nkoya people of Western Central Zambia, I argue an endogenous, local historical basis for many of their human-rights concepts and that the application of these rights in Nkoya society is often subtle and liberating. In addition, the Nkoya peo-

¹ Fieldwork among the Nkoya people has been conducted at regular intervals between 1972 and 2011. I am particularly indebted to the inhabitants of the valleys of Njonjolo and Kazo for their hospitality, friendship and trust over all these years. An earlier (Dutch) draft of the present argument was prepared at the request of my former colleague, the legal anthropologist Emile van Rouveroy van Nieuwaal in 1996 and was extensively commented on by him and Gerti Hesseling. While I am grateful for this feedback, the responsibility for this text remains entirely my own. For a personal tribute to Gerti Hesseling, see van Binsbergen (2011).

ple even boast a few human rights for which there are no ready equivalents in standard North-Atlantic human-rights catalogues.

Looking for a vantage point from which to consider human rights transculturally

In the mid-1980s the then Belgian Minister of Foreign Affairs, Leo Tindemans, was reproached in the media for having double standards in his contacts with the repressive regime of President Mobutu. While he was emphasizing human rights in his own country, he was allegedly displaying the greatest tolerance of the flagrant and systematic violation of human rights in Zaire/Congo, with which Belgium was entertaining extensive ties of friendship and neo-colonial relations. The Minister's self-defence was remarkable. Pressing into political service a cultural relativism that had been one of anthropology's main products in the 20th century, he explained his policy as follows: 'Well, Sir, you must not look at this through our Western spectacles. These people in Africa have their own culture, also in the field of human rights, and we must respect that.'

For several decades now, an important export product of the North-Atlantic region has been formed by human rights (also called fundamental rights), especially those that are closely associated with the nature and functioning of Western democracy. The export of human rights has not only been furthered by persuasive action and setting the right example but also by multifaceted social, economic and military sanctions, particularly in the context of foreign aid, which for decades was a major source of income for many African countries. With Minister Tindemans, one could have pretended that these human rights were nothing but the accidental, historic products of one particular culture, the North Atlantic one, and, with strategic humility, apply the idea of cultural relativism to the diffusion of human rights. Alternatively, one could adopt the position that we are witnessing the growth of a global culture, which comprises not only electronic and new media, jeans, the Kalashnikov and the condom (as a form of AIDS prevention), but also the notion of human rights as explicitly formulated in the North-Atlantic region since the end of the 18th century. From this perspective, human rights deserve a more universal characteristic than merely 'North Atlantic' and we could even call them 'cosmopolitan'. However, before human rights can be conceived of as being cosmopolitan, prevailing formations of human rights need to be checked for unintended elements of Eurocentrism and imperialism in view of their origins and history. How do we develop a transcultural perspective on these matters? The answer must largely come from legal specialists in such fields as constitutional and international

law.² However, the legal anthropologist can make some contribution here: by assessing whether the principles enshrined in modern human-rights catalogues can also be found in societies outside the North Atlantic, and through empirical accounts of how these societies handle the safeguarding and the limitation of human freedom. Perhaps human rights will turn out to be less exclusively North Atlantic than generally assumed. And we may discover some common ground between African and North-Atlantic societies that would make it impossible to justify African violations of human rights under the pretext of respectful cultural relativism. Human rights, *avant la lettre*, may yet prove to constitute African cultural values and it is even possible that we may find African human rights going beyond the common North-Atlantic catalogues in protecting human vulnerability.

Since the discussion on human rights in Africa has largely taken place in the context of the reception of cosmopolitan law in the context of colonization and decolonization, often highlighting the defective application of the received law in specific African situations, little has been written on the nature and implementation of human rights in traditional African societies. The present argument seeks to sketch how human rights present themselves within the traditional legal system of one particular African society, namely the Nkoya of Western Central Zambia.

Method and nature of our reconstruction

Our temporal point of reference is the second half of the 19th century, before the imposition of the colonial state in 1900. In part we can base our pronouncements on the law in force at the time, on extensive, concrete, oral-historical and documentary data. The remainder has to be reconstructed from the legal practice that I studied in the region a century later, from 1972 onwards. Part of the theoretical basis for such a reconstruction lies in the concept of the 'semi-autonomous field' as introduced by the legal anthropologist Sally Falk Moore (1978: 54-81). The concept draws our attention to a situation that typically occurs in the context of legal pluralism and, according to current insights, such pluralism is the rule rather than the exception in the modern world (von Benda Beckman 2001; van Rouveroy van Nieuwaal 1998; Tamanaha 2000). Several legal systems exist side by side, each with specific systematics, principles and their own history that cannot be reduced to those of rival legal systems. Local actors move incessantly from one such system to another but each system retains its own identity and continues to constitute a semi-autonomous field, even if that system is not the dominant one in the local and regional context at

² For a review of relevant recent literature, cf. Hesseling (2006).

hand. My assumption is that a local legal tradition, grounded in local culture and legal institutions, constitutes a semi-autonomous field that may be subject to constant change and adaptation in its concrete application but, as a semi-autonomous field, displays a tendency for its internal systematics and fundamental principles to persist across decades or even centuries. If the regional society as a whole undergoes massive changes in the domain of law, these will initially affect the interrelations between these systems and not so much the specific content of the various constituent legal systems. As a result, their later forms may be extrapolated back into the past.

Let us take the concrete example of local legal rules concerning respect for the body and the personality of the young child that were in force in Western Central Zambia in the 1970s (van Binsbergen 1979). These rules perfectly fitted the prevailing kinship and demographic context where, due to a combination of socio-economic conditions and bodily practices that resulted in a strikingly low reproduction rate, children were relatively scarce and were considered the incarnation of powerful ancestors that hold sway over the world of the living, and where control over each specific child was contested by a plurality of loosely formed and constantly shifting, yet rival, kinship clusters, against the background of a bilateral descent system. There is plenty of historical evidence (van Binsbergen 1981) to allow us to project this overall structural context at least one or two centuries back into the past, even though there are few concrete data on legal rules concerning children in this region in the 19th century.³ In this way, I am convinced that also the specific legal rules concerning young children, such as I found in the 1970s, may be projected back to at least the second half of the 19th century.

Our sources on Nkoya human rights comprise oral-historical and documentary data apparently evoking local conditions in the 19th or even 18th centuries; the results of participant observation in Nkoya daily life between 1972 and 1995; my personal presence as a researcher in cases of conflict regulation at all levels; and the legal files of the region's Local Courts and the Magistrate's Court at the district centre of Kaoma where my Nkoya research was concentrated.

³ There are a few indications to this effect. A similar respect for children is manifested in the way Mwene Kayambila solemnly welcomes his grandson at birth. The grandson was a very old man in the early 1900s and an informant of J. Shimunika who committed this tradition to writing (van Binsbergen 1992a: 247). And when Prince Munangisha through magical means (*malele*, a prerogative of royals) escapes the Kololo army that captured his junior kin, he returns and surrenders despite his superior weapons (poisoned arrows) that inspire great fear in the Kololo. Munangisha's argument is: 'I for one shall not use my weapons, but since you have captured my children, let us all go together with my children, for I cannot remain here without them' (van Binsbergen 1992a: 401).

To structure the data, it seems wise to depart from an existing catalogue of human rights, of which many examples are available in the various modern constitutions of African states and in the academic reflections to which these constitutions have been subjected by constitutionalists and political scientists. In the past I studied these comparative data with my colleagues Martin Doornbos and Gerti Hesseling (Doornbos *et al.* 1984, 1985). In addition, the Universal Declaration of the Rights of Man (1948) constitutes an obvious and systematic point of departure for our present discussion. As an anthropologist/historian/intercultural philosopher, I can hardly be expected to offer an original contribution to the systematics of constitutional law so I will simply follow the classification that Hesseling (1982: 165f; cf. 1985) offered in connection with Senegal's independence constitution.

First, we distinguish the so-called classic human rights:

- the principle of equality of each individual before the law
- freedom of expression
- freedom of association and of meeting
- the privacy of letters
- freedom of movement
- the inviolability of the dwelling
- the unassailability of human dignity and of the human person, including the integrity of the personal body
- freedom of religion
- the right to individual and possibly also collective ownership

To this we can add the following human rights:

- the right to due legal process
- innocence unless the opposite has been proven
- no persecution under retrospective legislation
- freedom from slavery and forced labour
- freedom from inhuman treatment

And finally there is a category of human rights that we could all social rights: positive rules that stipulate not so much what the state must refrain from but what the state should further, namely:

- human rights concerning marriage and the family
- the right to education
- the right to work, but also the obligation to work

Hesseling (1982) discussed at length the legal possibilities of limiting human rights either through national legislation or the rulings of lower-level bodies of local government. It is difficult to find equivalents to this in our data because

Nkoya human rights are not exclusively administered by the pre-colonial state (the royal court with its dignitaries and institutions) but also, often in defiance of the court and its officers, in general culture and everyday life in forms that are neither formal nor explicit, let alone constitutional.

Are we not running the risk of a gross distortion, of errors both of a methodological and an empirical-analytical nature, if we reconstruct more or less equivalents of the human rights in the cosmopolitan tradition from Nkoya legal sources? To answer this fundamental question, it seems appropriate to consider what the great legal anthropologist Max Gluckman has to say about the constitutional aspects of the Lozi (Barotse) kingdom. Since the middle of the 19th century, Nkoya society and its legal system developed in the periphery and under the increasing hegemony of Lozi political and judicial structures.⁴ An attempt to situate my approach in relation to the unrivalled work of the founder of the Manchester School⁵ may illuminate the limitations and the modest possibilities of my approach in the present argument.

Gluckman's work highlighting further methodological implications for the present argument

The concept of explicit human rights *per se* is alien to the legal traditions of Western Zambia, which have been studied in detail and with comparative and theoretical insight by Gluckman. Such a concept springs from the West-European or North-Atlantic legal tradition and only materialized in its present form towards the end of the 18th century in the context of North American independence and the French Revolution. There are no strict parallels to such principles in the surface phenomena of demonstrable legal rights and legal practices, in the sense of principles that are clearly marked in the consciousness of the local Nkoya actors. Admittedly, Gluckman showed (1968: 165f) that Lozi society knows the 'rights of mankind' (*milao ya butu*, in Lozi), but these are rather general moral, ethical and even aesthetic principles of social life, such as shame regarding nakedness or the rules of avoidance that exist between affines of different generations and genders. These are rules of a very different order than the North-Atlantic or cosmopolitan human rights, for the latter obviously belong

⁴ Even though 20th-century Nkoya sources (cf. van Binsbergen 1988, 1992; Anonymous [J.M. Shimunika] n.d.) claim a decisive Nkoya influence on Lozi royal culture, both before and after the Kololo invasion from South Africa that reshaped Lozi political organization in the middle of the 19th century and (except for court matters) replaced the Central Bantu Luyana language with the South Bantu Kololo, which is today known as Lozi.

⁵ See van Binsbergen (2007) and my earlier assessment of Gluckman's legal work on the Lozi (van Binsbergen 1977).

to the technical juridical domain in the narrower sense. Justifiably, Gluckman did not make use of the obvious linguistic possibility of simply translating the Lozi term *milao ya butu* as 'human right'.

An approach like this, seeking to describe an historic local legal situation in terms of the alien, North-Atlantic term of 'human rights', takes considerable distance from Gluckman's path-breaking studies. The latter's approach was to describe the local legal system in the first instance in its own terminology and systematics. Gluckman's books on Lozi law enable the reader to become acquainted with that legal system from the insight and perspective of the local actors who consciously, in their own language, use certain concepts and make certain connections. Only after laying that basis does Gluckman proceed to a meta-analysis that is beyond conscious Lozi legal thought. In other words, he proceeds to an analysis in terms of legal anthropology, positive law and comparative law. My argument here does the opposite, departing from a legal perspective that is alien to the society under study. I seek to assess whether this perspective may yet be illuminating for this society in a bid to highlight not so much the uniqueness but the wider correspondences, and not the specifically local categories but the partial applicability of cosmopolitan, alien categories.

Gluckman's work has made it emphatically clear that the Lozi legal system knows certain general principles, which are formulated in indigenous terms and systematically govern legal life in Western Zambia: the famous principle of the 'reasonable man' and the equally seminal principle that 'property rights flow directly from social status and hierarchical relationships'. However these principles cannot be identified with cosmopolitan human rights. My aim here is not to demonstrate how and why local law comes into being and reaches effectiveness, but to demonstrate that local African law⁶ tallies with cosmopolitan tradition to a much greater extent than we would suspect. As a contribution to anthropology as a self-contained field of study, Gluckman's approach is to be preferred but one of the missions of anthropology is to represent (to the point of vindication)⁷ peripheral societies before the dominant global society, and in this respect my own approach may be justified. It is complementary to Gluckman's but aims at goals that are so different from his that we cannot apply the same criteria of judgment. On the other hand, Gluckman may have started out from the representations, concepts and distinctions of the local (legal-specialist) actors themselves, yet he too was not satisfied before gaining a hold on the Lozi legal system in abstract, theoretical and transculturally generalizable technical-legal and often Latin terms. This suggests that Gluckman, by an emphatically

⁶ At least in its Nkoya form but there is no reason to assume *a priori* that Nkoya law differs significantly in this respect from other African legal forms.

⁷ A position unmistakable in Gluckman's own work, especially in Gluckman (1955).

ethnographic detour, ended up where I, with a different aim in mind, am beginning: to translate a local African system into the general analytical terms of a legal professional sub-culture whose orientation is largely North Atlantic.

There are other differences that spring from a difference in fieldwork strategy. Gluckman's brilliant analyses were achieved in a situation that had at least two striking characteristics: centralism and a judicial perspective. He positioned himself as a researcher at the very centre of the indigenous Lozi administrative and judicial process, effectively underpinned by the colonial state. I, on the contrary, also worked in remote villages on the periphery of the indigenous legal system and did so at a time when the power of traditional leaders had been significantly eroded by the colonial state. Moreover, Gluckman's point of departure in the study of local law was the strictly formal, judicial adjudication of conflicts rather than the day-to-day social process in villages. The frequent and often vicious conflicts at village level, even though they were illustrative of local legal principles, were only rarely adjudicated in formal courts of law. Most were contained by informal social control or by the intercession of village elders and headmen, while some conflicts even after formal or informal adjudication turned out not to be resolved but were to linger on as suspicions, (sorcery) accusations and downright sorcery. Gluckman had relatively little insight into these ineffectively adjudicated conflicts despite their frequency, importance and vehemence. As I argued in a study of Nkoya family law (van Binsbergen 1977), which was informed by the tangled complexities of day-to-day village life over many years and situated outside the sheltered, formalized and systematic framework of the court of law, my alternative perspective does admittedly offer less insight into the structure of the judicial process in itself but this is compensated for by a somewhat broader insight into the mainstream of social life in the village. Gluckman's vision is the specialist perspective of a legal scientist, whether Lozi or cosmopolitan, or both, while my own fragmentary, peripheral, every-day vision is that of the non-specialist villager and of an anthropological generalist. In the best case, these two positions complement each other but they also serve the respective shortcomings of the alternative perspective.

Background to human rights among the Nkoya

We cannot discuss Nkoya human rights without some initial insight into the institutions of formal and more informal legal process: from the head of a household via the village headman and valley chief to the king/traditional leader (*Mwene*), the latter being associated with a contiguous land area of between roughly 5,000 km² and 10,000 km². After independence in 1964, this structure

was revised by the setting up of Local Courts⁸ that, functioning directly under the national administration, were to be *de iure* (but not *de facto*) independent from the *Mwene*, which would no longer adjudicate cases. After a few decades, this structure was again revised by re-instating, albeit informally, the traditional court of law attached to the *Mwene*'s royal court under the name of *Mawombola* (arbitration) Court. However, the Mawombola Court lacks the sanctioning prerogatives of the Local Court and therefore has to refer more complex cases to it.

In Western Zambia by the middle of the 19th century, before effective Lozi dominance was established in the wake of the Kololo conquest,⁹ some situations suggest that the application of traditional human rights transcended the various individual Nkoya states and extended from one Nkoya kingdom into a neighbouring one. This is almost suggestive of an international legal order acknowledging and enforcing the exercise of human rights in neighbouring states, and is somewhat comparable with the European Convention on Human Rights or the adoption of the Universal Declaration of Human Rights of 1948, which regulates the trans-statal enforcement of human rights between 20th-century states. For instance, cruel tyranny by the Nkoya King Liyoka was a reason for intervention by a Kololo king. By the same token, a murder committed in about 1885 by Prince Shangambo (later Mwene Kahare Shamamano) outside the territory and the direct jurisdiction of the Lumbu King Kayingu was reason enough for the latter to force the offender to pay a substantial fine. Mwene Shiyenge's violation of marriage law (he forced the married women among his subjects to have sexual intercourse with him) has been likewise presented in oral traditions as reason for a Kololo king to intervene. On the other hand, when the Kololo headman Munyama, who was residing at the court of the Nkoya King Shiyenge, abducted a woman from the realm of the Nkoya King Kahare, this was no reason for Shiyenge to press charges against the headman.¹⁰

⁸ On Zambian Local Courts, cf. Coldham (1990); Hoover *et al.* (1970a, 1970b); Spalding (1970) and Spalding *et al.* (1970).

⁹ The Sotho-speaking Kololo from South Africa occupied Barotseland from c. 1840 to 1864, usurping and transforming the Lozi state but, in the process, consolidating the latter.

¹⁰ For these cases, cf. van Binsbergen (1992a: 144 (Liyoka), 152 (Shambango), 138, 145 (Shiyenge), 406 (Munyama). I realize that the mounting hegemony of Kololo, subsequently Lozi, over the Nkoya makes it in principle possible to read some of these cases as an expression, not of an international legal order comprising several independent states including the Nkoya states at the time, but as an expression of a regional Kololo/Lozi legal order infringing on the autonomy of Nkoya states. Since the late 19th century there have been Lozi claims that Lozi overlordship over the Nkoya dated back to the very foundation of the Lozi state in about 1500 and there were also Nkoya claims denying such overlordship and stressing Nkoya contribu-

These examples suggest that the human rights being discussed here under the ethnonym Nkoya may, in fact, have had a much wider distribution than the Nkoya language and the Nkoya ethnic identity (which only began to be articulated under this explicit ethnonym in the late 19th century). These rights appear to some extent to be enshrined in a regional culture encompassing a number of kingdoms.

The same examples, however, also indicate that a precise demarcation of human rights, as opposed to other types of legal rules as is possible in the cosmopolitan legal tradition, is far less obvious in the Nkoya traditional context: human rights, constitutional law, family law and penal law do intersect and can only be separated by analytical sleight of hand.

Specific human rights in the Nkoya context

We will not systematically discuss all the human rights listed above for the traditional Nkoya legal system. Some have been clearly conceived within the societal forms of the North-Atlantic industrialized society of the 20th century: human rights concerning trade unions, education and the right and obligation to work. The latter can hardly mean anything other than the right to wage labour in a monetarized labour market, which has only existed in Nkoyaland for the last few decades. Likewise, formal education and trade unions imply formal organizations that had no equivalents in pre-colonial Western Zambia. By the same token, the privacy of letters has little relevance in an illiterate society, such as that of this region until 1900. The scarce data on diplomatic contacts between royal courts in the 19th century (van Binsbergen 1992a: 231f) do not contain any suggestion that much value was attached to diplomatic secrecy. Nor will we specifically treat human rights concerning marriage and the family, in part because these will be discussed in passing when treating other human rights and because migrant labour and urbanization in the course of the last 150 years have resulted in so many changes, also in the formal adjudication of family law, that we can no longer confidently apply our method of reconstruction. This applies *a fortiori* for property law, where we encounter an additional reason not to devote a specific discussion to human rights concerning property. Gluckman already discussed the specific problematic of property rights in Western Zambia, where property is not regulated in its own right but is merely an aspect of someone's specific social status and hierarchical position. With these restrictions, let us now work down the list of traditional Nkoya human rights.

tions to Lozi court culture and royal legitimation. It is difficult to determine where the truth lies but such complex and contradictory dynamics do not surround the Kayingu case as its upholding of an international, regional legal order seems straightforward.

The principle of equality: Equality of all citizens before the law

Pre-colonial Nkoya society knew a hierarchical ordering of kings, freemen and slaves. Slaves¹¹ constituted a complex category, comprising, on the one hand, pawned freeborn individuals and, on the other, individuals who had been acquired as property by birth, as war captives or through purchase. The children of slaves felt social stigma and often continued to be designated as slaves but their status was not identical to that of their parents. In fact, many children of slaves were marginal figures because while one of their parents may have been a slave, the other was of royal blood. At royal courts it was a conscious strategy for princesses (whose unrestricted love life was only limited by the incest taboo on the extensive category of classificatory brothers and fathers) to choose their lovers from among slaves. As a result, the children from these, typically short-lived, relationships were entirely at the disposal of the power ambitions of their royal mother's brothers, without any interference from their slave father's side. The slave was legally incompetent and was considered to be completely devoid of kin to champion his rights.

The category of kings was not clearly demarcated and the same applied to the category of freeborn men. The status of king (*Mwene*) was acquired through individual election from among the entire clan with a royal title. Therefore, outside his official role, every ruling king remained the close consanguineal kinsman or affine of non-royal freeborn men, and was largely subject to the normal overall legal rules. We can discern a dynamic process in the course of which kings in the 18th and 19th centuries, if not much earlier too, sought to fundamentally differentiate their position from that of their freeborn subjects. These kings thus sought to introduce legal immunity for themselves but the many cases of abandonment and impeachment of kings, even of regicide, make it clear that they did not succeed in their attempts to create a permanent and different legal category for themselves. They remained largely subject to the general legal order.

The king did, however, occupy a special place in this overall order. The king – and until well into the 19th century the incumbent of the kingship was often a woman – had certain unique, inalienable rights, for example over all sorts of royal regalia, animal species, game (cf. Gluckman 1943), fishing pools, luxury goods and royal spouses. The standard punishment for infringement of these rights was death or the most gruesome mutilation. How far royal law differed from that prevailing in non-royal Nkoya life can be gauged from the fact that,

¹¹ In the 19th century, cultural and political boundaries between the Ila and the Nkoya, especially the Mashasha identity, were vague. Tuden's (1958) study on slavery among the Ila is therefore also relevant here. Cf. van Binsbergen (1992) and Smith & Dale (1920).

on the eve of a pretender's accession to the throne, he had to commit ritual (yet very factual) incest with one of his (classificatory) sisters, a custom that was only abandoned, reputedly for the first time, on the installation of Mwene Kahare Kubama in 1994.

The extent to which the king remained subjected to the more general legal order is clear from the following example. Around 1850, the male Mwene Shiyenge attempted to place himself outside this order by revising Nkoya family law in such a way that court cases regarding adultery would no longer be admissible, and that he himself, as king, would have unlimited sexual liberties *vis-à-vis* the women at this court. As an expression of the absolute rejection of this legislation by his followers, Mwene Shiyenge was denied the tribute on which he depended for his livelihood (kings cannot perform productive labour). And after dying of hunger, he was even denied a decent burial: 'he was buried by the ants' (van Binsbergen 1992a: 211).

Among the category of the freeborn, status differences were also to be found. A very low status was accorded to court musicians, even though they were clearly distinguished from slaves. Performances by court musicians at dawn and sunset were the most obvious symbol of the presence of the king at the court and of his good health. The kingship had solar connotations and the good health of the king was considered essential for the fertility of the land. Despite their low status, court musicians were protected by the general legal order. At the end of the 19th century, Mwene Kahare Shamamano, when drunk, killed his musicians following accusations of adultery with his queens. When the case was reported to the Lozi King Lubosi Lewanika (whose own court musicians were Nkoya as they were all over Western Zambia), he denied the Kahare kingship the right to a royal orchestra and this punishment was only revoked in the 1930s. Yet Lewanika was Shamamano's benefactor and a decade earlier the latter had inherited the Kahare royal title at the intercession of the very same Lewanika, partly in recognition of Shamamano's outstanding performance during Lewanika's Ila campaign.

Unlike court musicians, slaves did not enjoy such protection from the general legal order. Their status was characterized by a lack of human rights, including that of the integrity of their person and their life. An owner could beat, or even kill, a slave without his behaviour being considered a punishable crime. Moreover, a slave did not have the human right of freedom of movement: the very essence of being a slave or a pawned person was that s/he had no residential alternative to his/her master's home. This was a very fundamental legal restriction in a society where the entire social life of the freeborn consisted of successively playing out, in the course of one's life and career, the various residential alternatives at hand. From moving to a different village (often when social relations in one current village had become unbearably conflictive), one

gained access to a new kin patron and to new, effectively solitary clusters of co-residing kinsmen until such time when, having grown older, one could establish oneself as kin patron for junior kinsmen on the move.

Slavery was formally abolished by the British in the 1910s and its social manifestations slowly disappeared during the first half of the 20th century. However to this day, Nkoya villagers, especially those close to the royal courts, can point out individuals, families and villages that claim to be descendants of slaves, and who are still accorded lesser rights in the local social and judicial system. Formal exclusion from the judicial process is no longer possible but informal sanctions are unmistakable in such forms as gossip, insults and objections to courtship and marriage.

Freedom of expression

The basic idea underlying Nkoya notions of sociability and (informal and formal) adjudication is the open negotiation between equals and the free exchange of ideas and words, as expressed in the central concept of *ku-ambóla* (to have social conversation/dialogue). Freedom of expression counts as a fundamental right of every free man. And mature women were allowed to share in this right and speak during communal meetings and court cases. The memory that once all kings were female may have contributed to this but there is no indication that freedom of expression was permitted among slaves.

We have already mentioned the Nkoya court musicians but they have a special place in this connection. Their songs¹² contain stereotypical praise of the king, in which the singers speak on behalf of the entire kingdom. However, songs of this type are usually combined in a manner reminiscent of West African bards (*jeli*, griots) with a very different genre in which the specific professional group of musicians addresses the king in their own right about their miserable conditions and praises the king for quenching their hunger and thirst. The Nkoya consider this a form of freedom of expression. Normally, it is impossible for people in subaltern roles to express personal grievances and wishes directly *vis-à-vis* the king. Protocol dictates that all official conversation with the king take place through the Prime Minister, who is an elected commoner. However, the song (belonging to a repertoire of court songs that are performed twice a day in the royal palace's inner yard while the king fondly listens inside) is the form *par excellence* in which petitions may be uttered without the high-ranking addressee taking offence. Now we understand why Nkoya musical culture is pressed into service for political goals under the post-colonial state. The present-day annual Kazanga festival (van Binsbergen 1992, 1995, 1999, 2000, 2003) is an ancient royal harvest festival from the early

¹² A collection is offered by Brown (1984); also cf. Kawanga (1978).

1980s that has been revived. During the festival, a representative repertoire of Nkoya music, song and dance is packed into a formal two-day programme and performed in front of a massive audience at the Kazanga festival grounds in Kaoma District. The most important addressee is no longer the king (whose presence at the festival has been relegated to folklore) but a national or junior minister, while the Nkoya people all take on the role of musician underdog. In this very different context, music is again used instead of verbal petitions and mass demonstrations, as music is considered the time-honoured means for a person in a subaltern role to express his opinion and needs.

Criticizing the king openly and frankly was a generally recognized right employed by free villagers, especially members of the royal council of hereditary village headmen, who are often close kinsmen of the king.

So far we have focused on freedom of expression in a constitutional context set by the (indigenous) state and its highest officer but the right to freedom of expression also existed among and between non-office-bearing members of Nkoya society, albeit in a more limited form but again linked to music and dance. At public festivals (girls' puberty rites, name-inheriting rites, funerary rites), it has always been common for certain individuals to expose the shortcomings of others in improvised mocking songs, addressing adultery, laziness, defective bodily hygiene, the poor discharge of marital and kinship obligations and excessive boasting. In the ceremonial context of such public festivals, the victim is not allowed to take offence – even though in most other contexts, criticism between equals can quickly lead to court cases on the grounds of insult or slander. But even though the victim may not openly take offence, the publicly sung mockery often results in resentment, fighting, sorcery attacks and even suicide.

Unmitigated freedom of expression occurs in the specific context of joking relations, such as those between members of paired clans, e.g. between the Smoke clan (*Wishe*) and the Firewood clan (*Mukuni*), whose complementarity becomes obvious once one realizes that it is the destruction (burning) of firewood for the production of smoke that enables the honey hunter to smoke out bees from their nests and appropriate the honey.¹³ In the most literal sense, joking partners have a right to demand the very shift from each other's body and even to appropriate each other's possession without an explicit request and/or permission, but with impunity. Such appropriation is not considered as

¹³ Smoke thus acts as a catalyst linking the Firewood clan with that of Bees and Honey. Underlying this and other Nkoya clan nomenclature is a cyclical system of elemental transformation, which has parallels elsewhere in Africa (e.g. among the Tswana and clan systems with the same, rather narrow range of clan names that are found all over Bantu-speaking Africa) but also elsewhere in the Old World from Japan to the Aegean, cf. van Binsbergen (2009).

theft. Apart from appropriating material objects, joking partners also have a right to say anything to each other, including (what would otherwise have been) insults and far-reaching sexual allusions. And they may even touch each other's bodies in the most private and intrusive manner without offence. Paired clanship not only imposes funerary obligations but also turns the joking partners into classificatory grandparents and grandchildren, realizing that a few generations ago the one group gave a wife to the other group, often after an episode of inter-group violence. Such joking relations are not limited to the Nkoya but are found all over Zambia, even in the modern context of urban ethnicity where, for instance, the paired ethnic groups of Lozi and Tonga, and Bemba and Nsenga, are each other's joking partners/grandparents, and on this basis may be appealed to for assistance when one is facing difficulties in urban life (cf. Stefaniszyn 1950, 1964; Tew 1951).

Right to association and meeting

In many situations such as festivals, court cases, rituals and funerals where a human right of association and meeting would be more or less applicable, people used to assemble at the initiative and in the presence of the village headman, valley chief or king. Under these conditions, it is difficult to assess whether their meeting would also have been possible without the explicit approval of such dignitaries of the pre-colonial Nkoya state.

However, there were also situations in which a section of the population assembled without any formal authorities present, for instance, the ritual assemblies of the hunters' guild and cults of affliction venerating supernatural beings different from the local ancestors and thus outside the control of village headman and the king (cf. van Binsbergen 1981) and, from the 1920s onwards, Christian churches and syncretistic cults too. All these groups displayed a non-communal model of organization in the sense that they brought together people who in everyday life were not each other's neighbours, close kin or fellow villagers. In other words, these groups formed 'congregations' that did not reflect everyday social organization but that cut across, or even denied and challenged, such organization (van Binsbergen 1981). Sometimes kings and headmen participated in these groups and tried to bring them under their control. The Bituma cult and anti-sorcery movements in the first half of the 20th century are examples of this, involving Mwene Kahare Timuna (van Binsbergen 1972, 1981). In some cases and in certain clearly defined periods, the hunters' guild and the organization of boys' puberty rites, which are now extinct among the Nkoya, were clearly instruments of power for the king (van Binsbergen 1992a, 1993). But apart from the request for permission to establish the first Christian churches in the region, I have no information on any requirement of royal permission for these organizations and their meetings. This makes it probable

that a certain notion of this human right forms part of the traditional Nkoya legal order.

Freedom of movement

Having seen the importance of freedom of movement for Nkoya social organization and the differences between slaves and freeborn people in this respect, we now consider the significant limitations in movement that freeborn people experienced. A freeborn person has a number of residential alternatives on the grounds of belonging to his/her mother's kin, father's kin, grandparent's kin or joking partners' kin. One had the right to effect any one of these alternatives in the sense of moving to a different village within the territory of the same valley chief and the same king, but this usually required specific permission to gain access to agricultural fields in the new place of residence. Such permission was hardly ever refused but did amount to recognition of the valley chief and the king as positions in which (in the popular view) the communal land had been entrusted or (from the perspective of high-ranking office-holders themselves) as 'Owners of the Land', a category of the greatest politico-legal significance throughout Central and West Africa. Meanwhile, taking up permanent residence outside the territory of one's original valley chief and king was seen as a serious infringement of the power and authority of these dignitaries. For, as in many other parts of Sub-Saharan Africa and among the Nkoya too, power was primarily perceived in terms of numbers of adult male followers. Hence specific formal permission was required for such permanent departure, and if it was conflict ridden (as was usually the case), one could end up not as a slave at the court of an alien king but at least as a suppliant.

Thus freedom of movement was, even for freeborn persons, limited by the pre-colonial, indigenous state. In the first few decades of the post-colonial state this principle still remained: if one wished to move to the territory of a different traditional leader (chief, king), one still needed a formal letter of introduction from one's original traditional leader – and such a letter could only be obtained after a formal interview in which the reasons for the move were explained and justified.¹⁴ Royal permission was also required for establishing a new village on

¹⁴ Throughout the 20th century and including the period of colonial rule (1900-1964), the management of the Village Book (a register recording the population of a village for taxation purposes) was one of the headman's main prerogatives and accorded him official status with the colonial state. Coordinating this interface between the village and the state was one of the kings' (now *chiefs*) main claims to authority and recognition. It is possible that the rigid settlement pattern associated with the requirement of formal permission from one's traditional leader for nearly every residential move was a colonial pattern, projected back by my informants into the pre-colonial past, in ways that cannot be ascertained without further research.

unoccupied land, even if the move did not take those involved outside the territory of their original king.

Detailed biographical data since the end of the 19th century¹⁵ on hundreds of adults and their individual residential moves and my oral-historical data on the 18th and 19th centuries make it clear that these limitations were only of a limited nature and could easily be overcome. Moreover, some of these residential moves in the pre-colonial past have to be explained not from individual motives of maximizing (access to hunting grounds, fields and more attractive nearest neighbours and close kin) but from the mandatory displacement of a royal court after the demise of a previous incumbent of the throne or of a village on the death of its headman.

In addition to residential movement, movement for the sake of trade was of considerable importance. The kings had no effective trade monopoly on local produce (except for royal items such as leopard skins) but they did aspire to control over long-distance trade with the Portuguese, Ovimbundu and Swahili. It remains a matter of further research whether itinerant individual local petty traders dealing in local produce (e.g. beeswax, tobacco, ironware) with the region needed special permission from their king and had to cede part of their income to the latter.

Inviolability of the dwelling

Among the Nkoya there is a clear notion of the inviolability of the dwelling. As in most cultures, this relates to an entire complex of the symbolic structuring of the human space, which has cosmological, kinship and gender aspects that are not in the first place legal. There are plenty of indications that the sense of the privacy of the living space is well developed among the Nkoya: reed fences and mats protect the personal space (especially sleeping areas and bathrooms), paths are at some distance and a strong sense of etiquette makes it inappropriate to go into a yard without first stopping at the entrance, calling for permission to enter and ostentatiously waiting for a response.

The human right of the inviolability of the dwelling on the one hand regulates relations between the citizen and the state: freedom from visitation, from military intrusion into one's house, etc. On the other hand, this right regulates relations between citizens: the state and its legal instruments are to protect the dwelling of one citizen from intrusion by another. I do not know of any cases where we could derive local historic views on the access of traditional Nkoya state officers to Nkoya citizens. However, numerous court cases among the Nkoya involving theft, adultery and premarital sexual intercourse are juridically

¹⁵ I am indebted to Dennis Shiyowe for collecting this material in 1973-1974.

admissible on the grounds that they amount to a violation of the privacy of the home. An example from c. 1860 is as follows:

The daughter of Kancende (...) became the Lihano (Queen) of (Mwene Munangisha's) elder brother Shikongi. Mwene Shikongi had a conflict with his younger brother Munangisha because the latter *trespassed in his elder brother's house*. Then Mwene Shikongi said to his younger brother: 'You committed incest/broke a taboo! Just pay me a slave and marry her (Kancende's daughter) so that she shall be your wife'.¹⁶

The unassailability of human dignity and of the human person, including the integrity of the personal body

For this human right too, we must distinguish between the aspect that regulates relations between citizens and the state, and the aspect that regulates relations between citizens, with the state acting as arbiter.

Indigenous Nkoya states may have developed over the last few centuries before colonial rule because of the rise of a violent, male-centred ideology.¹⁷ This denied and eroded the principles of the pre-state worldview in Western Zambia: an harmonic and beneficial interplay, with a major role for women, of human society, nature and the supernatural, where the indispensable rain (featuring as the demiurge Mvula, 'Rain', the connection between Heaven and Earth) would fall in adequate quantities as long as humans refrained from murder, incest and sorcery. With the new, violent, male ideology, the state appeared as the main institution of violence, saturated with contempt for the human person and human life. An executioner's axe and sword still form part of the regalia of Nkoya kings, and in this respect they are on a par with their Lunda and Luvala neighbours among whom the major royal regalia consists of the horrific *Lukano* (a bracelet woven from human penises). Among the Nkoya, executioners (*Tupondwa*) make up part of the formal organization of the royal court and their task was not only to execute criminals after due process (today the central administration has the monopoly over criminal law), but especially to imprint the population with a sense of royal terror. The latter task they continued to discharge throughout the 20th century. It is the executioners who guarantee the unimpeded availability of specific medicine (prepared from parts of the human body, especially the brain) that is deemed to be indispensable for the survival of the king, and makes the king an ogre and a witch in the eyes of his subjects. Executioners also guaranteed the populations' preparedness to pay

¹⁶ *Likota Iya Bankoya*, Ch. 44: 3f. See also van Binsbergen (1992).

¹⁷ This was argued in van Binsbergen (1992a, 1993, 2003) and stresses the essentially endogenous dynamics of intrasocietal contradictions from around 1500 onwards. Further comparative research has suggested a transcontinental, exogenous element of kingships coming from across the Indian Ocean, bringing new ideologies and new regalia on a timescale that may go further back in history.

tribute to the king and supply labour for the upkeep of the palace. Important events in the lifecycle of the royal court demanded human sacrifice, such as the completion of the royal fence or of the palace itself, and the burial of a king. The royal drums required human sacrifices too, as among the Lozi. There is, however, little to suggest that these practices are entirely things of the past.

Especially in the 19th century, there are reports of male Nkoya kings' arbitrary, bloodthirsty violation of the human right of the unassailability of the human person. These traditions however indicate that such state action was clearly seen by the general population as violating a human right.

Against the ostentatious contempt for the person and human life on the part of the Nkoya state and kings, we should mention (cf. van Binsbergen 2003) the strong emphasis placed on these values in daily life among Nkoya villagers. Violence and sexuality constitute the two obvious conditions to test the application of this human right. Below we will see how the human right of dignity and of personal and bodily integrity, from a Nkoya perspective, may be viewed not as isolated values but as the specific application of a more general fundamental right: the right to a 'good life'. Another cosmopolitan human right, that of freedom from inhuman treatment, might also be accommodated here. If we then juxtapose the village and the royal court, we can only conclude that the village offers a better situation for the enactment of this human right than the royal court. Hence my emphasis in other studies on the real or apparent cultural discontinuity between the royal court and the village in this part of Africa as an important aspect of state formation in the pre-colonial period.

Outside the context of kingship, violence in village situations rarely occurs. Even the mere threat of violence is actionable in court as is, *a fortiori*, actual physical violence. Various social mechanisms (the bodily isolation and containment of the fighter by third parties present; and the fact that it is socially acceptable to avoid, or even to flee, provocation to violence) result in a situation where intra-village violence is limited to situations of extreme provocation, to drunkenness or a psychotic crisis (the latter notably in cases of sorcery accusation and bereavement, which tend to go hand in hand, since the notion of natural death is alien to the Nkoya worldview).

Regarding sexuality, it should be stressed that the domain of personal integrity does not coincide with what is understood by the same concept in urban North-Atlantic society today. Among the Nkoya, merely looking at or touching whatever part of the body (except the sexual organs) regardless of whether this part is covered by clothing or not is not seen as a violation of the human right in question, and is not admissible for adjudication. Touching is here a normal and constant aspect of any social interaction between equals and unequals regardless of gender and age, and thus appears to constitute a neutral lightning conductor for social and erotic tensions. A large section of Nkoya social life has perhaps

remained, until recently, relatively impervious to the commodification-driven sexualization and erotization that it has come to dominate the public culture and media of North-Atlantic society. Until well into the 20th century, female breasts constituted body parts that could be freely displayed in public and it is only in the last few decades that this has changed. Even people's sexual organs are not beyond the view or touch of recognized joking partners, and with impunity. But like any society, Nkoya society has also recognized a distinct realm of sexuality and this is almost exclusively conceived as heterosexual genital coitus. Coitus clearly falls outside what is permissible in joking relations but, on the one hand, a married woman's sexuality is the exclusive prerogative of her husband and violation, by another man, is a private-law offence and, as such, is admissible evidence. The only traditional exception to this rule is the recognized sibling equivalence i.e. the mutual inter-changeability (from a point of view of permissible sexual access) of sisters and brothers, provided it is done with discretion. The above-mentioned quarrel between Mwene Shikongi and his younger brother Prince Munangisha might thus be interpreted as an offence against things royal (in this case: the Queen) rather than as brother-in-law/sister-in-law adultery. In Nkoya society, the latter form of transgression is far from exceptional given the principle of sibling equivalence, and under certain conditions (prolonged absence of the lawful husband) even openly tolerated. On the other hand, a man, even a male spouse, must ask his female partner's explicit permission for coitus, regardless of the existence of a permanent sexual relationship between those involved and regardless even of marriage. A man's coitus with his own wife while she is asleep is an actionable offence, and is recognized as grounds for divorce. The justification of this rule and its heavy sanctioning lies both in its violation of bodily integrity and in the fact that such behaviour reveals the man as a factual or potential witch, as one 'who might as well have intercourse with a corpse' as witches are reputed to engage in necrophiliac sex.

The principle of the integrity of the human person and dignity is also reflected in Nkoya views on children. Children are much loved and receive plenty of affection. They are relatively scarce, and there is competition between kin groups regarding control over specific children. This must be seen against the background of a bilateral kinship system where each child effectively belongs equally to both the mother's and the father's kin. Kinsmen from all sides constantly scrutinize each other's behaviour as parents and educators to catch each other out committing offences, which are then exposed vocally. The reason for such criticism is not only the hope of taking over custody of the child from rival kin but also the more principled point that a child is vulnerable and can easily be forced to do things beyond his age and capabilities. If a mother allows her young child to burn its fingers when making the kitchen fire or sustain other

injuries, then her sisters-in-law will rush to demand a compensatory payment of a few pence (the price of one helping of home-brew village beer) and the offender will pay up without taking offence. More serious is the case when one of the parents makes demands on a child beyond the accepted limits of its age and abilities. Whosoever tells a toddler to fetch a heavy bucket of water not only invites ridicule but also risks the women of the village burdening the offender with accusations, threats of charges and insults. Such punishment can even be expected in response to such an apparently minimal offence such as letting a baby bounce and dance on one's knee. In such a case it is not unimaginable that the village women, to the offender's dismay and humiliation, will take off all their clothes on the spot and throw themselves naked on the offender shouting: 'Very well, you wanted us to dance? Now we shall dance!'.

Note the identification of the adult women with the wronged child. Disrespect for a child's natural limitations is symbolically reduced to a reference to uninvited sexuality as, after murder which is the most blatant violation of bodily integrity imaginable, lack of respect for the child is metonymically transformed into rape, and the group of village women, in their formidable expression of vocal gender identity (reinforced all the more by their puberty rites), becomes a sort of anti-rape brigade. Meanwhile there is here also an element of sacred nudity: the protesting, nude women invoke the power and identity of the ancestors, the ultimate defenders of every child (and every human being in general). And ultimately, overburdening a child is an act of sacrilege. Respect for the human dignity of the youngest members of society has a profound religious background: the circle of generations is closed time and again, and the youngest are considered to be the reincarnation of elders who passed away long ago. They bear their names (given at elaborate name-inheritance ceremonies) and are therefore often addressed even by their parents by the kinship terms that are normally reserved for addressing parents and grandparents. Little children not only represent the demographically vulnerable hopes of the kin group but also its past and its normative order.

The public humiliation described here constitutes one the most powerful informal sanctions that Nkoya society has at its disposal in its private-law relationships. In this respect, it is only surpassed by the lynching of a witch. Instances of such humiliation are rare (people avoid risking its administration at all costs) and this distinguishes them sharply from the most characteristic forms of social control among the Nkoya people: the singing of improvised mocking songs at festivals.

Freedom of religion

This might appear to be a value which hardly resonates with pre-colonial African societies. Nonetheless, in the formation of the Nkoya as a distinct ethnic

group, an attitude akin to the human right to freedom of religion is reputed to have played a role.

According to Nkoya oral tradition, the dynastic branches that would produce the current dynasties of the Nkoya people left their Lunda overlord Mwaat Yaamv in southern Congo after cases of humiliation (they were allegedly housed in the capital's pigsties) and after the Nkoya's rejection of the male puberty rites (*Mukanda*, involving male genital mutilation) that were controlled by the Mwaat Yaamv. The tradition of the Humbu War (in the second half of the 18th century) is interpreted as the Lunda king's attempt to re-impose these male puberty rites. In fact, the history of the Nkoya's relationship with male puberty rites shows complex oscillation between rejection and re-installment, and only a century ago Mwene Munangisha, who himself had a partially Lunda background, sought to reintroduce *Mukanda* even though it is significant that he did not succeed.

For the present argument, it is immaterial as to which interpretation of the Humbu war is closer to the historical truth. What is important and remains unaffected by these interpretational alternatives is that the right to denounce a central socio-politico-religious institution, such as male puberty rites, is affirmed in Nkoya traditions in the early 20th century, indicating the existence of parallels to the human right to freedom of religion.

Nineteenth-century Nkoyaland saw the rise of cults of affliction, imported from outside, from the East, the Indian Ocean coast and maybe even beyond. This diversified the range of religious expression in Western Zambia as until that time ancestral and royal ritual had been paramount. This diversification proceeded with the arrival of a variety of Christian missions and syncretistic cults in the 20th century. Traditional leaders gave selective and partial support to these developments but they did not jeopardize the growth of other expressions than those favoured by themselves. Freedom of religion appears to be a human right that is not without significance within the traditional Nkoya legal order.

The right to due process

This right is very relevant in the Nkoya context. Litigation plays an important role in Nkoya life, recognized procedures are considered and applied with great care, and nearly all adults (including women but formerly not slaves) have the opportunity to participate in the legal process. Of course, this does not imply that the rules of legal proof and sentencing are parallel to those applied in North-Atlantic courts of law or that the administration of justice, interwoven as it is with interests and power relations in everyday life and at the royal courts, could ever be absolutely objective. But these reservations apply all over the world.

The human right to due process was not always effectively applied. Kings had a considerable freedom in the imposition of punishment, including capital punishment. However, the case of Mwene Shamamano's musicians demonstrates that this freedom was not unlimited. Another form of defective legal course, or even its absence, is that of so-called instant justice, which was still found in South Central and Southern Africa in recent decades. In these cases, a crowd, convinced by mass-psychological mechanisms of the guilt of a particular individual in their midst and keen to have satisfaction, proceeds to inflict physical violence on the perpetrator, even to the point of death and without any trace of objective. Today, perpetrators are usually suspected of theft in public urban locations such as the street, the market or the bus station. In 19th- and early 20th-century Nkoyaland, sporadic incidents of lynching of fellow villagers suspected of sorcery were carried out.

This demonstrates that the common human right of asserting someone's innocence until proven guilty does not lie deeply anchored in the Nkoya legal consciousness. Or perhaps we should say that, in addition to due process, other procedures are allowed in order to demonstrate guilt. Here divination, rumour and personal intuition have often taken the place of due process. This is clear from the constant stream of sorcery accusations that have continued to constitute an important aspect of the social process among the Nkoya, mostly without formal adjudication.

Outside the context of family law I have no indication of deliberate innovations of local traditional law, and hence have no means of ascertaining whether there could have been a local human right preventing the retrospective application of new legislation, which is a standard principle in North-Atlantic positive law.

Freedom from slavery and forced labour

This human right has no equivalent in the traditional Nkoya situation: slavery and *corvée* labour for kings (by freeborn persons too) were realities in Nkoya life right up until 1930, and traces of these institutions can still be found. Meanwhile the polarization of Nkoya ethnic consciousness in the face of Lozi hegemony has led to a situation where, for Nkoya after 1950, slavery and forced labour were seen firstly, and in a very negative sense, as being associated with practices through which Lozi rule was imposed on Nkoyaland after the late 19th century. However, the Nkoya kings' own practices did not differ markedly from those attributed to their Lozi colleagues. Therefore we seem justified in seeing not so much the indications of a deep-seated local human right against slavery in these Nkoya remonstrations, but merely the selective application of a cosmopolitan, modern anti-slavery idiom coupled with a militant anti-Lozi sentiment during the last fifty years.

Remarkably, notions of slavery and forced labour were hardly ever applied to the experiences of Nkoya labour migrants as miners and farmhands in Zimbabwe and especially South Africa even in the 1860s. Over the last few decades, nearly all my Nkoya informants and especially those who had themselves worked as labour migrants seemed to lack any awareness of the nature of exploitative colonial and capitalist production relations. The colonial period was, in retrospect, held up as a period of plenty and unlimited movement, in sharp contrast to the miserable conditions that came to prevail in the countryside in Western Zambia when, after a century of extensive dependence on labour migration, the borders were closed for outgoing labour migrants to Zimbabwe and South Africa in 1965. Lest the reader think that I am merely imputing my own prejudices on my informants, the latter's assessment of the colonial and capitalist situations they lived in never failed to shock me. I started my fieldwork in Nkoyaland with a Marxist point of view influenced by the radical, anti-capitalist and anti-colonial overtones in the work of Max Gluckman, Jaap van Velsen and H. Jack Simons. I suppose my informants' surprising acceptance of their experiences under colonialism and capitalism sprang from their own historical contradictions on this point. Racist humiliation, segregation, extensive limitations of their freedom of movement and being forced to live a bachelor life abroad regardless of their age and family circumstances were probably compensated for, in their minds, by the much-coveted opportunity to earn cash as a labour migrant to pay for their hut tax, head tax, clothing, bride wealth, a gun as well as the opportunity to get away from the local village society that, especially for young males, was often conflict ridden, oppressive and exploitative (cf. van Binsbergen 1975a).

This concludes our exploration of cosmopolitan human rights in the traditional Nkoya context but the data still have a surprise in store for us.

Nkoya human rights that do not have equivalents in the usual cosmopolitan catalogue of human rights

I have already indicated the artificial element involved in the approach followed here: the demarcation and serial treatment of a distinct category of human rights within Nkoya culture and society. Although to some extent inspiring and illuminating, this approach does not do full justice to the historic specificity of Nkoya culture and its legal system. Not only do we make distinctions that are not, or were not, made by the local actors themselves, but our departure from existing, cosmopolitan categories of human rights implies the risk of overlooking that which the Nkoya themselves would prefer to see as their most central human rights. This lies in the ideal of the 'good life' (*ku-ikāla shīwāhe*) or 'to dwell, to live, to reside, in well-being, in good will'. This means freedom

from illness and hunger, from unnecessary conflict and fear and, above all, freedom from sorcery.

For centuries now, every Nkoya individual has played his/her part in a remarkable musical chairs: born in a particular village, s/he reshapes, through residential moves, (i) his/her main kin patron and protector (elder kinsman, mother's brother, and especially village head, who often combines the previous two qualities in his person), and (ii) the composition of the cluster of co-residing kinsmen (fellow-villagers), in such a way that the resulting situation, for some time at least, gives that individual the subjective impression of *ku-ikāla shīwāhe*, of 'staying well'.

The ideal kin patron is one who enables his follower/fellow-villager to enjoy the 'good life', while a bad kin patron is one who fails in this obligation and who, because of his own conflictive, ambitious and sorcery-ridden behaviour, threatens the stability and integration of his village, and fails to satisfy his junior followers, instead exploiting them for his own material and mystical power ambitions as a sorcerer. Every residential move of an individual or a family is inspired by the hope of finally finding the ideal, beneficial kin environment, and every case of illness, death, crop failure or misfortune destroys that hope again and confirms the lingering deep suspicion that it is precisely the senior members of the village who, despite their obligations and their adjurations to the contrary, abuse these juniors, frustrate their ideals and turn them (literally) into mystical sacrifices to unseen evil forces. Because of the tendency to viri-local residential rules and the small average size of villages, marriage for most women means a move to a different village, and in contracting a marriage (most women marry more than once in succession) she too is primarily guided by the hope of finally securing the 'good life'. A different spouse represents a package of new and hopefully more positive affinal relations.

Nkoya dependents 'vote with their feet', expressing their opinion in the first place by moving away, with this, rather than litigation, being the obvious response in the (almost inevitable) case that after a few years a particular kin patron turns out to be disappointing or even a sorcerer. Yet from my own fieldwork, and from oral-historical sources, I have known a few cases in which the senior kinsman, the village headman, valley chief or king was explicitly, and in a formal judicial context, reproached for failing to realize the ideal of the 'good life' for his dependents. This may serve to attribute the status of a central human right in the Nkoya context to this ideal.

The opposite of the 'good life' is sorcery, i.e. the calculating manipulation of persons and relationships with total contempt for personal dignity and integrity, sacrificing the property, health and even the life of others for the benefit of the witches' own power ambitions (cf. van Binsbergen 1981, 2001). Freedom from sorcery is an explicit human right within Nkoya society, albeit one that has

hardly been admissible for formal adjudication within, or even at the periphery, of the national legal system.¹⁸ Contrary to other parts of South Central Africa, we have hardly any data for the pre-colonial period on formal legal procedures in which Nkoya indigenous state officials confronted sorcery activities. This was perhaps because these officials themselves tended to be structurally perceived as sorcerers. As Big Men rather than legitimate kings they effected the explosion of the traditional world order into violence and power ambitions. The only sorcery court case that I myself attended in all my years among the Nkoya was in 1973. It turned out to be one in which youth belonging to the United National Independence Party (UNIP) acted as self-appointed prosecutors, while the defendants were the king and his court dignitaries. For this reason, the court had the format and the rhetoric but not the prerogatives of a Nkoya Local Court or Chief's Court (van Binsbergen 1975). In the course of the 20th century, the battle against sorcery was in the hands not so much of traditional leaders and the Local Courts but of religious leaders. This leads us question whether a human right that is not, and perhaps cannot be, enforced by judicial means does not cease, by that very fact, to be a human right in the technical, legal sense.

These witch-hunters of the 1930-1950s¹⁹ primarily legitimated their actions by reference to a Southern African variant of the sect of Jehovah's Witnesses, often in combination with an older Southern African tradition of identifying witches because a specialist 'smells them out' (in an idiom borrowed from hunting) or through the *mwave* poison ordeal whereby the accused was forced to drink an alkaloid poison prepared from the bark of the *mwave* tree²⁰ and if s/he vomited, s/he would live, and in the other case the poison would kill the accused. From the late 1980s to the mid-1990s Nkoyaland was the scene of the

¹⁸ Given the specific nature of colonial and post-colonial national legislation in former British Central Africa, which sees not witchcraft – for that 'does not exist' – but the accusation of witchcraft as an actionable offence. The situation that Geschiere with Fisiy (1995) describe as standard for post-colonial Cameroon and elsewhere of state courts actively confronting witches as if their existence in the light of the law was self-evident and their mystical actions actionable has long been avoided in Zambia. Witch-finders such as Mupumani (1913) were merely prosecuted for vagrancy and breach of the peace (van Binsbergen 1981); and while the 1950s saw an enormous increase in witchcraft accusations and self-accusations in Western Zambia (cf. Reynolds 1963), the legal action taken against these alleged or self-proclaimed witches was again in such terms that the courts could refrain from attributing any factuality to the idea of witchcraft. However, the sympathy of Kaoma District officials for Tetangimbu and my failure to gain access to the process documents in question suggest that this situation has been changing in recent decades.

¹⁹ On witchcraft eradication movements in South Central Africa, cf. van Binsbergen (1981), van Dijk (1992), Geschiere (1994) and the extensive references cited there.

²⁰ For taxonomic identification of the *mwave* tree, cf. Gilges (1974).

activities of a witch-hunter of Luvale ethnicity called Tetangimbu, hailing from Kalabo west of the Zambezi. With minimum admixture of Christian elements and operating his own private graveyard of exposed witches, Mr Tetangimbu modernized the *mwave* model with the exclusive use of agricultural pesticides, which in 100% of cases led to the death of the accused. The district authorities were hesitant and only intervened (and then only half-heartedly and ineffectively) after dozens of such murders, probably because the local population applauded Mr Tetangimbu's actions as an extremely effective enactment of the human right they held most dear: freedom from sorcery.

Conclusion

Our last example demonstrates that the situation regarding human rights in a traditional African environment does not entirely coincide with the human rights circulating within cosmopolitan legal practice and theory. On the other hand, the inventory in the present argument demonstrates that Africa is not exactly *tabula rasa* when it comes to human rights. It does not have an empty slate that has to be filled with apparently incomparably better, North-Atlantic insights in the usual condescending manner. There is no denial that the human-rights situation in many African states is deplorable although there are recognized exceptions, such as Botswana. It is rather surprising to conclude that our judgment regarding the arbitrariness and terror exercised by many post-colonial African states would have been scarcely less negative if our assessment had been based not on North-Atlantic, cosmopolitan human-rights catalogues but on the human rights that were being articulated in a small part of Africa, Nkoyaland, on the eve of the colonial period. Much more research on human rights within African traditions is needed because here may lie sources of inspiration that could help us in our attempts to formulate cosmopolitan catalogues of human rights which, freed from North-Atlantic/Western ethnocentrism, could have truly global appeal. Little would be more in line with Gerti Hesseling's Africanist research on the constitutional state over the years.

If a South Central African people can be demonstrated to have extensive, time-honoured parallels to formal, North-Atlantic, human-rights catalogues, this has considerable implications. There is no reason to assume that the Nkoya situation differs strikingly from that found in neighbouring ethnic groups in South Central Africa, including those of the Lozi/Barotse and the Shona whose legal institutions have been studied in great detail by famous ethnographers such as Max Gluckman and Hans Holleman (cf. Gluckman 1967 (1957), 1965, 1969; Holleman 1952). Even though their accounts are not specifically organized to highlight human rights. So we are tempted to surmise that South Central Africa has an endogenous tradition of human-rights thinking of its own

and that in this respect the South Central African region may not even be unique in Sub-Saharan Africa. This insight may help us to better understand the African response to colonization and to the state, and to appreciate the socio-cultural sources, both of anti-colonial protest and of post-colonial protest against state failure. It also means that we have to reconsider the facile schemes popular in studies of the reception of allegedly alien North-Atlantic constitutional law in the allegedly pristine African constitutional context. Perhaps popular political and religious action in colonial Africa was prompted not by the absence of the idea of human rights but by Africans' perceptions of the cynical, ethnocentric, class-ridden and selective application of familiar human rights on the part of colonial governments and their local allies. Finally, there is a puzzle here concerning long-range historical relationships. If North-Atlantic human-rights catalogues can be argued to have parallels in South Central African societies and if we cannot attribute those parallels to recent North-South borrowing during the Modern Era, we have to look at European and at global constitutional history with fresh eyes. In the face of these parallels, it is unlikely that North Atlantic concepts of human rights were primarily the product of the Early Modern Era – of the intellectual climate of the Enlightenment, of the transformation of statehood according to the Westphalian model after 1648 and of the seething of class relations in the same period. Much older, much less elitist and much more cultural and communal roots need to be reconsidered, probably not unrelated to the institutions of free citizens' rights (despite the prevalence of slavery!) throughout West Asia, both shores of the Mediterranean and Europe from the Bronze Age onwards. The throbbing pulse of ancient and medieval history in these regions is seldom considered to have been continuous with pre-Modern Sub-Saharan Africa, which is usually considered to have been isolated and aloof from global developments. Some rethinking is needed here.

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‘Sons of the Soil’: Autochthony and its ambiguities in Africa and Europe¹

Peter Geschiere

‘Land’ and ‘democracy’ were central notions in Gerti Hessel-ling’s work. The link between the two acquired new and poten-tially violent dimensions with the upsurge in notions of ‘au-tochthony’ and ‘sons of the soil’ as powerful slogans in post-Cold-War politics in Africa and elsewhere. This chapter ana-lyzes the classic example of Athens in the fifth century BC as the very cradle of both notions: autochthonia and demokratia. How-ever underlying tensions were already starting to emerge even though Athenian philosophers saw the notions as being intrin-sically related and the Athenians were the only ones in Greece to be autochthones, which was supposed to explain their special talent for demokratia. The Athenian example is highly relevant for present-day struggles over autochthony and politics in Africa but also in the Netherlands and elsewhere in Europe. A paradox that seems to haunt the notion in very different times and places is the tension between an appearance of naturalness and hence basic security on the one hand and, on the other, a practice of deep uncertainty since autochthony’s precise defini-tion appears always to be contested.

Introduction

One of the things I learned from Gerti Hessel-ling was how important land and land rights are. For her, struggles over land and law were a vantage point that

¹ This article contains elements from my 2009 book entitled *Perils of belonging: Au-tochthony, citizenship and exclusion in Africa and Europe*, notably from the Intro-duction and Chapters 4 and 5.

allowed deeper insight into society as a whole. In 1982 we worked together for two months in Senegal and she taught me to see land rights, which I had previously found a bit boring, in a broader perspective. Little did I know at the time that I would come to write a book about people's obsessions with their links to the soil. But then, how could I ever have foreseen that a notion like autochthony (literally: 'born from the soil') would become a major issue in so many different parts of the world? Indeed, one of the paradoxes of our times is the upsurge in our strong preoccupation with belonging in a world that pretends to be globalizing. Appeals to the soil – as in the notion of autochthony – play a particular role in this respect as some sort of primordial form of belonging, with equally radical forms of exclusion as its flipside. The emotional charge these notions have recently acquired in different parts of Africa – Ivory Coast, Cameroon, Congo, to mention the most blatant examples – will be well known.

Yet, it is important to emphasize that the impact of this notion and the concomitant obsession with belonging as some sort of shadow side of the process of globalization are not only being felt on the African continent. Actually my interest in the theme was triggered by the surprising realization that similar discourses in the 1990s on belonging had suddenly invaded everyday politics with highly charged slogans in regions as different as West Africa and Europe. My surprise was all the greater because the term 'autochthon', which I had become familiar with in Cameroonian and Ivorian politics, was becoming, at the same time and quite abruptly, a heavily laden emotional term in Dutch and Flemish discussions on how to deal with immigrants. How could the same term acquire such a great mobilizing appeal in completely different settings? And why was this happening at roughly the same time?

An inspiring notion in this context is Tanya Murray Li's term 'a deep conjuncture of belonging' as specific to our times (Li 2002; see also Li 2000). She uses it particularly to characterize present-day relations in South East Asia, but the concept is clearly acquiring global dimensions. Many people are emphasizing the fact that our world is rapidly globalizing, yet the shadow side to globalization seems to be an obsession with belonging, especially in localist terms. The concept of conjuncture is especially relevant when addressing this paradox: highly varying trends, apparently completely unrelated, converge in reinforcing the preoccupation with belonging. The examples referred to above – Cameroon, Ivory Coast and the Netherlands – indicate that the trends that are turning autochthony into a powerful political slogan with great mobilizing potential differ strongly according to region. What is all the more important is to try to be specific about the contexts in which autochthony as some sort of primordial form of belonging is emerging with such force.

This contribution focuses on the cradle of autochthony thinking, namely classical Athens at the time of Pericles and Plato. The reader may be surprised

that I am going so far back in time. My defence is that this old and one of the very first examples of autochthony discourse highlights all the ambiguities with which we will be subsequently confronted in present-day examples from both Africa and Europe. Indeed, the idea of autochthony seems to be closely but quite paradoxically linked to new forms of neoliberal thinking. And also, and this may be an even better excuse for going so far back, Gerti loved history and always gave it a central place in her own work.

Classical Athens: The first fortress of autochthony

The above-mentioned coincidence, that the notion of autochthony became quite abruptly so politically charged in both Cameroon and the Netherlands, made it a challenge to follow the term over time and space. This turned out to be an adventure: I had certainly not expected that it would take me to such widely differing places and moments like some sort of magical bird turning up unexpectedly. Leading thinkers have used the term and still do so, albeit in quite different ways. Levi-Strauss (1958: 238) gave it a central place in his analysis of the Oedipus Myth and its emphasis on the physical handicap of its main actor. Heidegger (1989/1934) proposed the heavy term of *Bodenständigkeit* as a translation of autochthony, using it to defend a more communitarian form of nationalism for Germany, as an antidote to the all too individualistic tenor of Anglo-Saxon and French versions of nationalism. (Unfortunately, but probably not accidentally, Heidegger developed these ideas in the days when he was making overtures to the Nazis.)² Derrida (1997/1994: 95) on the contrary criticized autochthony as a mark of a too limited (or even ‘phallic’) form of democracy, which we urgently need to surpass for a more universalistic version.³ Despite such differences, all these important thinkers drew inspiration from the same source: classical Athens, the very cradle of autochthony.

To Athenians during the city’s Golden Age in the fifth century BC at the time of Pericles, Euripides and Plato their own *autochtonia* was of crucial importance. They used to boast about it being proof that their city was exceptional among all the Greek *poleis*. The other cities had histories of being founded by immigrants, while only the Athenians were truly *autochthonoi*, i.e. born from the land where they lived. This was also the reason why Athenians had a special propensity for *demokratia*. The classical texts – Euripides, Plato and Demosthenes – are surprisingly vivid in this aspect. To today’s reader it might come as a shock to note that in the text of these venerated classics, the same language of autochthony appears that is being so brutally propagated by Europe’s prophets

² See also Garbutt (2006), Fritzsche (1999) and Bambach (2003).

³ See also Chérif (2006).

of the New Right. And indeed this correspondence did not go unnoticed by these prophets, as is clear from an incident in France.

On 2 May 1990, a Member of Parliament in the French *Assemblée Nationale*, a certain Marie-France Stirbois who was a member of Le Pen's *Front National* (that is still the most right-wing party in France), surprised her colleagues by delivering a passionate speech about classical Athens and the way in which Euripides, Plato and even Socrates himself defended the case for autochthony. Apparently her fellow *députés* were somewhat surprised because until then Mme Stirbois's interventions had not betrayed such a deep interest in the classics (or for that matter in any academic subject). Clearly another *Front National* sympathizer – probably a professor at the Sorbonne – had written her speech for her (Loraux 1996: 204). The incident had pathetic overtones but the good thing was that it inspired two leading French classicists – Nicole Loraux (a good friend of Derrida's) and Marcel Detienne – to look into the issue of Athenian autochthony. Both authors show, with impressive eloquence, that it pays off to take old authors seriously since these classical voices highlight sharply, and perhaps inadvertently, the tensions inherent to the autochthony notion as such.

At first sight, the Athenian claim to autochthony seems to be as natural and unequivocal as, for instance, the claims of the new president of Ivory Coast, Laurent Gbagbo, that one needs to distinguish *Ivoiriens* 'de souche' (literally: 'from the trunk of the tree') from later immigrants. (Le Pen uses a similar jargon in France).⁴ However, Loraux and Detienne's visionary analysis shows that it may indeed be worthwhile having a closer look at the Athenian language on autochthony. This requires a detour in time, and the lively imaginary of Greek mythology may put the reader's patience to the test. Yet such a return to the classical locus of the autochthony notion is rewarding as the tensions and inconsistencies of this apparently unequivocal notion come to the fore in particularly striking ways, as can be seen from the following examples that testify to both the vigour and the complexities of autochthony in Athenian thinking.

In *Erechtheus*, one of Euripides's most popular tragedies,⁵ the playwright has Praxithea, King Erechtheus's wife, offer her own daughter for sacrifice in order to save the city:

I, then, shall give my daughter to be killed. I take many things into account, and first of all, that I could not find any city better than this. To begin with, we are an

⁴ In fact, the Athenians went even further by declaring their autochthony to be absolutely unique: their city was the only city where the citizens – at least the 'real' ones – were *autochthonoi*. They could therefore justly claim pre-eminence over all the Greeks, and certainly over the Barbarians.

⁵ See Euripides in Collard *et al.* (1995). Unfortunately only a few sections of the text have been preserved.

autochthonous people, not introduced from elsewhere; other communities, founded as it were through board-game moves, are imported, different ones from different places. Now someone who settles in one city from another is like a peg ill-fitted in a piece of wood – a citizen in name, but not in his actions. (Euripides 1995: 159-160)

Dramatic language in dramatic circumstances. The story is about how Athens is threatened with destruction by Eumolpus and his Thracians invading Attica. The Delphi oracle has prophesized that King Erechtheus can only save the city by sacrificing one of his offspring. He seems to hesitate but his wife gives him a lesson in what autochthony means in practice:

This girl, not mine in fact except through birth, I shall give to be sacrificed in defence of our land. If the city is captured, what share in my children have I then? Shall not the whole then be saved, so far as is in my power. (Collard *et al.* 1995: 159-160; cf. also Detienne 2003: 36-39)

Euripides's tragedy was based on a myth that was placed in some sort of mythical time (Erechtheus is supposed to have already been mentioned by Homer). But it was clearly very topical for the situation in Athens in 422 BC when the play was first performed: the city was at the height of its naval power but was locked in mortal combat with its arch rival Sparta. There was, indeed, good reason to celebrate Athenian uniqueness at the time. In other respects too, Praxithea's words must have seemed highly to the point for the audience. Her scorn of people 'who settle in one city from another' being like 'a peg ill-fitted in a piece of wood' no doubt had special meaning in Athens at a time when the majority of the population were seen as foreign immigrants (*metoikoi*), quite a few of whom were much richer than those who were true citizens by descent.

For Plato, Athenian *autochthonia* seems to have been equally self-evident. He made Socrates – when instructing young Menexenes on how to deliver a funeral oration for fallen soldiers (a big occasion in Athens in those days)⁶ – celebrate Athenian uniqueness in no uncertain terms:

... the forefathers of these men were not of immigrant stock, nor were these their sons declared by their origin to be strangers in the land sprung from immigrants, but natives sprung from the soil living and dwelling in their own true fatherland.

As the next step in his didactic model for a funeral speech and still speaking through Socrates, Plato makes his famous (or notorious) equation of *autochthonia* and *demokratia*:

⁶ Socrates pretends in his dialogue that he has been trained in how to deliver an *epitaphios* (funeral oration) by none other than Aspasia, Pericles's famous partner. Some (Detienne 2003: 21) emphasize the ironic elements in the Menexenes dialogue. However, it seems clear that once Socrates'/Plato's exemplary oration gets going that irony gives way to patriotism (see also Bury 2005: 330).

For whereas all other States are composed of a heterogeneous collection of all sorts of people, so that their polities also are heterogeneous, tyrannies as well as oligarchies, some of them regarding one another as slaves, others as masters; we and our people, on the contrary, being all born of one mother, claim to be neither the slaves of one another nor the masters; rather does our natural birth-equality drive us to seek lawfully legal equality. (Bury, Loeb Library, Menexenus 2005: 343-347)

As in Africa, funerals and notably funeral orations must have been a high point in the expression of Athenian autochthony.⁷ In general, autochthony in Greece, again as elsewhere, was probably linked to heavy ritual and symbols that verge on the burlesque.

In Euripides's tragedy, Erechtheus is punished for his dearly bought victory over the Thracians by Poseidon, who is still furious that the Athenians preferred the goddess Athena rather than himself as the city's protector. With his terrible trident, Poseidon made a deep cleft right through the Akropolis (Athens's main mountain) so that Erechtheus disappeared to remain literally 'locked in the earth', an appropriate position in view of his emphatic chthonic character, which is invariably repeated whenever he is mentioned.⁸ But finally Athena, the city's chosen goddess, appeared to save the situation by ordaining the consecration in honour of the king-locked-in-the-earth of a small temple, the Erechteion, which would be situated on the Acropolis and become the focal point of Athenian autochthony celebrations.

Burlesque as some of the founding myths of this Athenian particularity may now seem, it is clear that this heavy symbolism had a powerful appeal at the time. The reference to the soil in autochthony discourse in Athens was affirmed in particularly graphic ways by a king-locked-in-the-earth and the rhetoric used in funeral orations. All this confirmed too an idea of Athenian autochthony as a long-standing trait of this particular city. Hadn't Homer already mentioned Erechtheus as an arch-chthonian? This pride in Athens's autochthony as an old tradition was so convincing that it was later also accepted by many modern classicists (cf. Rosivach 1987: 294).

⁷ Cf. also Pericles's famous *epitaphios* for the Athenians who fell in the first few years of the long war against Sparta, and Demosthenes's funeral addresses from a later period (the second half of the fourth century BC) when Athens was threatened again, this time by the Macedonians (Philippos, father of Alexander) (Loraux 1996: 44). There are, of course, striking parallels here with very different times and situations. Cf. Maurice Barrès, the champion of French nationalism in the 1880s and his famous dictum that the main things needed for creating a *conscience nationale* were 'a graveyard and the teaching of history' (Barrès 1925, vol. I: 25; cf. Detienne 2003: 131). See also below and Geschiere (2005) on funerals and belonging in neoliberal Africa.

⁸ Detienne (2003: 42) translates a variant of the King's name, Erichthonios, as *Très-Terrien*.

Yet several historians have recently raised doubts about this dazzling image of classical Athenian autochthony – problems that must have worried contemporaries as well. There is a clear tension with the study of history as it was being practised at the time. What is striking is that the two most prominent historians in those days did not make special mention of Athens being particular in this respect. Herodotus mentioned a wide array of autochthonous groupings, some more so than others, but he did not mention this trait in relation to Athens (Detienne 2003: 49). Thucydides seemed determined to avoid the very word ‘autochthon’, probably because he distrusted its rhetorical use. Instead he went to the other extreme by explaining Athens’s pre-eminence due to its success in attracting immigrants (the *metoikoi* mentioned before) from all over Greece (Loraux 1996: 94). Indeed, the upsurge in autochthony in Athens at the time seems to have been intrinsically related to the influx of immigrants who, especially in the Piraeus harbour area, were rapidly becoming a majority. As so often in its subsequent avatars, Athenian autochthony expressed a determined effort by the city’s citizens to deny citizenship rights to newcomers (some of whom were rapidly becoming richer than earlier inhabitants).

Vincent Rosivach (1987), another classical historian of our times, even shows that the very term autochthon must have been of a much later coinage, probably from the fifth century BC when Athens was emerging as the major power among Greek cities. He proposes distinguishing an ‘indigenous’ and a ‘chthonic’ use of the term. It is certainly true that Homer mentions Erechtheus from Attica as a chthonic figure. However in Rosivach’s view, this is in a rather different sense, as some sort of primal, serpent-like figure (a monster even) closely tied to the earth. It is only during the rise of Athens that this Erechtheus was linked to the search by Athenians to prove their exceptional indigeneity, giving the chthonic component in autochthon quite a different connotation. Rosivach’s conclusions may be quite hypothetical.⁹ Yet his insistence on the reverse side of attributing a chthonic origin – it could also imply primitivizing a being or a group as some sort of primal phenomenon – is very relevant for other

⁹ It is clear that the veneration of Erechtheus, the arch-father of Athenian autochthony who was so graphically locked inside the earth itself by Poseidon’s revenge, cannot be that old. Archaeologists now maintain that the Erechteion, his temple where Athenian autochthony was sanctified, was built between 430 and 422, i.e. at the very time that Euripides was writing his Erechtheus play in which Athena ordered the Athenians to build this temple (Collard *et al.* 1995: 193; Detienne 2003: 44). A similar tension between founding and belonging haunts Plato’s Republic as well. The founder of his model city, who necessarily must have come from elsewhere to found a ‘new’ city, had to acquire a certain aura of autochthony to create a myth of belonging: Plato described this as ‘a beautiful lie’ that would serve as the basis for the civic instruction of its newly settled citizens (Rosivach 1987: 303; cf. Loraux 1996: 176; Detienne 2003: 56).

situations as well. In Africa, as elsewhere, this double meaning was to come up time and again: the autochthon as the prestigious first-comer but also as a primitive or even pre-human being.

In the same line as Rosivach, Detienne (2003) emphasizes that Greek claims to autochthony must have generally been somewhat a-historical since they denied, by definition, the great era of Greek colonization of the sixth and seventh centuries BC when new *poleis* were founded all over the Eastern Mediterranean in an adventurous process of expansion. Even Athens was very much a city in formation up until the fifth century BC. It is striking that the laws on citizenship promulgated in 509 BC by Cleisthenes, the city's great legislator during Athens's ascension, were much more open and inclusive than the Pericles Law of 451 BC during the city's heyday. Although Pericles's Law came only a little over 50 years later, it brought incisive changes and reserved Athenian citizenship only for those who could claim that both parents were Athenian (Detienne 2003: 53).¹⁰

Loraux (1996) problematizes Athenian autochthony, and hence autochthony in general, at an even deeper level. For her, the insistence on remaining on the same spot is a basic denial of history, which always implies movement. It is a form of negative history which needs an Other – movement in whatever form – to define itself (*Ibid.*: 82, 99). At a very practical level for Athenians, this implied a guilty denial of memories of earlier migrations. This was especially the case for the city's aristocratic families who used to be proud of their founding histories and often referred to their provenance from elsewhere as some sort of mythical charter. Loraux signals that history and movement are a kind of hidden subtext undermining autochthony's rigid memory in other classic texts on autochthony.

A blatant expression of this is to be found in one of Euripides's most famous tragedies, 'Ion', which is probably the most outspoken celebration of autochthony he left. For modern readers (and viewers), the force of the play mostly lies in the beautiful verses where Euripides allows the actors to express their rage (contained by deep respect) against the Gods and the careless way they handle mortals. But another possible reading of the text and one that takes into account Athenians' preoccupation with autochthony suggests that this latter

¹⁰ The parallels with present-day struggles are again striking. Cf. Le Pen's half-hearted attempts to fix the notion of *Français de souche* as reserved for those who have four grandparents born in France: he had to rapidly give up this proposition since many of his followers would not have met this criterion. Or the fierce debates in Ivory Coast, which were directly related to the contested position of Alassane Ouattara (the leading politician from the North) over 'and' versus 'or', i.e. whether a person's father *and* mother had to be Ivorian to grant Ivorian citizenship to their off-spring; or whether either one's father *or* mother would suffice?

theme must have been at least as important. Compare, for instance, Ion's statement when his new 'father' (who later turns out not to be his real father) tries to take him to Athens, while Ion still believes he himself is a stranger in the city:¹¹

They say that the famous Athenians, born from the soil, are no immigrant race. I would be suffering from two disabilities if I were cast there, both the foreignness of my father and my own bastardy ... For if a foreigner, even though nominally a citizen, comes into that pure-bred city, his tongue is enslaved and he has no freedom of speech. (Kovacz, Loeb Library, 1999: 397, 403)

This is vintage autochthony thinking. However, as the tragedy unfolds, the theme leads to so many complications that it can also be read as some sort of carnival of autochthony: Ion has to be crowned in the end as Athens's truly autochthonous king, even though he is Apollon's son and adopted by a father who is himself a stranger (the latter is even led to believe that he is Ion's 'real' father). As Detienne (2003: 59) so graphically put it: 'nothing is impossible in autochthony'.

There is clearly a deep unrest in autochthony thinking that Loraux highlights by insisting on the sheer impossibility of excluding history. Persons are not what they seem to be. If a foreigner – like Ion – can turn out to be an autochthon, the reverse must also be true. Indeed the obsession with having traitors on the 'inside' and the urgent need to unmask them, which has recently been demonstrated in recent developments in Ivory Coast, Cameroon, Rwanda and many other hotspots of autochthony, was very much present in classical Athens too. If a citizen was slandered by someone who questioned his citizenship, he could summon the slanderer to appear before a city tribunal. However this ran risks: if the slanderer was found to be innocent, his accuser would not only lose his own citizenship but also his liberty and could be sold as a slave (Loraux 1996: 195).

This may indicate why today's New Right in Europe is tempted to quote the celebration of autochthony in classical Athens as a precedent to be respected. However, both Loraux and Detienne convincingly show that on closer reading these texts instead highlight the basic impossibilities of autochthony thinking: the tortuous struggle to come to terms with history constantly undermines the apparent self-evidence of chthonic belonging and even more the great uncertainty it creates about 'authentic' and 'fake' autochthony, and hence an obsession with purification and the unmasking of traitors-in-our-midst.¹² Such uncer-

¹¹ Later, this same Ion was to learn that his 'real' mother was the sole inheritor of the city's autochthonous royal line. Greek stories love playing havoc with lines of descent!

¹² The focus of Detienne's last chapter is on present-day historians and their ongoing contribution to the reproduction of autochthony thinking. His main and quite shocking example is Fernand Braudel and one of the latter's more recent books *L'Identité de la France* (1986, Paris: Flammarion). Braudel made his name with *La Mediter-*

tainties make the notion, despite its apparent self-evidence, a fickle base for the definition of citizenship, a problem that is unfortunately all too relevant for autochthony's present-day trajectories.

Autochthony now: Globalization and the neoliberal turn

Autochthony clearly has a long history. The discourse of its present-day protagonists is certainly not new; it instead brings a reshuffling of elements from the past. Yet it is obvious as well that since the late 1980s, autochthony has been experiencing a powerful renaissance. The question is why this is becoming such a tempting discourse in many parts of the globe.

Li's notion of a 'conjuncture of belonging' points to the importance of various aspects of what has come to be called 'globalization'. The rapidly increasing mobility of people, not only on a national but also on a transnational scale, has set the wider context for people's preoccupation with belonging.¹³ But Li's approach allows us to outline more specific factors too, albeit that these may be quite different for various regions. For the areas she studies in South East Asia, Li emphasizes global concerns about the loss of biodiversity, indigenous people and disappearing cultures as crucial factors in this upsurge of concerns over belonging. The determining factors for Africa could instead be the twin processes of democratization and decentralization, both of which are closely related to the new emphasis since the late 1980s on the need to bypass the state in the policies of the global development establishment.

Across the continent, the new wave of democratization in the early 1990s seemed to initially bring a promising turn towards political liberalization. Yet in many countries it inspired in practice and quite unexpectedly determined at-

ranée (1949), precisely because it showed how to surpass the limits of the nation-state (and nationalist thinking) while writing history. So it is disconcerting that the same Braudel starts his later book by emphasizing that, after all, an historian is really at home with the history of his own country – a familiarity that brings Braudel to project *notre hexagone* (the favourite national metaphor for France and its territory) back into pre-historical times and link the Palaeolithic drawings of Lascaux to French identity. Detienne (2003: 142) cites all this as an illustration of the 'extraordinary weight of nationalist thinking' that in the end could even constrain the view of an historian with such a broad vision as Braudel.

¹³ Historians (cf. Lucassen & Lucassen 1997) may emphasize that, demographically, migration in many parts of the world was more important in earlier centuries. Yet it is clear that the facilitating of mobility by new technology conjures up a vision of rapidly increasing migration and it is precisely this vision that plays such a central role in much of the autochthony discourse. Cf. Appadurai's (1996) powerful definition of globalization as the increased mobility of 'goods, people and ideas'. For him, ideas are at least as important as the other two.

tempts towards closure to exclude fellow countrymen from their full rights as national citizens, or at least to differentiate between citizens who 'belong' and others who belong less. As always, Ivory Coast offers a particularly tragic example of this: the *Opération nationale d'identification* was announced in 2002 with some fanfare by the country's former President Laurent Gbagbo, a confirmed champion of autochthony. The idea was that everybody had to go home to their village of origin to claim their national citizenship and those who could not identify a specific village in the country as their place of origin would automatically lose their citizenship.¹⁴ In Eastern Congo, the enigmatic *Banyamulenge*, who are known as *Banyarwanda* (Rwanda people) by their opponents, became similar objects of fierce struggles over belonging and autochthony, fanned by Mobutu's machiavellistic manipulation by offering them full citizenship and then withdrawing it at will. In Anglophone Africa too, belonging became a crucial issue in the new style of politics. The former Zambian President, Kenneth Kaunda, could be excluded from the political competition by the simple claim that he was 'really' descended from strangers. In a completely different context, the new ANC democracy in South Africa became marked by furious popular reactions for excluding all *Makwere-kwere*, 'these' Africans from across the Limpopo.

At least as important as democratization was the already-mentioned drastic shift in the policies of the global development agencies like the World Bank, the IMF and other major donors: from an explicitly statist view to an equally blunt distrust of the state. While it was self-evident until the early 1980s that development had to be realized by the state and that strengthening the state and nation-building by the new state elites were therefore the first priorities, the state was subsequently no longer seen as a pillar but rather as a major barrier to development in the World Bank's official view.¹⁵ After the release of its 1989 report on Africa, it was no coincidence that the Cold War was clearly over and that 'by-passing the state', 'strengthening civil society' and 'decentralization' became buzz words. However just as democratization turned out to create unexpected scope for autochthony movements, the new decentralization policy and support to NGOs, which was often quite localist in character, similarly turned questions of belonging and exclusion into burning issues. For instance in Cameroon, the new forest law, which was heavily supported by the World Bank and the World Wildlife Fund, helped to make autochthony – i.e. the question as to who could be excluded from the development projects' new style for 'not

¹⁴ See Marshall (2006); Banégas (2007), Banégas & Marshall (2003) and Yéré (2006). This idea has only ever been applied in mitigated form but is still around in government circles.

¹⁵ An overview of speeches by World Bank directors and other representatives from 1972 to 1989 shows how deep a shift took place in the 1980s (Geschiere 2008).

really' belonging – a hot item, even in areas that are so thinly populated that there seems to be no demographic pressure at all on the soil an/or other resources.

What is important here is that such developments cannot be dismissed as being merely political games or manoeuvres imposed from above by shrewd politicians or well-meaning 'developers'. Political manipulations and external interventions by development agencies certainly play a role in all of the examples above but they can only work because the very idea of local belonging strikes such a deep emotional chord with the population in general. Indeed the force of the emotions unleashed by a political appeal to autochthony is often such that it threatens to sweep the very politicians who launched it right off their feet. This is, for instance, vividly illustrated by the increasing importance across the continent of the funeral 'at home' (i.e. in the village of origin), which is turned into a true festival of belonging, often to the clear discomfort of urban elites who dread such occasions when villagers can get even with 'their brothers' in the cities. Marked by a proliferation of all sorts of 'neo-traditional' rites that frequently involve vast expenditure, these occasions show how deeply rooted this obsession with belonging is, but also what a complex balancing act between returning and maintaining distance this requires from urban elites. In many regions, there is a direct link between democratization and the increasing exuberance of the funeral 'at home', a clear sign of how important local belonging has become. And all of this not despite but rather because of 'liberalization'. A major challenge in studying autochthony and the politics of belonging is therefore how to relate shrewd political manipulation on the one hand, and deep emotional involvement on the other, since the combination of both seems to be at the heart of the conundrum of belonging and exclusion that is becoming so central in our supposedly globalizing world.

Elsewhere other factors have had similar effects, as was clear from my surprise at recognizing the same language I had heard in Cameroon coming from my radio at home in the Netherlands. One of the interesting aspects of the term 'autochthony' is that it bridges the gap between 'South' and 'North' so easily.¹⁶ Apparently its language works as well in Flanders or the Netherlands as in Cameroon or Ivory Coast. But the background here is more an increasing fear of transnational immigrants or 'guest labourers' who are never planning to return home.

¹⁶ In this respect, there is again an interesting difference with the related notion of 'indigenous': the latter seems to retain its exoticizing tenor (mostly referring to 'others', i.e. people with a non-Western background). Autochthons are not necessarily the others; indeed the term can be adopted by majority populations, also in the West.

In the late 1980s, I became familiar with the Dutch term *autochtoon*, which was primarily used by our southern neighbours in Flanders, although in subsequent years it has conquered the Netherlands with surprising rapidity. The shocking murder in 2002 of Pim Fortuyn, Holland's most successful populist politician ever, made his legacy all the more powerful. His meteoric rise to fame made Dutch politicians realize that electoral success depends on taking 'autochthony' seriously. Defending the 'autochthonous cultural heritage', which for the Dutch who have always been proud of *not* being that nationalistic has proved to be quite hard to define, has become a dominant theme alongside the idea that more pressure is needed to force immigrants to 'integrate' into this elusive culture. The term autochthony is now less used in France and is virtually never heard in Germany or the UK, even though similar concerns about belonging are high on the political agenda there too. Yet elsewhere, the word crops up in unexpected places: in Italy, Umberto Bossi recently adopted it for his *Lega Norte*; and it appears quite forcefully in the Pacific and in Quebec, albeit in a different sense.

A brief illustration shows how confusing it can be when autochthony, with its different meanings, crosses the dividing line between continents. In 2006, several Africanists and I were at a conference on autochthony at the *Ecole des Hautes Etudes en Sciences Sociales* in Paris, the leading institute for social sciences in France. The conference had been organized in close collaboration with colleagues from Quebec and France. The meaning of the term autochthony was clear for the *Québécois* and some of their French counterparts. In the 1980s they had decided that this was to be used as the translation for the budding Anglophone notion of 'indigenous' because the more direct French translation, *indigène*, had had such a pejorative charge to it since the colonial period that it had to be avoided at all costs.¹⁷ In the Quebec version of the term, *les autochtones* are 'indigenous people' – i.e. people in a minority position whose way of life is threatened by other dominant groups. In this view, Quebec's Native Americans are the prototype of *peuples autochtones*. At the conference, however, our Quebec colleagues discovered, to their dismay, that on other continents the term had acquired quite different meanings. It was difficult for them to accept that, for instance, the term 'autochthonous' in Cameroon and elsewhere in Africa does not primarily refer to groups such as the Pygmies or endangered pastoralists but is commonly claimed by well-established groups that are in

¹⁷ What is particularly galling is the memory of the French institution of the *Indigénat*, the lower juridical status of the *indigènes* (in sharp contrast to the *citoyens*) that, until 1944, gave the harsher forms of French colonial rule (forced labour, corporal punishment) a formal basis. Cf. the challenge implied by the brutal name – at least in French – of the recent film *Indigènes* on the generally neglected role of African soldiers in the French army during the Second World War.

control of the state and try to use this against immigrants, who are still seen as foreigners. What was even more surprising seemed to be the fact that, for instance, the majority of the population in Flanders and the Netherlands is happy to be labelled 'autochthones.' As one participant from Quebec eloquently put it:

If the Dutch are so foolish as to label themselves 'autochthons', it is their affair. But the United Nations Working Group on Indigenous Populations has already decided that *autochtone* is the French translation of 'indigenous'. And I think we should stick to this.

Questioning the UN's mandate to decide the meaning of a term that had had very different histories in different parts of the globe was of little use. And the suggestion that the *Québécois* might be tempted to use the term themselves for their relationship with Anglophone 'latecomers' was hilarious for many in the audience. Apparently in Canada, the *autochtone* has to be the Other, with his own, endangered culture.

A neoliberal moment?

Betting on the market and 'traditional' forms of belonging

It is tempting to see the recent upsurge of 'autochthony' or related notions of belonging in different parts of the globe as an unexpected outcome of the neoliberal tide that swept our globalizing world with such speed after the end of the Cold War. And democratization and decentralization, the dominant trends on the African continent since 1990, have fitted in well with the so-called 'Washington Consensus', tersely summarized by Ferguson (2006: 39) as pretending to bring 'less state interference and inefficiency' and, one could add, more leeway for the market.¹⁸ Yet the explanatory value of invoking neoliberalism as a final cause may lately have become somewhat overstretched.¹⁹ At recent seminars and conferences, colleagues have been warning that this notion, just like globalization, is rapidly becoming some sort of panacea that is being applied to a discouragingly wide range of phenomena. So it might be necessary to try and be more specific. A *Leitmotiv* in the examples above might be the surprising penchant of many advocates of neoliberal reform for 'tradition' and belonging. There is of course an interesting paradox here: how, as a solution to all problems, can one combine a fixed belief in the market with far-reaching trust in

¹⁸ The term 'Washington Consensus' was coined by economist John Williamson in 1989 to summarize basic, and supposedly novel, principles behind IMF and World Bank policies at the time. Apparently subsequently he bitterly regretted having launched this term (see Wikipedia article on 'Washington Consensus').

¹⁹ I thank Daniel J. Smith for his critical comments on this point.

‘the’ community or ‘customary chiefs’ as stable footholds?²⁰ For Africa, this penchant for ‘community,’ tradition and ‘chiefs’ would seem to be a logical consequence of the belief in decentralization as a panacea. If one wants to bypass the state and reach out to civil society, local forms of organization and traditional authorities would be obvious points of orientation. Unfortunately, this new approach to development tends to ignore the fact that most traditional communities are the product of incisive colonial and post-colonial interventions. Even more seriously, there is supreme indifference in the fact that focusing on such partners inevitably raises ardent issues of belonging: chiefs relate only to their own subjects and tend to discriminate against immigrants (who were often encouraged in the past to migrate by colonial development projects). Local communities now have a tendency to close themselves off and apply severe forms of exclusion to people who were earlier considered fellows.

For different reasons, the same paradox emerges with the protagonists of the New Right in Europe (and elsewhere). It is striking that while liberalism on this continent used to be equated with various forms of anticlericalism (or in any case with the insistence on a strict separation of religion and state), neoliberal spokesmen are now demanding the resurrection of ‘Judaean-Christian values’ as an anchor for society. What is more important is that they are managing to combine the good old liberal principle of reducing the interference of the state as far as possible, with a vocal appeal to the same state to exercise almost total control over society (mostly against suspect immigrants), thus strengthening the presence of the state in everyday life instead of promoting its withdrawal (Geschiere 2009: Chapter 5). Neoliberalism as such may be a fuzzy phenomenon but this surprising combination of market and tradition is having very concrete effects on the ground.

The above may help to relativize the apparent naturalness of autochthony claims. In the different contexts discussed above – from classical Athens to its manifestations under neoliberalism today – autochthony may present itself as self-evident but in practice it turns out to always be contested and full of uncer-

²⁰ Striking illustrations of this penchant are described in the recent thesis by Juan Obarrio (2006) on Mozambique that offers a fascinating view of what the author terms the ‘Structural Adjustment State’. Obarrio describes how, for instance, a senior American UNDP official assured him that ‘communities know how they are and know also their boundaries perfectly well’ to counter warnings by some observers that ‘the’ community on which his organization wanted to base its new projects might in practice be highly elusive and volatile. Similarly a British USAID consultant insisted that communities ‘will be like corporations, unified single legal subjects under the new land law’ (Obarrio 2007: 105). Cf. the recent volume by Buur & Kyed (2007) who similarly note the unexpected comeback of traditional chiefs in a neoliberal context.

tainty. One sad example from a recent article on Ivory Coast (Chauveau & Bobo 2003) remains one of the most striking illustrations for me of the dangerous ambiguities hidden in this now so current notion. The article is based on courageous fieldwork on a violent topic: the *barrages* (road blocks) that were erected after 2000 throughout the countryside in southern Ivory Coast by Gbagbo's *Jeunes Patriotes*. Soon the *barrages* and their revenues – mostly 'fines' extorted by violent threats from 'strangers' – became a way of life for these youngsters, mostly *rurbains* (disappointed urbanites forced by the ongoing crisis to return to 'their' villages). These *Jeunes Patriotes* tended to posit themselves as the guardians of autochthony and tradition, often directly confronting their elders who they reproached for having squandered their ancestral lands to strangers to the point that there was none left for them.²¹ Some elders still seemed to have preferred to lease the land to strangers who at least pay some rent. Yet, many youngsters succeeded in reclaiming 'their' land, often violently. But then these *rurbains* quickly became disappointed with the rural way of life, and a number tried to sell their new farms to generate the funds required for a ticket to Europe (or beyond).

In this one example, all the tragic contradictions of the notion of autochthony seem to be condensed, most importantly its basic insecurity, hidden under an aura of self-evidence, which can so easily lead to violence. More generally, autochthony's volatile relationship with citizenship shows that appeals to history and culture, which are central in such claims to belonging, offer a slippery foothold for defining who qualifies as a full citizen and who can be excluded as a 'stranger'. The culturalization of citizenship, which seems to be a recurrent aspect of the 'global conjuncture of belonging' we are living in these days, has great emotional appeal in many settings. Juridical or economic aspects are thus relegated to the background. Yet precisely because such cultural or historical claims to belonging are present and despite apparent self-evidence beset by deep uncertainties, they confound rather than clarify issues of citizenship.

Land and democracy were central topics in Gerti Hesselings' work and also in her important activities outside the confines of academia. It is precisely the unexpected complications in the relationship between the two, some of which are outlined above, that continue to mark the future of entire societies both in Africa and elsewhere. There is deep regret that Gerti's wide-ranging work was so abruptly cut short but it will retain its importance in the years to come.

²¹ See Fisiy (1999) for an earlier analysis of the tensions over land between elders and youngsters in Ivory Coast.

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How can Africa develop? Reflections on theories, concepts, policies and realities

Patrick Chabal

Discussions surrounding the prospects for development in Africa revolve around a number of arguments that make important assumptions about both the situation on the continent and the effects of the policies being adopted. Whilst most of the debate concerns the modalities of more effective development policies or more appropriate foreign aid programmes, this chapter looks at the approaches taken in thinking through these questions. It reconsiders the main concepts, theories and models used by observers, practitioners and scholars alike to assess the extent to which the analytical instruments we use are deficient. Revisiting the ways in which we conceptualize development and aid may be a useful step in contributing to a better understanding of the realities that often baffle or elude us.

Introduction

Can Africa develop? Blunt as this question may be, I believe it needs to be asked again and again. And this is for a very simple reason: there is, in the end, very little agreement on what development in the present context means and there is fierce debate on the role of development assistance. Indeed, at a time when some are calling for an end to foreign aid to Africa, it seems important to think afresh about why Africa appears not to be developing. Is the problem one of needing greater assistance, better governance, a stronger state, less corruption or more dedicated leadership? Or is the problem to do with how we think through the process of development and conceptualize the ways in which it can be achieved? Do we need more aid or a paradigm shift?

The optimists make four points. First, they argue that there has been a notable upswing in economic growth in Africa, as is testified by the higher GDP

in many countries. Economic activity and exports have also increased and internal revenues have risen. Second, the amount of violence (civil war, warlordism and regional conflicts) has dropped, with great improvement having been made in countries such as Liberia, Sierra Leone and Rwanda. Third, democratization in the form of multiparty elections has become established across most of the continent: the African Union is zealous in its lack of tolerance regarding the illegal seizure of power. And finally, great progress has been made in containing and treating HIV/AIDS. The integrated health model that has reduced the number of new HIV cases could serve as a template in the fight against other major diseases on the continent too.

The pessimists rebut these arguments. First, they point out that GDP per capita has hardly increased since the population is continuing to grow at a rapid level. In addition, GDP is distorted by export figures, which are no indication of development. And despite the rise in GDP, income differentials and poverty have also risen. Second, while it is true that some of the worst cases of civil conflict have ended, many remain, like Darfur and DRC, which are lingering on despite international intervention. In addition, criminality and gang violence are on the increase across the continent. Third, the process of democratization has shown its limits (cf. Abbink & Hesselink 2000). In many instances, such as Kenya, Côte d'Ivoire and Congo, multiparty elections have actually led to civil strife. And in any event, careful study of these elections shows that the parties in power have learnt how to 'manage' democracy to their continued advantage. Finally, in spite of the progress made in the treatment of HIV/AIDS, there is little prospect that overall health levels in Africa will improve as long as poverty is widespread.

Such radical disagreements are puzzling since they show diverging opinions or interpretations of what ought to be well-researched facts. At the very least, they highlight how, in many ways, we continue to be at a loss as to how best to understand what is going on in Africa. But rather than add yet another voice to the debate about whether Africa is making progress or not, I would prefer to pitch the argument here at a different level. I should like to offer some reflections on a number of key concepts and highlight the importance of conceptualizing how we approach the question of development in Africa. And in so doing, I hope to suggest that what matters most is how we ask the questions, not whether we can provide the 'right' answers.

I begin by revisiting the concepts of *development*, *aid* and *accountability* with a view to clarifying what it is we are talking about. I then discuss the importance of the analytical standpoint, the relevance of history and the issue of causality before concluding with some remarks on the limits of Western social theory.

The meaning of development

A broad reading of the literature on the subject points to a wide range of possible definitions of development. The confusion is all the greater since there is little or no discussion of the concept in many publications: it is simply assumed that everyone knows, or has agreed on, what it means. But there are at least two competing genealogies at work here: one is primarily economic; the other essentially socio-political. The first derives from the work of development economists, the second from those experts that are concerned with poverty. Of course, the two are related and intertwined but because their origins are now obscure to most development practitioners and the assumptions on which they rest are rarely discussed, current debates are often a dialogue of the deaf with people arguing at cross purposes.

The economic notion of development is straightforward: it is a process of evolution that combines growth with a change in the nature of production from agricultural to industrial. There may be debate on the thresholds and the mix of savings/investment ratio, but there is little ambiguity in meaning. Development occurs when economic growth is higher than the growth in population *and* becomes self-sustained. On this account then, East Asian countries are developing, and some of them very fast, whereas most African countries are not. Other than Botswana, Mauritius and a few others, African countries have not met the twin criteria of economic development – even if there have been periods (primarily in the 1960s) when it seemed that an economic ‘take off’ was on the agenda in countries like Côte d’Ivoire and Kenya. Why this did not happen is still being debated forty years later.

The socio-political approach to development argues for a broader and more inclusive notion. Here development is equated with an increase in well-being and freedom rather than merely with income and industry. Although not denying that economic growth could serve these more socio-political aims, the proponents of this type of development claim that what matters most is the alleviation of poverty. Strange as it may seem to those who studied development economics in the 1960s and 1970s, the consensus in the aid industry by the 1980s was that what was crucial was less the longer-term perspective of economic growth *per se* than the more immediate use of foreign assistance to reduce poverty. One could not wait for growth to provide the resources to alleviate poverty: action was required immediately. Indeed, this approach culminated in the setting of the Millennium Development Goals (MDGs), which all focus on indicators of poverty, equality and social welfare, rather than on the growth indicators favoured by economists.

This shift towards a more social definition of development went hand in hand with a reconsideration of the political factors that seemed to affect African

countries. When the failure of authoritarian one-party states to achieve self-sustained growth became manifest in the 1970s, the international community turned its attention to the state, which was now seen as the principal obstacle to development. This resulted in what became known as 'the Washington Consensus' on development: a smaller state is a better state *and* democracy is necessary for a market economy. This was judged to be the only way to economic progress. In effect, the move towards democratic politics was seen as the first step towards economic development.

At the same time, the test of whether development progress was being made came to rest increasingly on two factors: the involvement of civil society in policy making and the easing of poverty in general. This new approach was given concrete form in the Poverty Reduction Strategy Papers process (PRSPs), which became a condition for foreign assistance with donors insisting that civil society have a say in how aid would contribute to a reduction in poverty. The state was meant to be the *enabler* rather than the *engineer* of growth. Its task was to facilitate market-led investment and ensure that aid was disbursed in such a way that it did not distort market forces. Efforts to reduce poverty were thus to complement the market.

This shift from an economic to a more socio-political notion of development, which has occurred gradually and largely by stealth, has led to a situation whereby analysis of Africa's circumstances has very little coherence. Depending on the analyst's standpoint, it has become possible simultaneously to point to either the progress or failure of development. Sticking to a mainly economic perspective, it is not difficult to show that African countries, which in the 1960s stood at a similar or higher level of GDP than many East Asian countries, have failed to achieve any kind of self-sustained growth. On the other hand, a primarily socio-political approach to development can point to strides in democratization and progress in some of the areas covered by the MDGs.

The upshot here is that we no longer know what we are talking about when we speak of development. Western governments, international donors, the Bretton Woods Institutions, NGOs and national aid agencies are all groping for definitions of development that will account both for what is happening on the ground *and* reflect some of the progress they want to believe is taking place in Africa. In other words, normative and ideological considerations have trumped the hard-headed vision of the 1960s economists who conceptualized development in terms of measurable criteria of self-sustained growth and quantifiable indicators of productive investment and diversification. We have now reached a point where, caricaturing matters slightly, donors are saying that there must be development because there is aid. This is indeed the current mantra of the high-profile economic guru Jeffrey Sachs. In what might be described as an elabora-

tion of the trickle-trickle-trickle-down theory, his view is simple: increase aid to Africa and you will eventually get development (Sachs 2005).

The matter of aid

The very notion of development in Africa is now intimately tied to the question of foreign aid. Unlike in the early 1960s when the belief in development economics led the international community to believe aid to be merely a trigger to a process of growth that would soon become self-propelled, today's notion of development seems to rely almost wholly on foreign assistance. This change is so huge that we must consider whether it is the very meaning of aid that has altered. But the matter of aid is complicated because both the rationale for it and its modalities are, and have always been, tied to the politics of donor nations as well as to the vagaries of international politics – and not primarily to the agendas of the recipient countries.

The reasons for providing assistance after decolonization ranged widely but were centred on four key issues. One was the obligation felt by the colonial powers to help their former colonies establish independence and achieve economic development. The price to be paid for this was continued links with their former colonial masters. The second was the belief that well-targeted foreign aid would assist former colonies in their efforts to take off economically. The third point was that aid would ensure that minerals and other resources from Africa would continue to benefit donors' economies at a time of rapid economic growth in Europe and North America. The final reason for giving aid had to do with the Cold War, with foreign assistance being negotiated for international support.

However, although the geo-political and economic reasons for giving aid to Africa are often discussed at length, very little attention is paid to the donors' ideology, culture and ethics, which are of no little importance. The obvious observation that some donor countries, like France, have had very clear strategic and economic reasons for providing assistance should not obscure the fact that today there are numerous reasons for supporting assistance to Africa. Foreign aid is usually justified in terms of a combination of economic and ethical factors. The two apparent extremes are, on the one hand, China with its obvious interests in oil, minerals and land and, on the other hand, the Scandinavian countries that see themselves as entirely 'disinterested' donors who are only bent on reducing inequalities and poverty. This is not the place to berate the one and incense the other. My interest here is merely to show how domestic factors can influence the ways in which aid is conceptualized in donor nations.

The present hostility in the West towards China's foreign aid policy can help us focus on the importance of taking into account a donor's domestic ideology

in the assessment of the nexus between aid and development. The ostensible objection to current Chinese policy is that its aid amounts to 'bribing' Africa in order to get at its resources *and* that the Chinese disregard the nature of the African regimes concerned, even when these have been accused of massive human- and political-rights violations. Although this argument appears merely to expose the hypocrisy of Western donors, it evidences real and significant differences in approach to 'aid' and 'development' between the two. And these point to the fact that Western and Chinese partners make very different assumptions about the dynamics of economic growth and development. Chinese aid to Africa is predicated on a vision of capitalist development, which does not depend on either political democratization or the avowed aim of reducing poverty. China, unlike the West, is not constrained by Africa-centred domestic considerations. Public opinion and parliamentary accountability in the West make it difficult to ignore the issues of development, poverty, probity, corruption and violence that make the headlines in the Western press. And NGOs quickly expose those donors that sacrifice morality for profit.

Since aid policies are primarily formulated by Western countries and international organizations dominated by the West, it is this agenda that dictates the debate. And the terms of the debate are determined by a twin set of considerations: the assumption that aid will enhance development *and* the obligation of rich countries to assist poorer ones. The positions of Western donor governments now differ considerably according to national ideology and popular opinion. Broadly and somewhat schematically, northern countries (for example, Scandinavia, the UK, the Netherlands and Canada) feel a greater sense of obligation than southern ones (Italy, France and Spain). And this matters in at least two ways. One is that, among donors, there is more or less strong support for aid *giving* – that is the obligation to exercise charity towards those who are poorer. The other is that the stronger the moral imperative to give, the stronger the need will be to *believe* that aid enhances development, i.e. to adopt theories that link aid with development and, conversely, to reject theories that dispute that link.

My point, therefore, is to highlight the fact that theories on the relevance of aid to development in Africa are not just influenced by the type of causality presently invoked by Jeffrey Sachs, such as large-scale increases in assistance. They are often affected by factors that have more to do with the self-image of Western donors and the need of politicians in the West to demonstrate charitable commitment. Nothing illustrates this process more vividly than the influence exercised by celebrities, such as the singer Bono, who were strong supporters of the 'Make Poverty History' campaign and are seen today as quasi-political actors by governments and international organizations alike. One compelling reason why some Western governments give aid, or even seek to increase their

aid budgets to 0.7% of GDP, is quite simply because it is politically expedient to do so *regardless* of the evidence of the effectiveness of such aid.

Hence the shock in the West when Dambisa Moyo published *Dead Aid* (2009). The book is in two parts. The first argues, quite convincingly, that aid has not contributed to development but has instead led to waste, corruption, lack of accountability and the maintenance of a system of rent rather than production. The second part is a straightforward liberal plea for the market to spur Africans to invest for development. Moyo has been attacked on both counts but, whatever the validity of her argument, she has made a forceful point and one that can no longer be ignored. That point is very simply that aid may, in fact, be counter-productive for development, however useful it may be in the short run in reducing poverty. In her view, the way out of poverty must involve more than international charity and this is going to require self-generated economic growth within Africa itself.

The nature of accountability

Present theories of development that stress good governance highlight the importance of democratization for accountability. The argument is simple: if politicians have to be elected (and re-elected), they will have to consider public demands and work for the greater good of the country. At first sight, it would seem that politicians today are keen to be re-elected and that they are campaigning on issues that are of direct relevance to their constituencies. On occasion, politicians and governments are even voted out of office, thus comforting the view that the electorate has sanctioned those who did not honour their commitments and has forced accountability on the politicians themselves. The general view in the development and donor world is that democratization has indeed improved accountability to the benefit of the ordinary people. The conclusion is thus that the more frequently elections take place, the more they matter.

But this is a partial, not to say simplistic, analysis of what has been happening in Africa. In the first place, it is clear that the straightforward projection of the Western concept of accountability on Africa is not really warranted. Moreover, such an approach ignores what might be called informal forms of accountability, which are often more important to politics in real life. Finally, the process of aid-giving itself subverts processes of accountability at work. I will discuss these briefly.

The notion of accountability that we work with in our own Western democracies is the outcome of a political process that started long before liberal democracies emerged and it derives from social processes whereby the working and 'lower orders' forced the ruling classes to account. As is well known, this

process only became institutionalized when rulers sought to impose a system of taxation. Since these European rulers could no longer go to war at will, they were eventually forced to consolidate their rule by consent rather than (merely) coercion. Raising revenues from the population forced a reconfiguration of existing relations of power. This and the ideology of constitutional monarchy, later parliamentary government, brought about ever wider political representation. But all this has been achieved as a result of hard, often violent, struggle.

The situation in Africa is different. Rulers established their legitimacy in the first instance because they had brought independence to the continent. Later, they held power through a judicious combination of patrimonialism and coercion and, in this, followed in the footsteps of the colonial state. The relationship between rulers and the ruled never revolved round the nexus between taxation and representation. And to this day, taxation is but a relatively minor source of revenue and there is little meaningful correlation between paying tax and the delivery of services. The exercise of power and the basis of political legitimacy remain essentially patrimonial, which means that accountability is conceived in terms of what patrons can deliver to their clients. And, critically, patrons and clients both expect this relationship to continue: patrons, because they need political support; clients, because in the absence of a functioning state that provides public goods, the only avenue is to tap their patrons.

In addition to the existing formal mechanisms of accountability (such as elections), there are powerful informal means too.¹ These take myriad forms ranging from the need to favour one's community of origin over others to the demands that ancestors be propitiated in the proper manner. Whatever the channel through which accountability is exercised, the link is vertical between the politician/leader and the local level. If, to use a particularly stark example, politicians fear the possibility of witchcraft in their village more than the electoral sanction of their constituency – in part because they know how to secure the required number of votes – then it is clear that the accountability that matters is not that envisaged by the advocates of good governance. And yet, it may well be extremely effective.

More generally, as governments in power learn how to 'manage' multiparty elections, the significance of electoral accountability becomes less compelling, even though elections obviously do still matter. In practice, the driving force of political accountability remains patrimonial, a fact that the development industry simply refuses to acknowledge. Much as the African Union's new strictures emphasize the importance of democratic accountability, in large part because this is what donors want to hear, the reality of power on the continent dictates

¹ By informal I mean only that they are not part of our political theories of contemporary Africa.

that rulers are mainly held to account in other ways. The good news is that there are processes of accountability; the bad news is that we do not have a good theory to make sense of what is going on.

The third, and most paradoxical, aspect of current development theories is that one of the greatest obstacles to effective accountability is foreign aid itself. African governments are so dependent on foreign aid that they have to prioritize accountability to their donors rather than to their domestic constituencies, not infrequently against their better judgement. In addition, the so-called civil-society sector in Africa is also almost wholly dependent on outside funding, and thus largely accountable to foreign NGOs. But there is still worse to come: the process of good governance imposed by donors can undermine any potential domestic accountability. For example, the Poverty Reduction Strategy Papers (PRSP) mechanism gives more voice to so-called Civil Society Organizations (CSOs) – whose participation in the PRSP discussion is largely determined by government – than to any elected parliament, which is often left merely to rubber-stamp the decisions made by the executive. Finally, the overwhelming emphasis given by donors to electoral competition induces politicians to do whatever it takes (even including violence) to secure victory. But this subversion of the spirit of electoral democracy is not only detrimental to meaningful accountability; it is also a powerful demonstration of the limits of multiparty democracy. The result is that there is no reason for the ordinary voter to think that electoral democracy is anything other than a variant of patrimonial politics.

The need for a new perspective

If, as I argue above, our conceptualization of key aspects of development in Africa is not just too narrow but also misleading, then it is important to ask how our approach to the question could be changed. My contention is that the main reason we are in need of a different perspective is because we continue to use social theories, many of which have now reached their limits. By this I mean that they are decidedly deficient in terms of explaining the main political, social and economic processes on the continent, a question that is addressed from a more general perspective in my forthcoming book. Here though I focus on what I believe to be the three important aspects of any theory of development in Africa: the question of standpoint, the relevance of history and the issue of causality.

The question of standpoint

What is striking about the present development models is that they all stem from the perspective of the West. This is of course not surprising since our social, political and economic theories derive from the conceptualization of the

Western experience over the last three centuries. We consider that, with some local variations, this represents the path to development that all nations should follow if they are to reach the condition of modernity achieved in Western societies. Moreover, since the intention behind foreign aid is to help African countries develop as rapidly as possible, if we can offer Africans shortcuts based on our own experiences, why should they not benefit from the insights of our theories?

This approach to development has been abetted by our African partners – politicians, governments and, more generally, the dominant elite – who, for their own reasons, have had good cause to assure us in the belief that aid would indeed result in development. Be that as it may, the issue of a standpoint is a critical one. Indeed, it is probably the greatest single impediment to a paradigmatic shift that might make aid more productive than it has been in the last fifty years. However, this shift will be difficult as it goes against the interests of both donors and recipients. This is though all the more reason to begin the necessary debate.

The consequences of the present Western standpoint are numerous. The most corrosive effect is that we approach African realities from the perspective of our own theories; seeking confirmation in Africa of what we have been taught should constitute key economic and socio-political processes. A few examples will illustrate what I mean. Even though economists have now accepted that the bulk of relevant economic activity in Africa is ‘informal’, they continue to employ standard economic theory to formulate the policies that are supposed to bring about development. Second, nothing has changed the World Bank’s view that, in the long run, state intervention is a drain on the market, even if it is clear that it is now effectively supporting what it sees as the most efficient ‘developmental states’, which (such as Ethiopia) appear to be delivering on GDP growth. But this support collides with the assumption, now common in development circles, that democracy is a precondition for economic development.

Equally, the assumption ever since the collapse of communism in Eastern Europe that civil society is *ipso facto* a key element in the democratization of politics is too simplistic. It is not clear whether there is a civil society in Africa that follows the European model. The stress placed on the role of CSOs by donors has created a situation in which Africans have had to ‘invent’ a civil society with the intention of mirroring the West’s rather than one that actually reflects the intricacies of the local realities. Not the least paradoxical consequence is that the few genuinely home-grown CSOs in Africa are usually denied support by donors because they fail to conform to the required criteria of accountability and effectiveness. So, for example, little assistance is given to local self-help rural groupings like *tontines* (self-organized savings banks) or farm-

ers' associations that are working towards, and may already have contributed to, an improvement in living or working conditions in many parts of the continent.

The illusion that our Western standpoint is universally valid is compounded by two factors. The first is that, since funding is dependent on our African partners agreeing with the policies we advocate, it is in their interest to agree. Their agreement placates our belief that the problem in Africa is not our policy advice but the fact that it is not being implemented properly. The second is that most of the African elite have been educated either in the West or in African institutions of higher education that offer Western curricula in economics and the social and political sciences. Since they are valued (and employed) by Western donor institutions insofar as they can show mastery of Western knowledge and commitment to the policies they infer, it is entirely rational that they should (appear to) agree with our social-science theories. Their dependence on Western funding induces apparent conformity, which is detrimental to insight.

My argument is not that Western theories should be jettisoned but simply that we need to make a paradigmatic shift. Instead of focusing on how the continent can be made to fit the supposed requirements of a Western-style modernization, we should be asking how development policies could be working *with the grain*, rather than against it. Here, the five-year Overseas Development Institute (ODI) African Power and Politics research project funded by the Department for International Development (DfID) is a welcome first step.² Its ambition is to find empirical evidence on the successful delivery of public goods in Africa, even in places where the process does not conform to generally accepted standards of good governance held up by Western donors and international donor agencies. One of the concepts that has emerged from an in-depth comparison of the experience of Asian and African countries since the 1960s is 'developmental patrimonialism' – by which it is meant that clientelism may not be an obstacle to development *as long* as rents are centralized *and* utilized for investment according to a long-term horizon. In other words, it is the determination of governments to generate development that is critical regardless of patrimonial relations or corruption (Kelsall *et al.* 2010).

The relevance of history

I want to start with the observation that most development theories and policy recommendations are singularly short on history. If on the odd occasion the impact of colonial rule is factored in the analysis, it is rarely analyzed in ways that highlight the continuities between the colonial and post-colonial state. Furthermore, there is virtually no reference to the pre-colonial history of the continent, which is by no means irrelevant to how it is evolving today. This is prob-

² See <http://www.institutions-africa.org>.

lematic for several reasons. First, as I have already explained, it is easy to forget that our theories are based on Western historical experience, which means they may or may not be relevant to non-Western settings. Second, the tendency to a-historical policy advice removes the requirement that we impose on ourselves when we study our own societies of taking into account the weight of history on present circumstances. Who would think, for instance, of ignoring the impact of the French Revolution in an analysis of contemporary politics in France? Thirdly, it makes us blind to the realities on the ground that plainly matter for analysis and policy. I will elaborate briefly.

On the vexed question of the causal correlation between democracy and development, the study of the political experience of European and now East Asian countries offers two lessons. One is that European and Asian countries developed economically *before* they became democratic, under authoritarian and notoriously corrupt regimes. So the current assumption that democratization will favour development in Africa goes against the lessons of history. Similarly, the injunction that good governance will promote development is at odds with the East Asian experience, in which what mattered most was *effective* rather than *good* government, by which I mean a government capable of carrying out its developmental policies rather than one following the moral precepts of liberal democracy. Clearly then, focussing on what *effective* governance entails would serve policy advice better than an insistence on *good* governance, which remains impossible at the moment. Finally, history shows that in both the European and East Asian cases, it was the state rather than the market that drove development forward, with coercion when necessary. So, present World Bank and IMF orthodoxies on the role of the market in Africa are difficult to understand.

Conversely, neglecting history makes it difficult to assess, for instance, the relevance of different colonial systems in the operation of present-day bureaucracies in Africa. Such information is vital if one is to weigh up management capacity and effectiveness in implementing development policies. For instance, the Portuguese administrative traditions of punctilious bureaucracy and notorious inefficiency have weighed heavily on the capacity of former Portuguese colonies. On the other hand, the relative efficiency of colonial governments in Dakar and Abidjan was an asset in the years following independence. On a different register, it is well-nigh impossible to analyze political events in Nigeria since independence without solid knowledge of the pre-colonial political, religious and ethnic divisions, particularly regarding the divide between the Muslim North and the rest of the country. There is far more continuity here than most policy papers allow for. Similarly, it would be pointless to address the question of land allocation in the Ashanti region of Ghana without any relevant knowledge of how chiefly authority has managed the question over time and

from long before colonial rule.³ To date, there are bitter disputes going back a long way that revolve around the interpretation of chiefly decisions (Berry 2001).

The thorny question of ethnicity, which resurfaces at regular interval as the *deus ex machina* of African politics, can also not be understood without history. It is not simply a matter of decreeing that ethnicity explains politics in Africa or claiming that ethnicity was merely a colonial invention. The relevance of ethnicity is only to be appreciated by means of a fine-grained study of the origins, genealogy and transformation of the complex, fluid and changeable bundle of factors that come together to provide individuals with a sense of self-identity. Just because ethnicity might at times be politically salient or instrumentalized by political elites does not mean that it is necessarily the central feature of African identity. For example, the conflicts between Kikuyu and Luo in Kenya, between Bamileke and Douala in Cameroon or between Igbo and Hausa in Nigeria are all to be explained by contingent economic, electoral or political factors. They are not 'inscribed' in the history of these supposed ethnic groups, the concrete expression of which has varied greatly over time. Without history, there is no valid consideration of ethnicity.

Finally, it makes little sense to try to engage in peacekeeping or conflict resolution without a solid understanding of the long history underlying civil strife. Simple as it may appear to seek its cause in terms of greed, grievance, ethnicity or resources, it is often the case that conflicts are rooted in long-standing histories of rivalry, war and competition. For example, RENAMO in Mozambique was first seen to be a mere gang of bandits, then an offshoot of the South African security forces and, finally, a political party aspiring to capturing office. All these are true but the results of elections since 1994, with their striking regional divide, must be linked to the nineteenth-century conflict between the expanding Gaza Empire and the much put-upon Shona speakers of the Zambezi region. This divide, which affected the war of national liberation, continues to have political resonance today.

The issue of causality

Ultimately when addressing the question of development, we are confronted with the knotty problem of causality. It is not good enough to conceptualize and analyze what is taking place: we need to have a sense of what strategy will bring about what results. Decisions about aid are based on development policies and these are derived from the theories that inform their validity. But theories are nothing more than supposedly well-grounded hypotheses about what com-

³ Similarly relevant discussions on the relationship between inherited colonial state law and local customary law in Mali are contained in Hesseling *et al.* (2005).

bination of actions will most likely bring about certain outcomes. However, the development industry behaves as though theory was a luxury in which only academics can indulge and act on the basis of assumptions they seldom discuss. So I want to engage here in a short discussion of some of the key assumptions about causality that lie at the heart of the development industry's ideology.

I have already suggested that two core assumptions of causality are at the very least open to serious questioning when considering historical records: (i) the conclusion that development is market- rather than state-driven; and (ii) the assertion that multiparty elections (democratization) are a prerequisite to development. Whether or not these turn out to be true, what is at stake is an approach to development in Africa that assumes these causalities hold. But a closer look at the reasons why such assumptions are being made reveals that it is not because they are based on good theory. Rather, they derive from a combination of ideology within donor countries and the need to put forward constructive policies after years of failed attempts to kick-start development in Africa. Unfortunately, good intentions are no substitute for hard thinking about which causalities are plausible and which are not.

I now turn to some of the other assumptions about causality currently being made in the aid industry. The first is that aid will facilitate development and that more aid will facilitate it even more. One key problem here is that no distinction is made between aid as a means of improving people's lives and aid as a trigger of development. There is an unstated presumption that the one will be instrumental in causing the other. But there is no good evidence that the funding of programmes to enhance quality of life or alleviate poverty will result in activities that will generate economic development. These are two different processes. And as several analysts have suggested, aid may in fact act as a deterrent to the implementation of policies conducive to productive investment.

The second is that budget support is more likely than project activities to enhance development. The reasoning here is that project aid is piecemeal and uncoordinated, leading to a situation where donors operate according to their own priorities and with little regard for overall development strategies. Budget support, on the other hand, provides governments with increased means to carry out their policies and invest in areas that are critical to development – education, infrastructure, health, administration and agriculture. The theory behind this assumption is unimpeachable but there is a missing link in the causal reasoning. Unless governments do indeed want to pursue, and more importantly have the ability to implement, such development policies, budget support simply means bolstering state revenues. Attempts on the part of donors to enforce accountability are largely futile since they can do little to ensure that government policies focus on the productive investment required. The same applies to debt rescheduling/cancellation.

Similarly, the assumption that decentralization is more effective than centrally controlled planning at spurring development is questionable. It may be true that decentralization gives greater local control over the use of resources and even ensures that more central funding reaches the lower levels, but there is no solid evidence that such measures are causally beneficial to development. This is partly because people at the local level may well be more concerned with practical improvements which, although very useful to them, are not necessarily those that will generate the type of economic activity required if their country is to see economic growth. Of course, it is good if local people can actually control the budgets of their schools and hospitals but the quality of these institutions is still dependent on government investment in education and health. And in any event, better education and health can only be useful to development if or when there is scope for economic activities that will benefit both the individuals concerned and the country's economic prospects. In this respect, it is now being argued that it might be better to 'just give money to the poor', since current research suggest this serves both to lessen poverty and generate extra investment in local development activities (Hanlon *et al.* 2010).

And finally what about the assumption that a focus on aid for poverty alleviation is conducive to development? It may sound cold-hearted to question the importance of reducing poverty but my concern here is about causality. The historical experiences of Western and Asian countries do not support the hypothesis that fighting poverty necessarily aids development. Furthermore, it seems to be the case historically that poverty in the West and East Asia only decreased significantly when economic progress gave working people more political power with which to force authoritarian governments to devolve more resources to the poor. Seen in this light, it could be argued that a focus on poverty might be detrimental to development in two ways. One is that it relieves the governments concerned of their obligations to their less well-off citizens, enabling the regimes to escape the wrath of those who might want to vent their anger against politicians, which would be a form of accountability. The other is that it deflects attention from the priorities that should be attached to the policies needed for productive investment that would lead to sustained growth.

Conclusion

Whatever our desires may be for the type of development that will bring Africans a better life and a more hopeful future, we students and analysts of the continent need to remain vigilant about what we advocate. I have suggested that one of the reasons for the failings of our – admittedly well-meaning – development advice is that we have not been able to come to terms with the limitations of the economic, social and political theories we employ. Whether we admit it

or not, it is the weight of the assumptions with which we work that is probably one of the greatest obstacles to us understanding the processes at work in Africa today. Can Africa develop? Yes, without question. Will it develop as we presently envisage it will? Probably not.

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LAND ISSUES AND ECONOMICS /
PROBLEMES FONCIERS ET L'ECONOMIE

L'économie sociale et solidaire pour stimuler le développement ascendant et endogène

Abdou Salam Fall

« L'agir citoyen est à la démocratie et au développement,
ce que la constitution est à l'Etat »

Gerti Hesseling

L'économie sociale et solidaire, en raison de son approche holiste fondée sur un paradigme qui place la dignité humaine et la responsabilité citoyenne au centre de l'entrepreneuriat collectif, devrait inspirer les politiques publiques et les mécanismes de régulation internationaux. Cependant, il ne faut pas qu'elle continue à évoluer à la marge ou rester réactive. Elle doit être inscrite au cœur de ces politiques et les structurer. Au Nord comme au Sud, il s'agit d'une véritable bouffée d'oxygène compte tenu des crises du capitalisme, des changements climatiques, des revendications citoyennes de plus en plus fortes pour une gouvernance plus ouverte et vertueuse. Les résultats en demi-teinte de l'aide au développement et des politiques de lutte contre la pauvreté devraient conduire à un changement de cap en faveur du plein emploi et des emplois décents. Les espaces de créativité libérés par les crises mettent en évidence des résiliences que l'impératif du développement de l'intérieur des sociétés résume parfaitement. Dans ce cadre, sera mise sur orbite la vision de l'économie sociale et solidaire à la fois pour une production et consommation responsables, mais aussi pour

un développement inclusif faisant participer et partager les fruits de la croissance durable par les larges couches sociales.

Introduction

Cette contribution vise à montrer de quelles façons l'économie sociale et solidaire se situe au cœur de la croissance inclusive et de l'économie durable. Pour ce faire, un premier bloc analyse comment l'économie sociale et solidaire participe à rendre la croissance économique des pays plus inclusive pour en faciliter la soutenabilité, tout en permettant une plus large participation et un partage des fruits de cette croissance.

Un deuxième bloc porte sur les principes fondamentaux de l'économie sociale et solidaire à l'aune de l'emploi pour le plus grand nombre. Il est suivi d'un troisième bloc portant sur la protection sociale en tant que patrimoine historique de l'économie sociale et solidaire. Le quatrième bloc introduit les formes évolutives d'engagement de l'économie sociale et solidaire qui en font un instrument de production de richesses mais aussi de lutte contre la pauvreté.

Le dernier bloc est consacré à l'analyse de l'économie sociale et solidaire comme expression du besoin de renouvellement des paradigmes de développement. Passant également en revue les leçons apprises des crises, il se termine par un exposé sur les conditions du passage de l'économie sociale et solidaire à une grande échelle. Cette perspective ferait influencer l'économie sociale et solidaire sur le marché mondial par un meilleur partage de ses valeurs ajoutées en tant que modèle de développement fondé sur les finalités sociales.

L'économie sociale et solidaire pour une croissance inclusive

L'économie sociale et solidaire tire vers le plein emploi

La productivité progresse dans le monde mais les salaires ne suivent pas. Le chômage atteint actuellement un record jamais égalé. La priorité des priorités va à l'emploi. La croissance baisse dans les pays occidentaux, plombant les opportunités de relance économique, tandis qu'elle monte en Asie et fluctue en Amérique latine et en Afrique. Dans les pays du Sud, la croissance démographique demeure forte, plaçant les besoins en emplois au cœur des plans de développement s'ils se veulent cohérents pour éviter de sacrifier les générations actuelles et futures. Mais le sous-emploi est généralisé et continue à mener à la précarité dans les pays d'Afrique au Sud du Sahara. Dans les pays développés, des politiques actives de développement de la main d'œuvre ont conduit à l'émergence d'initiatives de création d'activités économiques visant l'intégration. Les entreprises d'insertion socioprofessionnelle ont concerné le recyclage par exemple dans les pays du Nord.

Ailleurs, en Afrique, comme le montrent de nombreuses expériences d'insertion professionnelle, des associations et ONG, autant que les institutions publiques et privées, ont initié des structures de formation aux métiers, contribuant à qualifier des jeunes victimes de la sélection scolaire et à accompagner leur insertion professionnelle, soit par les liens entretenus avec des entreprises privées ou publiques, soit par l'aide à l'installation notamment grâce à l'auto-emploi au sein de petites coopératives ou individuellement. Au Sénégal par exemple, on peut citer des ONG et associations de jeunes qui se sont distinguées dans ce domaine. Par exemple, le Centre International de Formation Pratique à Mboro (CIFOP) initié par les Eclaireuses et Eclaireurs du Sénégal en coopération avec les Scouts et Guides du Luxembourg depuis 1988. Le CIFOP forme annuellement, à titre gracieux, une centaine de jeunes en un cycle de trois ans, offre un internat et articule encadrement rapproché et formation technique en menuiserie bois et métallique, chaudronnerie, bâtiment, agriculture, mécanique automobile, etc. La niche occupée par cette formation est celle de conducteurs de travaux qui faisait défaut dans l'offre professionnelle.

Depuis 23 ans, ce centre forme des jeunes qui s'insèrent dans différents secteurs, complètent, au besoin, leur formation dans des cycles ailleurs, et nombre d'entre eux occupent des postes à responsabilités élevées dans leurs activités professionnelles. Le temps d'apprentissage est rationalisé et écourté, à la différence du secteur dit informel où la maîtrise d'un métier peut se dérouler sur plus d'une dizaine d'année, sans que le statut d'ouvrier qualifié ne puisse être revendiqué durant ce temps consenti comme aide dans les ateliers et garages, souvent improvisés au sein des quartiers. A l'instar de ce centre, d'autres exemples comme ceux du Centre de Bopp, de ASAFIN, etc. ou d'autres écoles d'entraide scolaire, comme ACAPES dans la banlieue de Dakar, contribuent à qualifier d'anciens exclus du système scolaire et, en particulier, à améliorer la productivité dans le milieu du travail grâce à la formation professionnelle ciblée. Une productivité que le rapport sur l'emploi de la Banque Mondiale en 2007 au Sénégal considère comme particulièrement faible (2,5 fois plus faible que celle de la Chine). Grâce à l'engagement citoyen des associations, de nombreux jeunes sont requalifiés et leur insertion sur le marché du travail participe à les mettre en conditions d'accès à des emplois décents et à des opportunités de mobilité sociale.

Le plein emploi n'est pas seulement un rêve, c'est une impérieuse nécessité. Dans de nombreux pays du Sud, l'économie populaire indique que lorsque l'entrepreneuriat s'inscrit comme moteur du développement local et demeure porté par les communautés, elle mobilise de larges groupes au sein de la population. En Europe, l'économie sociale et solidaire, ancrée dans les territoires, très peu délocalisable, a été créatrice d'emplois ces 30 dernières années dans un marché de l'emploi globalement déprimé. Dans la même veine, l'entrepreneuriat

social articule production, services et consommation, domaines dans lesquels des emplois se pérennisent. Les changements doivent donc emprunter cette voie de liens intrinsèques entre producteurs et consommateurs qui se trouvent en face d'un monde nouveau à construire, un monde équitable et solidaire.

L'économie sociale et solidaire contributive d'une croissance inclusive

Le taux de croissance économique permet de mesurer le niveau de vie d'une population donnée. Il reflète les variations du Produit Intérieur Brut (PIB) d'un pays. Actuellement, la croissance économique a un faible impact sur la pauvreté. Il apparaît que la croissance reste captée par les franges aisées dans de nombreux pays en l'absence de mécanismes impliquant les acteurs populaires dans l'économie moderne. Il fait également défaut, une structure économique qui facilite à large échelle la redistributivité horizontale des richesses. Il s'y ajoute les effets pervers de la croissance sur l'environnement et autres vulnérabilités de genre par exemple, ou géographiques, notamment les déséquilibres des grands ensembles territoriaux qui rigidifient les inégalités sociales. Le rapport de Stiglitz, Sen et Fitoussi (2009), établit bien que les rapports entre la croissance moyenne du PIB par tête et les inégalités se creusent : « *Beaucoup de personnes peuvent se trouver plus mal loties, alors même que le revenu moyen a augmenté* ». ¹

Il faut donc une qualité de croissance pour tirer vers le haut le niveau de vie. Pour être durable, cette croissance doit être endogène. Elle doit être portée, entre autres, par l'économie sociale et solidaire qui est en soi l'espace de l'endogénéité. En effet, l'économie sociale et solidaire est une économie du peuple. Elle se réalise à l'échelle locale. Elle est donc ancrée dans les territoires. Elle garantit l'accessibilité géographique qui fait défaut à l'économie moderne. Celle-ci reste, en effet, segmentée et se traduit par une concentration des pauvres dans des quartiers et régions périphériques, donc éloignés des opportunités.

Une telle marginalisation est accentuée par un faible investissement public dans le capital humain, notamment dans la formation et l'entrepreneuriat, dont la conséquence est de limiter la portée de la participation des pauvres dans le travail. Les services financiers ont le plus souvent une implantation faible, en particulier dans les zones habitées par les pauvres, du fait des risques et des coûts d'exploitation élevés. C'est pourquoi l'OIT (Organisation internationale du travail) met le « travail décent » au cœur des efforts pour éradiquer la pauvreté. Il est en effet un moyen de parvenir à un développement durable, équitable et fédérateur.

¹ Rapport de la Commission sur la mesure des performances économiques et du progrès social, 2009, Joseph E. Stiglitz, Amartya Sen et Jean-Paul Fitoussi.
www.stiglitz-sen-fitoussi.fr

Inversement, la croissance inclusive rend possible l'égalité d'accès à des opportunités créées pour tous, notamment pour les pauvres. Comme le montre Birdsall (2007), elle contribue à augmenter la taille de la classe moyenne. C'est dans ce cadre que l'entrepreneuriat social participe à cet effort d'accessibilité du travail décent et de l'élargissement des opportunités d'affaires à de larges franges de la population. L'inclusion des pauvres à la croissance ne suffit cependant pas pour que celle-ci soit inclusive. Il faut cela et plus encore : Assurer des emplois décents pour le plus grand nombre y compris les couches moyennes, promptes à s'essayer dans le véritable entrepreneuriat social ; en particulier celui qui revêt des formes coopératives, associatives, mutualistes, communautaires. En effet celles-ci font appel à des critères précis, notamment celui – fondamental – de la propriété à la fois privée et collective qui est une des clefs pour un avenir durable (Jeantet 2008).

De nombreuses expériences confortent l'idée selon laquelle les niches d'emploi sont identifiables dans l'activité au quotidien des acteurs sociaux. Les réseaux de commerce équitable créent des liens entre producteurs qui valorisent leur mode d'action, les techniques locales ou l'artisanat. L'activité s'intègre à leur vie sociale à l'image de l'économie sociale et solidaire qui est demeurée un mode de vie séculaire dans les pays du Sud.

Produire autrement au travers de l'approche écologiste

Il est tout aussi indispensable que les mesures de performance économique intègrent les coûts environnementaux. Par exemple, le réchauffement de la planète doit entraîner une autre régulation des émissions de carbone. L'approche écologiste et éthique préconisée par l'économie sociale et solidaire aide à montrer une autre voie en vue de produire autrement dans le respect du développement durable. Ainsi que le relève le Growth Report de Oxford Policy Management (OPM) (2008), ce sont les pays pauvres dans les régions tropicales qui sont les plus susceptibles de souffrir de la pire façon des dommages causés par le réchauffement de la planète. Les projections suggèrent, par exemple, que l'érosion côtière pourrait menacer des millions de personnes d'ici à 2050 dans les deltas du Nil en Egypte, du Mékong au Vietnam, du Gange, et du Brahmapoutre au Bangladesh.

S'il est vrai que les pays en développement n'ont pas, le plus souvent, les ressources nécessaires pour s'adapter facilement au réchauffement climatique en déplaçant un grand nombre de personnes de zones à faible altitude, certains de ces pays, qui ont atteint la taille de grandes puissances, comme le reflète leur taux rapide de croissance économique, contribuent au problème en générant du dioxyde de carbone beaucoup trop pour être ignoré.

Inversement, dans de nombreux pays, les pêcheurs artisanaux, organisés en coopérative de producteurs ainsi que leurs alliés impliqués dans la transforma-

tion des ressources halieutiques prennent conscience des techniques nocives de pêche et des conditions d'hygiène, et auto-définissent des règles progressistes dont leurs communautés deviennent les sentinelles au bonheur des consommateurs responsables. Il en est de même de l'eau, des forêts, des ressources cynégétiques, foncières, énergétiques où des chartes ou codes sanctionnent des procédés d'autorégulation définis par les communautés concernées. L'économie sociale et solidaire structure de ce fait le développement des communautés en projetant une réflexivité sur les résiliences, capable de générer les ressorts des progrès sur soi (Fall A.S., Favreau L., Larose G., 2004).

Encadré 7.1

Sortir de l'impasse par une inspiration écologique et une orientation pro-pauvre

« Il faut, d'une certaine manière, répéter les succès de la révolution verte en termes d'accroissement de la production, mais d'une manière acceptable au plan de l'écologie et de l'environnement, économiquement viable et de nature à réduire la pauvreté, c'est-à-dire fondée sur l'équité sociale. Cet objectif a été qualifié de « révolution doublement verte », faisant référence à la nécessité d'une continuité de l'effort productif de la Révolution verte, mais aussi à la vertu d'une inspiration écologique radicalement nouvelle de la technologie à promouvoir, en même temps qu'à son orientation « pro-pauvre ». Michel Griffon, 2006, *Nourrir la planète*. Paris, Odile Jacob.

En raison de l'approche faite de proximité par les communautés, elles-mêmes conscientes des menaces sur leur environnement et sur leur espace de vie, la réduction des émissions de dioxyde de carbone portée par l'économie sociale et solidaire se trouve dans les techniques locales et adaptées, régénératrices et écologiquement éprouvées. Participer à l'effort commun face aux risques mondiaux (révolution verte comme suggérée par Griffon dans l'encadré précédent) trouvera un écho favorable et mobilisateur auprès des acteurs qui se posent comme pionniers du développement durable et fiers de leur responsabilité citoyenne.

Le Forum social mondial, dans sa formule rotative (de Porto Alègre 2001, 2002 et 2003 à Dakar 2011 en passant par Mumbai 2004 et Nairobi 2006), a contribué à partager ces exigences écologistes de notre époque grâce à sa fonction d'amplificateur des messages des mouvements sociaux à l'échelle internationale et de construction commune et démocratique d'agendas des changements et des transformations économiques et sociopolitiques, émancipatrices des inégalités structurelles. Les Rencontres du Mont-Blanc (forum international des dirigeants de l'économie sociale) ont de leur côté contribué (notamment le sommet de 2007) à compléter la feuille de route de l'économie sociale en faisant du développement durable un objectif incontournable.

Vers une croissance de qualité portée par le grand nombre et à long terme

En matière de croissance, un accent doit être mis sur la qualité de la participation pour éviter que les plus pauvres et les classes moyennes subissent plus fortement les effets des défaillances des marchés. L'insertion à la marge qui est le reflet de mauvaises conditions de travail et de bas salaires ainsi que le déficit d'accès à l'information économique, contribuent à produire une participation étriquée des pauvres à la croissance.

Plus fondamentalement, la croissance inclusive introduit la perspective à long terme des processus de développement (Lanchovichina et Lundstrom, 2009). Stiglitz, Sen et Fitoussi (2009) relèvent que « *le bien-être présent doit être soumis à l'évaluation de sa soutenabilité, c'est-à-dire de sa capacité à se maintenir dans le temps. Le bien-être présent dépend à la fois des ressources économiques comme les revenus et des caractéristiques non économiques de la vie des gens : Ce qu'ils font et ce qu'ils peuvent faire, leur appréciation de leur vie, leur environnement naturel* ». Ils insistent sur l'importance de la « *viabilité du niveau de bien-être* », c'est-à-dire l'accumulation de capital multidimensionnel en stock suffisant pour être consommé rationnellement et transmis aux générations futures. Ils encouragent, dès lors, la nécessité de disposer de mesures d'instruments de la croissance inclusive en termes d'étendue et degré d'inclusivité.

La croissance inclusive devient un engagement politique en faveur des pauvres et des classes moyennes dont la participation économique serait reconnue au travers de leur forte présence dans l'économie sociale et solidaire. Mais elle va au-delà de la lutte contre la pauvreté pour embrasser la question fondamentale des transformations économiques et sociales pour une meilleure intégration du développement social et économique, tel que stipulé par l'objectif du « travail décent » de l'OIT. L'économie sociale et solidaire permet, grâce à un fonctionnement de base démocratique, une approche raisonnée des fonds propres (mis au service des projets et non d'actionnaires), à des femmes et des hommes de prendre leur destin économique et du coup social, directement, en main. Elle génère donc une gouvernance d'un autre type, originale certes, mais exigeante.

Dans les pays ayant connu l'évasion fiscale et la fuite des capitaux, le patriotisme économique porté par des chefs d'entreprises nationaux constitue un élan salvateur, susceptible de réconcilier les communautés locales avec celles et ceux qui créent des richesses en les réinvestissant dans la création d'emplois décents et, en prenant une part active à la réalisation de conditions favorables à l'entrepreneuriat à utilité sociale avérée. L'accompagnement des pouvoirs publics ainsi que le dialogue structuré avec ces investisseurs, partageant l'ambition de construire une économie souveraine, participent de la croissance inclusive.

Toutes les incitations en faveur d'un ancrage local, national ou régional de l'économie sont la voie la plus sûre pour conférer une dimension engageante et humaine aux investissements. La citoyenneté active n'a pas seulement pour cadre électif les quartiers et les villages, elle couvre tout l'espace public. L'entreprise sociale en a autant de légitimité parce que composante de l'espace public. La reconnaissance sociale devient dès lors la fibre que les entrepreneurs doivent convoiter, aidés en cela par les pouvoirs publics qui les y invitent et les employés, co-gestionnaires ou non, qui exercent leur contrôle citoyen. Ces valeurs d'utilité sociale, traits identitaires de l'économie sociale et solidaire, traversent, pour ainsi dire, les catégories socio-économiques tout en constituant les repères de la tension vers la cohésion sociale. Une croissance inclusive est donc un choix politique qui appelle un volontarisme comme le mentionne l'encadré 7.2 portant sur les mesures politiques dans ce cadre.

Encadré 7.2

Les mesures politiques de croissance inclusive

Le rapport du Governance and Social Development Resource Centre (GSDRC), 2010,² suggère de pertinentes mesures politiques de croissance inclusive :

- La création d'un environnement propice : Promotion d'institutions efficaces pour garantir les innovations, investissements structurants, participation, primauté des droits économiques et sociaux des personnes ;
- Le renforcement des mécanismes de dépenses de redistribution publique et de protection sociale par une solidarité verticale, des régimes ciblés de protection sociale permettant aux pauvres de prendre plus de risques (Rauniyar, Kanbur, 2009) ;
- L'augmentation du taux de création d'emplois pour adopter un modèle de croissance large en termes de secteurs, de régions et de populations ;
- Le développement des infrastructures : Transport, énergie, télé-communications afin de garantir l'équité entre les citoyens par rapport à l'offre de services publics ;
- La promotion du partenariat public-privé : Un appui aux entreprises de services aux pauvres ;
- L'évaluation régulière des contraintes à la croissance forte et durable pour tous les groupes.

Au cœur de l'économie sociale et solidaire est la dignité de la personne humaine

Le travail s'intègre dans l'environnement des personnes qui se réalisent ainsi et gagnent en estime de soi. Cette dimension intégratrice du travail est fondamentale dans l'économie sociale et solidaire. Se réaliser et s'épanouir par le travail

² Helpdesk research report, Literature review on inclusive growth.

grâce à l'utilité et la reconnaissance sociale demeure tout autant une pratique en économie sociale et solidaire et un principe cardinal du « travail décent ». A cela s'ajoute la place centrale de la personne humaine dans les deux cas, postulant, de ce fait, que la dignité humaine reste une membrane identitaire partagée (Favreau L., Fall A.S., 2007).

Les cadres internationaux y participent activement

L'emploi productif et librement consenti est au cœur du mandat de l'OIT qui promeut le plein emploi. L'économie sociale solidaire y contribue en s'adossant au « *droit de développement dans le respect de leur totale liberté d'action* » tel que formulé dans la charte de différents groupes d'économie sociale et solidaire en Amérique latine, en Afrique et en Europe.

Au titre de l'amélioration des normes internationales et de leur actualisation, l'expérience du nouveau cadre régional défini récemment en Afrique est à souligner. L'Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA) a mis au point en janvier 2009 un important projet d'acte uniforme relatif aux sociétés coopératives qui offre un cadre réglementaire régional destiné à 16 pays membres. Le projet a fait l'objet de délibérations au sein des Etats concernés, impliquant le mouvement coopératif et mutualiste qui, dans chacun des pays, a amendé et contribué à adapter ce cadre aux besoins des sociétés. Le projet d'acte uniforme s'inscrit dans le respect des principes coopératifs tels qu'édictees par l'Alliance Coopérative Internationale (ACI), garantissant ainsi l'autonomie et l'indépendance ainsi que le fonctionnement démocratique des coopératives (OHADA, 2009). Un des objectifs de l'OIT est de faire encore mieux connaître ces statuts mais aussi ceux des associations et des mutuelles, sans oublier les fondations : L'économie sociale étant un tout.

Les possibilités d'emploi et de rémunération

La qualité de l'emploi est la condition de son caractère épanouissant et porteur de progrès. Les confluences de ce postulat avec l'économie sociale et solidaire résident également dans le fait que l'OIT place l'objectif du « travail décent » en bonne place dans la lutte contre la pauvreté. Pareillement, l'économie sociale est dans le marché mais avec ses principes propres et sa finalité débouchant sur l'intérêt général et la participation harmonieuse au développement de la société. L'économie sociale et solidaire vise à affranchir les communautés des inégalités sociales.

A l'opposé de cette situation de l'industrie agricole en Inde, l'économie sociale et solidaire qui, promeut l'expérimentation permanente dans tous les domaines, œuvre pour la primauté de la personne humaine sur le capital. Juan Somavia (2006), Directeur général du BIT (Bureau international du travail), est

*Encadré 7.3**Création de la pénurie, résistance de la production endogène en Inde*

L'exemple analysé par Vandana Shiva (2001)³ en Inde démontre que « sous le masque de la croissance, se dissimule, en fait, la création de la pénurie ». En effet, à la fin des années 1980, a été initiée la reconversion des firmes chimiques dans les « sciences de la vie », avec pour enjeux la mainmise sur l'agriculture à partir d'un triple dispositif : Brevetage des semences et des plantes, développement du génie génétique et concentration des capitaux. Les règles de la mondialisation libérale donnent la possibilité à ce dispositif de fonctionner et de mettre en œuvre trois ordres de phénomènes que reprend et dénonce Shiva : La cleptomane des firmes, l'accablement des communautés, avec des drames humains à échelle de masse, l'acharnement contre la biodiversité, avec des risques de casse de la chaîne alimentaire.

Que d'emplois perdus en masse, de vies brisées et de chaîne de production endogène déstructurée ! Le principe de la concentration est mis en exergue et dénoncé. Cinq firmes seulement contrôlent le commerce mondial des grains, tout en étant fortement impliquées dans les accords commerciaux internationaux, soutient Shiva. Un des effets dévastateurs de cette situation de monopole est ce que l'auteure nomme « l'énorme flux alimentaire s'écoulant des Etats-Unis et de l'Europe en direction du tiers-monde » à travers les mécanismes dit de « libre-échange » et qu'elle qualifie de « marché forcé ». Du fait de cette situation, « ... la proportion de produits alimentaires importés au Mexique est passée de 20% en 1992 à 43% en 1996. (...) 2,2 millions de Mexicains ont perdu leur emploi, et 40 millions sont tombés dans l'extrême pauvreté ».

sans équivoque : « *Le but fondamental de l'OIT aujourd'hui est de promouvoir l'accès des hommes et des femmes à un travail décent et productif dans des conditions de liberté, d'équité, de sécurité et de dignité humaine* ». C'est à cette condition que les atouts de l'Inde dans l'échiquier mondial seront préservés. Georges Soros (2010), explique que « *l'Inde, servie par sa croissance endogène* »⁴ a réussi à tenir lorsque la crise financière internationale de 2008 a éclaté. Comme le mentionne Shiva, les modes de régulation du commerce mondial affectent les pays du Sud. Il faudra alors préserver les emplois en défendant la nécessité « *des clauses sociales aux traités commerciaux comme conditions du respect des droits fondamentaux et base universelle de la mondialisation* » selon l'analyse de Guy Ryder (2010)⁵.

Dans la promotion du travail décent, l'OIT met en exergue les politiques transversales notamment l'égalité de genre et la création de l'entreprise, domaines dans lesquels les bonnes pratiques de l'économie sociale et solidaire sont reconnues.

³ Vandana Shiva (2001) *Le terrorisme alimentaire. Comment les multinationales affament le tiers-monde*. Traduit de l'anglais par Marcel Blanc. Paris, Fayard.

⁴ George Soros (2010), *Quelques leçons tirées de la crise*, Editions Denoël.

⁵ Guy Ryder, Secrétaire général de la Confédération syndicale internationale (CSI, *Le Monde* du 21 juin 2010).

La protection sociale est un métier historique de l'économie sociale et solidaire

La prévention de différents risques constitue une compétence de l'économie sociale et solidaire depuis son origine.

L'entrepreneuriat n'est pas le monopole des investisseurs riches

L'économie sociale et solidaire ou « s'associer pour entreprendre autrement » est une façon naturelle de favoriser une croissance endogène, démocratique et solidaire qui remonte à longtemps depuis le moyen âge avec l'aide mutuelle. L'une des figures témoins demeure la plus ancienne coopérative encore active, celle des travailleurs du port de Gênes (Mattsson et Olsson 2009).⁶ L'économie sociale et solidaire porte le sceau du mouvement ouvrier au XIX siècle qui s'en est emparé pour résister et œuvrer à améliorer ses conditions de vie et de travail face à l'essor du capitalisme.

Dès les années 1844, les ouvriers de Rochdale, petite ville de la banlieue de Manchester, créent les Equitables pionniers à la suite de l'échec d'un conflit social. Ils sont une trentaine, à la tête de laquelle Charles Howarth, qui initie une société de consommation basée sur l'aide mutuelle. Chemin faisant, ils ouvrent un magasin de vente de denrées alimentaires et de vêtements, bâtissent des logements pour eux-mêmes, installent une fabrication de produits pour caser leurs membres ayant perdu leur travail et achètent des terres de cultures pour certains de leurs membres sans emploi. Ils organisent enfin l'éducation pour leurs enfants. Cette expérience de développement endogène qui fait penser en France à Saint-Simon etc. leur est inspirée par des associations de gestion d'obsèques en Angleterre.

Cette expérience n'est pas isolée puisqu'en 1847, Friedrich Wilhelm crée une boulangerie coopérative en Allemagne. Pareillement, en France, le mouvement ouvrier avait développé des formes variées d'auto-organisation : Secours mutuel face aux besoins communs de préparation des obsèques et de gestion des handicaps survenus en cours d'emploi voire même de substitut à des pertes d'emploi. La reconnaissance officielle de la mutualité se traduit en France par la loi de 1867 portant sur les sociétés commerciales qui comprennent les coopératives. La charte de la Mutualité intervient en 1898 et la liberté d'association suivra en 1901.

⁶ Compagnia di Caravana, créée en 1340, voir Mattsson et Olsson (2009) qui remontent à cette expérience pérenne et analysent l'économie sociale et solidaire comme une vision d'une nouvelle société basée sur la solidarité, l'égalité et la justice sociale. Elle est l'expression concrète de la démocratie économique et industrielle que les universitaires, les praticiens et les politiques doivent formuler.

« Entreprendre collectivement » remonte donc à longtemps dans l'histoire universelle de l'humanité. Le mouvement de la mutualité en est la preuve. Dans les zones rurales des pays du Sud, tout au moins en Afrique, les sociétés de travail, comme on les appelait, ont été le cadre des réciprocités dans l'économie rurale. En effet, les travaux faisant appel à une forte main d'œuvre se faisaient rotativement dans les champs des familles avec d'autres membres de la communauté, invités à la rescousse, notamment durant les récoltes ou d'autres travaux préparatoires ou d'entretien des cultures sur de grands espaces. La famille bénéficiaire offrait généralement la boisson ou le repas s'il y avait lieu. Le même procédé avait cours dans les travaux d'édification d'une demeure ou pour faire face à des situations de désastre comme les inondations, l'incendie, les attaques des criquets et autres insectes ravageurs des cultures. Dans ces dernières situations, le bénéficiaire n'offrait pas de repas qui était à la charge de la communauté selon ses instruments propres de co-veillance.

L'économie sociale et solidaire puise donc toujours dans ses principes et valeurs pour organiser des systèmes de protection sociale pour les gens qui ne sont pas couverts selon les mécanismes d'assurances. L'économie sociale et solidaire est souple et peut faire face aux nouveaux risques. Elle peut résister et devient même une alternative dans la réforme et la privatisation en cours de la sécurité sociale, en raison de ses capacités à construire par le bas et autrement.

La reconnaissance de l'économie sociale et solidaire rend plus visible son potentiel d'assurance sociale et de création d'emploi de qualité.

Dans le domaine de la protection sociale, l'économie sociale et solidaire apporte une touche supplémentaire en étant le cadre de la vitalisation des liens par la mutualisation des ressources en face de besoins communs. Certains pourfendeurs de l'économie sociale considèrent que la solidarité n'est pas l'objet de l'économie qui serait le cadre par excellence du profit. Par voie de conséquence, l'économie sociale et solidaire qui se définit comme non lucrative, serait en dehors de la sphère de l'économie. On peut, néanmoins, leur objecter par exemple que si les coopératives et mutuelles ne font pas partie de l'économie, que reste-t-il de non marchand ou de patrimoine collectif dans ce secteur? On peut leur démontrer que les entreprises d'économie sociale et solidaire dégagent des excédents nécessaires à leur développement, à la rémunération équitable des partenaires tout en pratiquant des prix accessibles, mais ceci sans avoir à se soumettre à des critères exclusivement financiers et boursiers.

De même, dans leur Rapport sur l'économie sociale dans l'Union Européenne (U.E) en 2007, Rafael Chaves et José Luis Monzon du CIRIEC International montrent que les coopératives associations, mutuelles et assimilées compaient, en 2002-2003, 11 142 883 emplois, soit 6,7 du volume total d'emplois salariés dans l'UE à 25. Plus récemment, en 2008, l'INSEE établit que l'écono-

mie sociale représente près de 10 % de l'emploi salarié national hors agriculture et 8% des salaires en France. Ces exemples corroborent le fait que l'économie sociale et solidaire est une façon autre d'agir en économie au service de la cohésion sociale. Elle participe donc à fonder les bases de la protection sociale. Cette protection sociale vise à rendre possible à la fois la solidarité horizontale (groupe de pairs) et verticale (de l'Etat, collectivités locales aux acteurs pour conforter leurs initiatives et garantir les droits de vie au plus grand nombre). L'économie sociale et solidaire est porteuse d'une vision de progrès au service de l'humain en société. Elle postule une gouvernance ouverte et vertueuse susceptible d'inspirer les ruptures nécessaires au sein des Etats, des institutions régionales ou continentales, en particulier, dans les pays où les politiques sociales restent débridées.

L'Organisation Internationale du Travail (OIT) a fini de faire la démonstration que l'inclusion coûte moins chère que l'exclusion. Autrement dit, investir volontairement dans les politiques sociales façonne un Etat social et favorise la justice sociale et un développement équilibré alors que les politiques d'exclusion avilissent la vie en société et déshumanisent l'économie. Pourtant c'est l'économie, dont Karl Polanyi (1983), Marc Granovetter (1985) ainsi que de nombreux penseurs de la longue durée, nous rappellent son originel « encastrement dans le social ». La thèse de l'encastrement et la construction sociale des activités économiques reste une avancée considérable de la pensée en sciences sociales.

Encadré 7.4

L'éducation à la santé : Aussi un rôle des mutuelles au Bénin

Ce programme nommé Promusaf (Programme d'appui aux mutuelles de santé en Afrique) qui accompagne les communautés dans la création des mutuelles de santé au Bénin a permis la création de 15 mutuelles dans ce pays avec l'aide des mutualités chrétiennes et de l'Ong Solidarité Mondiale. « Chez nous, les mutuelles de santé font un important travail d'éducation à la santé. On explique comment certaines maladies surviennent, les gestes et attitudes à avoir pour les éviter, comment faire pour obtenir une guérison rapide, explique le coordinateur. Nous nous sommes axés au Bénin sur trois grandes maladies : Le paludisme, première cause de consultation et de mortalité, les maladies diarrhéiques pour lesquelles nous développons une action sur l'hygiène et l'assainissement, et enfin le sida pour lequel nous intensifions l'information et la sensibilisation auprès des populations. »

“En fonction des spécificités locales, chaque mutuelle identifie également des thèmes propres d'éducation à la santé. C'est ainsi que certaines mutuelles ont un programme d'information sur la nutrition, une autre sur la méningite, une autre encore sur la fièvre typhoïde ou sur la santé de la reproduction.”

Source : http://www.enmarche.be/International/Cooperation/Coton_mutuelles_sante.htm

Les mutuelles sont le cadre de la gestion anticipée des risques. Elles contribuent à fidéliser les habitants des zones éloignées aux structures de santé et d'autres sont également fidélisés grâce à une meilleure prévisibilité sur les coûts des soins. En mutualisant les frais des soins de santé, les populations favorisent une meilleure accessibilité aux structures de santé et dans certains cas, une qualité des services. C'est un outil de protection sociale pour toute la population. Dans de nombreuses localités où des mutuelles de santé ont été organisées, différentes franges de la population s'intègrent mieux dans la société. Des mutuelles destinées aux élèves des écoles primaires ont permis de relever la fréquentation des élèves et leur maintien dans les classes.

Des formes évolutives d'engagement de l'économie sociale et solidaire

Différents mouvements sociaux actifs dans l'économie sociale et solidaire œuvrent à la création ou au maintien des emplois décents dans une diversité de secteurs. Les syndicats poursuivent la défense des intérêts de leurs membres dans le monde du travail mais ils initient, non sans réussite, de multiples expériences de finances solidaires dont les fonds de pension retraite, de coopératives d'habitat, des centrales d'approvisionnement et de consommation.

Le renouveau coopératif dans de nombreux pays et secteurs y compris émergents (radios communautaires, logiciels libres, ressourceries, éco-tourisme, etc.) est significatif d'une implication du mouvement associatif dans le domaine économique, à la fois pour atténuer les impacts des crises, mais aussi pour créer des richesses et des emplois décents.

Les fédérations d'organisations de producteurs agricoles ou d'entrepreneurs ainsi que des ONG développent des services financiers accessibles au plus grand nombre. Ils ont pris conscience que le secteur agricole est un gisement d'emplois mais faiblement développé. Ils explorent de nouveaux marchés internes et externes et valorisent partout le potentiel d'« emplois décents » à créer dans un contexte de restriction du marché du travail.

Dans les pays du Sud, la majorité des emplois se trouvent au sein des PME/PMI. Cette situation est l'expression de l'esprit d'initiative des individus et des groupes, parmi lesquels les groupes de femmes se distinguent fortement. L'entrepreneuriat social montre donc que les groupes vulnérables peuvent s'intégrer dans le marché régulier du travail.

Les initiatives entrepreneuriales collectives à caractère économique restent des essais des mouvements sociaux de renouveler et d'adapter leur offre de service à l'endroit de leurs membres. Par ses formes évolutives d'engagement, l'économie sociale et solidaire contribue à rendre dynamique l'agenda de l'OIT en matière de « travail décent ».

Pour une économie plurielle

Il est nécessaire de s'inscrire dans l'économie plurielle, c'est à dire la reconnaissance des attributs de chacune des principales façons de faire de l'économie. L'économie publique est portée par les Etats centraux et locaux en charge des investissements structurants, de l'équité, de l'accessibilité et de la qualité des services. Elle a aussi en charge l'impulsion des modes négociés de régulation des activités économiques ainsi que des politiques sociales qui sont le cœur de métier des OMD. Il y a également l'économie privée, par laquelle s'exprime le droit à l'investissement, à la création de richesses par des entrepreneurs. Ce droit est assujéti à la responsabilité sociale des entreprises au sein des communautés et territoires dans lesquels elles sont installées. Enfin, l'économie sociale et solidaire, par son rôle fédérateur de l'entrepreneuriat associatif par les citoyens, cristallise la vitalité des liens sociaux dans la création de richesses à finalité sociale. Une telle approche fondée sur le pluralisme économique est susceptible de développer les synergies et d'offrir plus d'opportunités aux acteurs sociaux.

L'économie sociale et solidaire accroît le capital humain

Ainsi que le montrent Beck, Demirgüç-Kunt, Honohan (2009), le déficit d'éducation au-delà du primaire est une contrainte à l'auto-emploi et à l'emploi et restreint l'accès au marché du crédit.

Pareillement, le mauvais état de santé peut limiter la disponibilité de la main-d'œuvre et sa productivité en particulier dans les pays à fort taux de prévalence de VIH. Les initiatives dans le domaine des garderies d'enfants, des mutuelles de santé, gestion communautaire des ressources, les tarifications forfaitaires instituées par les comités de santé, la participation de la communauté dans le financement de la gestion de la santé dans les localités les plus éloignées, la prise en charge des personnes âgées, bref tous les services de proximité qui participent à prendre en charge solidairement les besoins des individus et des groupes tout en resserrant les liens et en favorisant une meilleure interconnaissance vont être des leviers des processus participatifs de développement.

Dans le domaine de l'éducation, dans de nombreuses communautés, la réhabilitation de l'école publique est le fait d'organisations citoyennes qui prennent conscience de la responsabilité collective dans le processus de développement ascendant. Elles construisent des écoles, entretiennent des cantines scolaires, financent des écoles d'entre-aide scolaire, gèrent l'accès au pré-scolaire.

Aucun pays n'a impulsé une croissance soutenue sans également réaliser des investissements publics dans le domaine des infrastructures, de l'éducation, de la santé et dans les secteurs pourvoyeurs d'emplois durables et ayant un effet levier comme l'agriculture dans son acception large, la pêche, l'artisanat ou l'industrie.

Dans le cadre de la lutte contre la faim et contre les famines, des coopératives de producteurs, consommateurs et services agricoles et non agricoles organisent des magasins de stocks de céréales et d'autres cultures, des banques de semences, des mutualisations des pratiques de la gestion de la lutte contre la dégradation des sols et cultures à faible rendement.

Les pratiques communautaires ou mutualisées de gestion des ressources agricoles et environnementales participent à intégrer les ruraux à l'économie locale et aux échanges transfrontaliers et inter-pays et à favoriser une meilleure productivité.

Pour protéger les enfants contre la violation de leurs droits, des groupes de femmes d'âge avancé mettent en place des garderies tandis que d'autres assurent le service de médiation sociale. Il en est ainsi de la santé reproductive en particulier avec l'insertion de l'éducation à la vie familiale dans les activités des tontines, ces groupes rotatifs d'épargne dans les quartiers et villages qui restent le premier pallier des mutuelles. Lorsque l'eau manque ou qu'elle est stagnante, voire s'impose sous forme d'inondation, les organisations communautaires de base organisent des unités de réhabilitation de l'habitat social, de désengorgement des maisons et de canalisation des eaux.

Quel que soit le mobile, des initiatives communautaires se mettent en place, les unes durables, les autres éphémères. Elles sont toutes l'expression de la participation et de l'autonomie d'action de l'économie sociale et solidaire. Elles créent des liens dans l'activité sociale et économique. L'économie sociale et solidaire reste donc le pont entre les communautés et les politiques publiques pour en constituer une base opératoire pour l'action et la responsabilité collectives.

L'économie sociale et solidaire pour contrer l'exclusion

L'économie sociale et solidaire émerge partout pour contrer l'exclusion des marchés de production et de consommation de différents acteurs. Les coopératives de production et de services donnent de l'élan à l'entrepreneuriat social. Les activités économiques à finalité sociale ré-encastrent l'économie dans le social. Elles montrent que l'initiative privée, l'entrepreneuriat ainsi que la production de richesses ne sont ni l'apanage des individualités ni celui des clans de riches. Bien plus, les richesses à créer sont le fait de personnes reconnues, appartenant à des groupes et soucieux de leur environnement social, local et écologique. Le cœur des métiers de l'économie sociale et solidaire étant la création de lien social et le développement local, le « travail décent » trouve dans cet écheveau des liens féconds. Les ressources mobilisées et valorisées par l'économie sociale et solidaire sont par essence d'abord celles du milieu de vie. De micro initiatives très locales se transformant parfois en entreprises à dimension nationale voire continentale, internationale, l'économie sociale se révèle capable

de passer de la petite à la grande dimension économique, sociale (cf les petites mutuelles de santé ou d'assurance ou encore des banques coopératives réunissant progressivement plusieurs dizaines de milliers ou millions d'adhérents au Sud comme au Nord).

L'économie sociale et solidaire contribue à élargir et à dynamiser le marché intérieur et donc à offrir une meilleure intersectorialité. En raison de la diversité de son champ d'action et de la complémentarité de ses pratiques, l'économie sociale et solidaire répond aux questions que le bien-être pluridimensionnel pose.

L'analyse de McKay (2008) met en relief le fait que des niveaux élevés de vulnérabilité font que les pauvres seront moins susceptibles de s'engager dans des activités risquées qui ont le potentiel d'être plus rentables. La contribution de l'économie sociale et solidaire dans la lutte contre l'insécurité économique repose également sur l'augmentation de revenus et leur conversion en services pour les populations pauvres (Fall A.S., 2007).

Les crises révèlent l'impératif du développement de l'intérieur des sociétés

Les situations de crise que le monde a connues ont révélé l'intérêt pour l'économie réelle et les limites de l'économie spéculative. Non seulement les systèmes de mesure de l'activité économique doivent être adaptés pour mieux refléter les changements structurels qui caractérisent l'évolution des économies modernes (Stiglitz, Sen, et Fitoussi, 2009), mais, de plus, les modes de régulation internationale s'avèrent peu favorables à l'ancrage national et local des économies modernes. Il est donc essentiel de prendre la pleine mesure de l'orientation de l'économie sociale et solidaire pour un développement de l'intérieur des sociétés. C'est un paradigme qui met en avant ce que Joseph Ki-Zerbo (2003) a appelé la primauté du développement endogène : « *on ne développe pas, on se développe* ».

Stiglitz, Sen, et Fitoussi (2009) évoquent cette orientation en préconisant « la perspective des ménages (qui) suppose de prendre en compte les transferts entre secteurs tels que les impôts perçus par l'État, les prestations sociales qu'il verse, les intérêts sur les emprunts des ménages versés aux établissements financiers ». L'attention portée pour un développement ascendant et endogène est une des meilleures contributions de l'économie sociale et solidaire en faveur de la justice sociale et économique.

Il est évident que la mondialisation inéquitable renforce de nouvelles économies de territoires qui apparaissent, à la fois, comme une rétroaction à produire pour les marchés locaux et régionaux, mais aussi comme un repli sur soi. Se soustraire du marché mondial n'est pas le but, mais bien le signe du refus de

s'accommoder à des règles non négociées sur des bases démocratiques. L'économie sociale et solidaire promeut, de ce fait, les produits du terroir, dans des circuits courts, et invite à une solidarité entre producteurs et consommateurs.

Plus généralement, la consommation responsable devient le maître mot pour traduire une prise de conscience des consommateurs de leur fonction citoyenne d'influencer positivement les conditions décentes de production (quelle qu'en soit la distance géographique) et la qualité des emplois. L'économie sociale et solidaire confère une fonction politique aux produits qui cessent d'être anonymes, incitant le consommateur à davantage de citoyenneté et de renoncement à la consommation froide ou anonyme, à faire attention à toute la chaîne de production : Equitable du producteur au consommateur, respectueuse des personnes comme de l'environnement, de la santé...).

L'ancrage au développement local et régional constitue le premier palier à asseoir pour un développement maîtrisé. Pour cela, les économies locales doivent être protégées avant d'atteindre une phase de maturité qui leur donne les ressources de la compétition à une échelle plus grande. Il faut donc des politiques visant à promouvoir l'inclusion, l'équité et l'égalité des chances pour tout le monde. C'est à cette condition que se forme une stratégie de croissance qui englobe toutes les classes, les localités et les régions.

Ce que nous apprennent les crises

Les crises anciennes et récentes ont montré qu'il faut réinventer le système de régulation à l'échelle mondiale qui n'est pas équitable. Le système multilatéral qui s'est affirmé au lendemain de la Seconde Guerre mondiale, sous le sceau des institutions de Bretton Woods, s'est fortement affaibli à la suite de la crise financière internationale de 2008 qui est venue s'ajouter aux précédentes. Le bilan indique que si l'Europe a pu supporter, d'une certaine manière, ses effets dévastateurs, c'est en raison de son système de protection sociale. La Chine, considérée comme le pays ayant tiré le plus de gains de cette dérégulation du capitalisme international, doit cette position de fer de lance de l'économie mondiale à la créativité et l'entrepreneuriat de sa population. L'entrepreneuriat populaire est un formidable bassin de création d'« emploi décent » (Soros G., 2010). Il laisse entrevoir que le plein emploi se jouera dans cet effort de libérer l'énergie créatrice et entrepreneuriale. Cependant, elle doit être stimulée et accompagnée, non point par un capitalisme d'Etat, mais bien plus, par des acteurs engagés dans une coproduction des politiques publiques et privées. Il faudra un volontarisme pour que la mise en réseau des entreprises d'économie sociale et solidaire se réalise à toutes les échelles : Locale, nationale, continentale et internationale.

On ne pourrait pas faire l'économie du bilan de l'institutionnalisation des entreprises d'économie sociale et solidaire, et encore moins, celle de tirer les

leçons des expériences les plus fortes et qui confortent l'idée qu'un développement de l'intérieur des sociétés est compatible avec un rayonnement international de l'économie sociale et solidaire dont le paradigme compterait désormais sur le marché mondial.

Plaidoyer pour une économie sociale et solidaire influente sur le marché mondial

Pour donner un visage humain à la mondialisation, il faudra reconnaître que la gouvernance internationale est assurée par des « *pilotes sans boussole fiable* » (Stiglitz J., Sen A., Fitoussi J.P., 2009) – en référence aux instruments de performance économique conçus après la Seconde Guerre mondiale, dont le PIB et certaines institutions de régulation au niveau mondial – et œuvrer à un rééquilibrage des relations internationales. Il faudra du temps pour développer une nouvelle « *architecture* » des institutions et des règles régissant l'économie mondiale. Il est devenu, cependant, nécessaire de favoriser une approche coordonnée, en une réponse multilatérale des économies. Les pays en développement ne peuvent pas se développer sans le soutien de la pointe des économies. En particulier, ils doivent avoir accès aux systèmes ouverts de commerce mondial. Ils peuvent aussi avoir besoin d'une certaine latitude pour promouvoir leurs exportations, jusqu'à ce que leur économie ait mûri et leur position concurrentielle se soit améliorée (OPM 2008). Mais monnayer la solidarité est inacceptable. Les pays en voie de développement ont raison de penser que la solidarité appelle des sacrifices au titre desquels figure la redéfinition des mécanismes de régulation à l'échelle internationale.

La fonction de laboratoire de l'économie sociale et solidaire est à mettre à profit pour interroger le paradigme dominant les processus de développement. Quoique couvrant de nombreux secteurs d'activité économique à finalité sociale, l'économie sociale et solidaire est restée le plus souvent, principalement, au ras du sol et à l'échelle mezzo. Son champ est donc large, mais ses entreprises évoluent généralement à de petites échelles. Cet ancrage local et territorial, qui est en quelque sorte une marque déposée de l'économie sociale et solidaire, doit servir de fondement pour viser une influence à l'échelle macro-économique.

Les entreprises de promotion du commerce équitable, celles du tourisme social ou de la finance solidaire, illustrent bien un potentiel de développement au plan international. Il faut œuvrer à réunir les conditions d'une offensive de l'économie sociale et solidaire au cœur du marché mondial pour l'influencer encore plus et valoriser la conception que « affaires » et éthique peuvent cheminer ensemble, si tant est que l'intérêt général ou la responsabilité collective peuvent se concilier avec l'entrepreneuriat privé.

Au niveau continental, des entreprises se fédèrent depuis quelques années pour peser plus lourd face aux entreprises à forme classique et démontrer

qu'une autre voie est possible (cf. l'exemple européen de 14 mutuelles et coopératives d'assurances rassemblant 27 millions de sociétaires qui ont créé le réseau opérationnel Euresa).

Des bonnes pratiques de l'économie sociale et solidaire isolées les unes des autres

Les expériences reconnues de l'économie sociale et solidaire pouvant servir de rampe de lancement de cette offensive internationale sont nombreuses : L'économie populaire en Afrique au Sud du Sahara concentre plus de 80 % des nouveaux emplois créés dans ces pays. L'artisanat local comme les initiatives de valorisation de l'art culinaire ou la petite industrie culturelle sont en pleine expansion selon l'esprit résister et produire, ou résister c'est créer face à la nouvelle hégémonie des produits de masse en provenance de l'Asie.

De même, l'Amérique latine a expérimenté l'entrepreneuriat à l'échelle mezo au travers des PMI avec des initiatives de cogestion et un partenariat privé-public réussi dans de nombreux cas. Villa El Salvador au Pérou avec son parc industriel (voir encadré 7.5) ou les cuisines collectives à Lima sont des exemples connus de réussite. Parmi les bonnes pratiques, le Canada s'illustre par le développement communautaire et son lien avec le développement local mais aussi par l'implication du mouvement syndical québécois dans la promotion d'outils de finance solidaire couvrant de nombreux groupes d'acteurs. Le mouvement Desjardins international, l'une des premières institutions financières du Québec, a contribué à tirer le développement national.

Encadré 7.5

VILLA EL SALVADOR AU PÉROU, le bidonville de l'espoir

Octobre 2008 par Louis Favreau

Peut-être la réussite la plus grande dans l'édification d'une communauté d'entraide locale dans le monde est-elle celle de Villa El Salvador à Lima, où les citoyens ont planté un demi-million d'arbres, construit 26 écoles, 150 garderies, 300 cuisines communautaires, et formé des centaines d'assistants médicaux qui vont de porte en porte.(...) Les principaux artisans de cette réussite ont été un vaste réseau de groupes de femmes et la structure administrative démocratique des associations de quartier, qui a des représentants dans chaque bloc d'habitations. Ensemble, ils forment un dosage équilibré entre une organisation très développée à la base et un système d'administration, qui réagit vite, afin d'obtenir une plus grande participation possible dans la conception et la mise en œuvre des actions de la communauté (Durning, Worldwatch Institute, 1989: 264-265).

Une ville saine, propre et verte ; Une communauté éducative ; Un district productif et générateur de richesses ; Une communauté solidaire ; Une communauté démocratique.

En Europe, la Banca Etica, les coopératives du Mondragon, les assurances sociales, les fonds de pension, etc. sont autant de repères d'une économie sociale et solidaire institutionnalisée et qui se hisse en bonne place sur le marché mondial. En Asie, l'expérience du Pratham a réussi à réhabiliter l'école publique en démontrant que face à des problèmes complexes, le peuple indien adopte des solutions simples, à sa portée et tout aussi efficaces. On peut multiplier les exemples non sans mentionner la Grameen Bank au Bangladesh qui influence tout le système de micro-finance dans le monde.

Aux Etats-Unis, les quartiers abritant le quartier général des anciennes filières industrielles sont aujourd'hui revitalisés par des associations citoyennes. Les usines dans de nouvelles niches sont reprises par des associations de travailleurs qui cogèrent avec d'autres investisseurs y compris étatiques ou privés. Dans le domaine des technologies de l'information et de la communication, des groupes se forment pour valoriser les logiciels libres, gérer des radios communautaires, des journaux en ligne, des sites web, etc. De nouveaux métiers émergent et l'entrepreneuriat devient plus inclusif. Les fondations et ONG ne sont pas en reste. Elles sont plusieurs à avoir décidé d'accompagner l'irréversible processus de changement pour un monde meilleur, équitable et fondé sur la justice économique et sociale. Elles doivent cependant se mettre en réseaux et financer ces cadres communs afin de constituer un pôle alternatif à l'image que ce que le Forum social mondial a impulsé.

Face à cette constellation d'initiatives économiques conduites par divers groupes sociaux, comment alors expliquer qu'aujourd'hui l'économie sociale et solidaire n'apparaît pas comme un grand pôle économique mondial, capable de dialoguer avec les autres types d'économie et donc de valoriser son paradigme fondé sur l'utilité sociale, le bien collectif indivisible, la confiance en l'effort collectif, la solidarité en économie, la cohésion, en bref, les finalités sociales de l'économie portée par des communautés et des groupes.

Favoriser donc les coopérations transfrontières, trans-acteurs, trans-activités devient fondamental pour que l'économie sociale et solidaire joue pleinement son rôle ; c'est un des objectifs d'ailleurs des Rencontres du Mont-Blanc auxquelles l'OIT participe depuis 2004.

L'économie sociale et solidaire doit donc être soutenue grâce à des dispositifs dédiés par les Etats et les organismes de développement. Trois directions sont à privilégier pour faciliter le rayonnement de l'économie sociale et solidaire et du partage de son paradigme à une échelle internationale visant à en faire un grand pôle de référence d'une autre façon d'entreprendre : D'abord, l'observatoire des statistiques et des pratiques pour visibiliser l'économie sociale et solidaire dans l'évaluation des performances économiques, ensuite, des programmes de renforcement des capacités des entreprises de l'économie sociale et solidaire organisées autour des réseaux nationaux et continentaux,

enfin, des fonds dédiés pour accompagner les innovations entrepreneuriales et en faciliter l'éclosion. Le Plan d'action pour la promotion des entreprises et organisations de l'économie sociale en Afrique (2009), initié par l'OIT, reste un grand pas fait dans cette direction.

Conclusion :

L'économie sociale et solidaire, une vision holiste et structurante

Il est nécessaire d'avoir un leadership fort, démocratique et synergique capable de galvaniser les changements et de les fonder sur des valeurs pluralistes et populaires. Ce changement puisera ses ressorts dans l'ingéniosité et l'entrepreneuriat créatif et inscrit dans le dessein de créer inclusivement des richesses matérielles et immatérielles au sein de sociétés épanouissantes et bâties sur la dignité humaine. L'interdépendance multidimensionnelle entre les pays développés et ceux en développement, révélée par l'évolution du monde et grossie par les crises du capitalisme moderne, appelle des réponses fondées sur la solidarité.

Dans ce domaine, l'économie sociale et solidaire fait montre d'un important pouvoir d'agir des peuples grâce à sa façon d'entreprendre autrement par le truchement des collectifs et des dynamiques communautaires. Au sein de ces groupes, le pont est établi entre l'entrepreneur intégré à ses réseaux d'appartenance et porteurs de valeurs interculturelles positives, les innovations de progrès et la société ouverte. Cet élan participatif au cœur de l'activité économique à finalité sociale demeure une contribution aux cadres politiques internationaux impulsés pour changer le monde et rendre la mondialisation plus équitable.

Il reste à se demander si l'approche holiste qui structure l'économie sociale et solidaire, inspirera les mécanismes de régulation internationale qui claudiquent, tandis que les politiques publiques, dans de nombreux pays, débrident les besoins à mettre en cohérence, faute de vision intersectorielle et de méthodes véritablement intégrées et participatives.

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Land conflicts in Senegal revisited: Continuities and emerging dynamics

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Following on from Gerti Hesseling's work on the social workings of law concerning land issues and our own previous research, this chapter investigates how the dynamics of land conflicts in Senegal are evolving. By way of one urban (Yoff, Dakar) and two rural case studies (Ross Bethio in the north and Kaymor in central Senegal), it considers how urbanization and increasing pressure on agricultural land are leading to an intensification of land conflicts. But while external actors are contributing to conflict dynamics in Dakar and Ross Bethio, conflicts in Kaymor are intensifying but remain limited to the local level. In all three cases, however, we observe that, whereas in the past, the co-existence of customary law and state law offered local stakeholders and the authorities the space to invent provisional and flexible solutions suiting most parties, in the current era of rising (commercial) land values, such co-existence appears to be becoming contra-productive and contributing to greater insecurity for the parties concerned as well as to a hardening of conflicts.

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Introduction

In the mid-1990s, one of us conducted fieldwork for her PhD on land use and social change in the rural community of Kaymor in central Senegal (Kaag 2001). Inspired by scholars who had analyzed land claims by looking at the social and political workings of law and at longer-term changes in society (Hesseling 1992, 1994; Blundo 1996, 1998; Berry 1989, 1993), she explored, among other things, how local rules evolved over time through negotiation and action. At the time of her research, the co-existence of customary law and state law offered local stakeholders and the authorities the space to invent provisional and flexible solutions that suited most parties, thus providing a level of tenure security in local society. The rural council, which has been the decentralized government body responsible for local land management since the 1970s, mainly used traditional ways of problem solving, focusing more on preserving a peaceful society than on the rule of law. When looking at the practices of people, distinctions between customary and modern land management systems blur as people use both register and mix them in their strategies (Kaag 2001, 2005).

After her PhD, her research took a different turn until she got the chance to return to the theme of land and land conflict in 2010. She realized that over the past ten to fifteen years, Senegal and the world had undergone important changes that have had an impact on local land conflicts in several parts of Senegal. Firstly, the socialist government in Senegal was overthrown after forty years in power, to be replaced in 2000 by a liberal regime under the presidency of Abdoulaye Wade. Demographic growth has gone hand in hand with a strong process of urbanization. And at the global level, a food and energy crisis and the loss of Western economic and political hegemony have led to an increasing tendency by both Western and Asian states to see African land as a possible way of securing their energy and food needs (Cotula *et al.* 2009; Zoomers 2010; Evers *et al.* 2011). This is often referred to as the ‘global land grab’. How are these developments impacting on conflicts relating to land in Senegal?

When looking for answers in the literature, it appears that publications on local land and resource management in Africa, which were so plentiful in the 1990s, have greatly decreased in number in the last decade. There are few studies that can account for the changes in land use and land conflicts over the last few years. The drop in publications would appear to reflect declining interest in the issue of local environmental management as a result of changing fashions in development studies and policies. It is only recently that a new debate on land and land use has begun to evolve, this time focusing on the phenomenon of ‘land grabbing’. Interestingly, there is little connection between the literature on local land use and management and this new debate. The debate

on land grabbing has been rather alarmist, assuming that external investors are directly and automatically threatening the tenure security of local populations, but there has been little empirical investigation into the processes by which investors are gaining access to land and local populations become marginalized.² There is a tendency to consider Africans as the passive victims who have been overruled by external ‘invaders’ (particularly when speaking about non-Western investors) and it is only recently that the role of local and national elites in practising and facilitating land grabbing has come to the fore (Hilhorst *et al.* 2011).

While acknowledging that the threat of land grabbing is real, we argue that more research is needed into the (political) micro-processes underlying ‘successful’ land grabbing, and that current land-grab practices should be considered from a more historically informed perspective. What can history teach us about the current dynamics of land claims (including land grabbing), the ways land conflicts are solved, and their implications for tenure security? This implies a plea for building on past research on land use and land governance in order to understand current dynamics, and to have debates on land governance from the 1990s inform the current debate on land grabbing. We can only wonder what Gerti Hesseling would have contributed to this current debate if she were still with us today. We imagine that she would have urged us to go into the field, to investigate empirically what was happening on the ground and to analyze the social and political workings of the law in processes of gaining access to land.

On the basis of these reflections, we propose to look in more detail at the ways in which land governance and land conflicts have recently evolved and to trace processes of change and continuity, thus providing a bridge between the older literature and current developments. We will do so by investigating land conflicts in three different regions of Senegal. The first is Yoff, a former fishing village that has become part of Dakar’s urban conglomeration. The pressing urbanization and the concomitant increase in the commercial value of land in combination with a variety of institutions having a say over its use, have led to increased conflicts at family and community level, and between the community and other actors, such as the central state. The second case study is Ross Bethio, an agricultural area in the Senegal River region in northern Senegal where the availability of large tracts of arable land in combination with possibilities for irrigation has attracted investors from outside the local community, both from Senegal and abroad. The final case study is Kaymor, an isolated rural community in the former ‘peanut basin’, where land and water degradation are important problems. These case-study areas represent different, generally distin-

² Among the exceptions is interesting work done by the IIED, as exemplified by Vermeulen & Cotula (2010).

guishhable conditions in present-day Senegal, ranging from an urbanized area with its specific dynamics of population growth and an urban economy to a rural region of increasing economic interest, to a more marginalized rural area.

There is an additional reason for choosing both urban and rural case studies. Land issues have always been predominantly considered in rural contexts and when urban land issues have been studied, they have remained rather delinked from rural experiences. We think it useful to consider rural and urban areas in combination, as many rural areas are becoming increasingly urbanized. In addition, the dynamics of land conflict and the way they are solved may be similar in rural and urban areas to the extent that they are informed by more general social and political realities. Comparison could reveal these similarities, but also differences as a result of increasing land pressures and urbanization. And finally, national land reform should be applicable to rural and urban situations alike, which makes an integrated analysis indispensable.

As has been indicated, we will explicitly focus on land conflicts. This is justified by the fact that in land conflicts, and the ways they develop and are solved, the social and political workings of the law can readily be observed, as well as the ways in which the latter contributes to or hampers tenure security, and for whom. Conflicts can thus be used as a lens through which to observe the more structural properties of a society (Caplan 1995).

The results of the case studies of Yoff, Ross Bethio and Kaymor will be presented in the following sections. In the conclusion, we will consider the three cases together to see what the evolving conflict dynamics mean for tenure security in these areas, and what kind of solutions could be proposed to safeguard or enhance tenure security in view of current developments. Before turning to the case studies, however, we think it useful to briefly outline the evolution of land law and land use in Senegal.

Land, land use and land legislation in Senegal

It was not long after independence in 1960 that Senegal attracted international attention due to its innovative land law, which aimed to reconcile customary and formal land rules coupled to an advanced plan for the devolution of state control over land to local governing bodies.

According to customary rule, land belongs to those families that first cleared it. Underlying this system is the basic territorial right that this is the privilege of the founding family of a village or clan, which is normally represented by the village chief. In most cases, land inheritance is based on the patrilineal trans-

mission of rights.³ In the past, the eldest male, usually a younger brother of the deceased, was the main inheritor and it was only if there were no male representatives in one generation that land went to the next generation. This system has been transformed by the increased influence of Islamic law, and land rights are nowadays usually transmitted from a father to his sons. Women are traditionally not allowed to inherit land, which is justified by the fact that when they marry they leave the family home.

The 1964 Law on the National Domain has turned virtually all rural land into state property, which, in turn, is given in usufruct to the farmers. The allocation or withdrawal of user rights is based on the productive use of land, and an applicant also has to live in the community (Hesseling 2009: 250-251). Within six months of passing this law, customary land owners could claim their land and register it provided that long-term use and customary ownership of it could be proven (*Ibid.*: 244-245). This however only happened in a limited number of cases, mainly because of a lack of knowledge and urgency on the part of the local population. The rule that after a death, the sons have to re-register it is generally not adhered to either.

In practice, families that were already cultivating land have been allowed to continue as before, albeit under the ultimate supervision of the state. Only when land is not put to sufficient use can it be taken away and allocated to someone else. In addition, one can claim rights to a tract of land if one has cultivated it for more than three years. This means that local land rules are recognized within the limits set by national law. Families can claim rights to their land as long as they continue to till it but fallow periods lasting more than a few years and longer-term leases can create problems in that the rural council or the temporary tenants may claim the land on the basis of national legislation.

The Law on the National Domain introduced a revised Senegalese administrative infrastructure with the creation of rural communities made up of a number of adjacent villages, as well as communes in the urban areas. The administration of these new entities lies with a rural council or municipal council of elected locals with a five-year mandate. Their task is applying the Law on the National Domain by allocating and reallocating land, and executing modest development projects covered by its own budget, which comes mainly from local taxes.⁴ The village chief still continues to play an important role at village

³ This is not the case for the Lébou community in Yoff that originally applied a matrilineal system.

⁴ The introduction of these rural communities administered by a rural council in 1972 was the first phase in the Senegalese decentralization process. The second step was taken in 1990, when the president of the rural council was given greater authority to the detriment of higher levels of administration, particularly with respect to budgetary matters. The third stage was set in motion in 1996 when competencies that

level but his position has inevitably changed following the introduction of this new layer of administration.

The Law on the National Domain has weaknesses that have been extensively noted and analyzed in the literature on land tenure in Senegal. Firstly, criteria relating to putting land into use (*mise en valeur*) are poorly defined (Traore 1991), which makes it possible for rural councils to use the notion in a very flexible and arbitrary way when allocating or withdrawing users' rights. Therefore, a wide variety of rules and interpretations with regard to the notion of productive use of land exist at the local level (Hesseling 2009: 253). While the rural councils are democratically elected institutions, it is precisely this political dimension that results in decisions regarding the distribution of land not always being impartial and often based on political partisanship (Blundo 1998; Kaag 2001; Kaag & Venema 2002).

Another problem is that the rural councils have not been well prepared financially for their tasks. The Senegalese state is hesitant about creating a real salaried civil service at the local level due to financial constraints and the fear that the state might lose power once the local authorities are equipped to function independently. This means that local authorities have only limited resources to work with as less than 3% of the Senegalese national budget is allocated to the local authorities (Faye 2008: 5).

Finally, the current law appears outdated in several respects. The sale of land, for instance, is not permitted on the basis of the Law on the National Domain but is current practice in many places in Senegal, as will be seen in the following sections.

Projects to reform national land legislation have been in the pipeline since the 1990s. Under pressure from foreign financial backers, such as the World Bank, that called for legislative reform to develop the private sector, expert analysis of land constraints was undertaken and legislative reforms were proposed. This *Plan d'Action Foncier du Sénégal* (1996) focused almost exclusively on the privatization of land and stimulating private investors to find new financial sources at a time when the state was retreating, while the practical needs of small-scale family farmers were barely taken into account (Benkahla *et al.* 2011). While this tendency towards privatization had been mainly donor driven under the socialist regime, the liberal government, which came to power in 2000, has taken privatizing land tenure and developing agri-business as important concerns. This was clear for instance in its *Projet de loi d'orientation*

had previously been the domain of the central state were delegated to the rural communities, which were given greater responsibilities in areas like healthcare, education and natural-resource management.

agricole in 2003 when industry- and business-like forms of agriculture were promoted based on the use of wage labour and high-level investments in technology. For this, the privatization of land and the opportunity to buy and sell land would be prerequisites. But the topic is sensitive: it runs counter to the interests of the majority of small family firms in Senegal, which makes it difficult for the government to introduce fundamental reforms. Despite ongoing preparations, the Law on the National Domain is still the law of reference. However, practices are evolving, partly due to government agricultural policies that promote land allocation to large-scale investors, population growth and evolving market forces, all of which increase the gap between rules and practices. The following sections consider what this means for the evolution of land conflicts and their solutions in Yoff, Ross Bethio and Kaymor.

Yoff: Land speculation and overlapping authorities in an urban context⁵

Yoff is today an integral part of the bustling urban landscape of Senegal's capital Dakar. Founded as a fishing village on the Atlantic Ocean by the ethnic group of the Lébou some 400 years ago, it retained its rural character for a long time. With the urbanization of the last few decades, it has become increasingly encroached upon by the city and its population has grown from 40,000 to 100,000.⁶ In 1996, Yoff changed administratively from being a rural community to a commune.

In the old part of Yoff, the Lébou people still account for the majority of the population, living in big compounds of up to seven households headed by a family chief. Even though fish and agricultural land are increasingly scarce, the population is still geared towards its traditional occupations. The old village is easily distinguishable from the newly established neighbourhoods in Yoff (such as Nord Foire, Ouest and Sud Foire) where people live in smaller family groupings and property owners are civil servants, staff from universities and NGOs, and migrants, who have often bought their lots illegally from the Lébou.

Land conflicts in Yoff have a long history. In the colonial period, the traditional Lébou leaders challenged attempts by the colonial authorities to acquire their land for urban expansion purposes (Laborde 1995). Conflicts within families over inheritance have existed for generations because the Lébou traditionally had a matrilineal system in which land was passed down from a maternal uncle to a nephew. Since the advent of Islam, however, the pattern of father-to-son inheritance has been promoted. As a result, disputes over land

⁵ Fieldwork in Yoff was carried out by Yaram Gaye between August and October 2010.

⁶ Interview with staff at the local Public Records Office in Yoff in 2010.

between matrilineages (maternal cousins) and patrilineages (sons) frequently occur.

Land issues are becoming progressively more complex as a result of the increasing monetization of the value of land due to urbanization. In addition, the institutional landscape concerning land issues has come to include various traditional authorities, Islamic leaders, the community council and the central state. All play a role but none has hegemony over the others. Instead, there is an overlap and intertwining of authorities that leads to competition and rivalry, and a subtle game of coalition-making. Finally, the precarious position in which many urban families find themselves, combined with processes of individualization, are resulting in land being an essential means of acquiring wealth for many in Yoff. They may make money by selling plots for multiple uses (habitation, commerce), while renting out buildings and single rooms is also lucrative as the area is close to the centre of Dakar and easily accessible. It is also close to the airport and attracts staff working there and all kinds of services and enterprises for whom proximity to the airport is important.

The traditional Lébou social and political organization is still strong. According to customary law, the family who cleared the land owns it. At village level, the village chief (*djaraff*) is the central authority but his power is held in check by the *ndeji-ji-rew*, who handles internal village matters as a kind of Minister of the Interior (Laborde 1995), and the war chief (*saltigué*). The council of notable elders, and a council of younger notables aged between 55 and 65 (*frey*) are the other important pillars of the system. This traditional system still functions, albeit that through political cleavages Yoff at times may have several *djaraffs* and *ndeji-ji-rew* (Laborde 1995), each contesting the other's authority. In addition, the *frey* in Yoff seem to have gained in importance and influence to the detriment of the older notables (Laborde 1995; Billaud 2009).

Another pillar of authority is constituted by the religious leaders of the Islamic Sufi order of the Layennes. This order was established by the Yoff-born Lébou *marabout* Limamou Laye at the end of the 19th century.⁷ His mausoleum is in Yoff. The present *khaliffe* also resides in Yoff. The Layennes are almost exclusively Lébou. The Layenne *marabouts* play an important role in local social and political life. Rivalry with the traditional authorities, like the *djaraff*, has been common, for example when it comes to negotiating with the (colonial and post-colonial) state.

Finally, with the Law on the National Domain and the subsequent decentralization process that turned Yoff into a rural community and then a commune, another layer of authority has been added.

⁷ For an in-depth analysis of the Layenne Sufi order, its religious characteristics and social and political clout, see the excellent study by Laborde (1995).

It is not surprising that, with land values increasing, the political dynamics surrounding land issues and the power play between the different authorities are becoming increasingly intense. It is important for politicians to maintain their position and win as many votes as possible at election time. The customary authorities, for their part, are trying to secure allies within the administration to handle their land interests. They feel that the Law on the National Domain has severely weakened their control and rendered them dependent on the whims of the administration. The municipal authorities, even when they act within the law, are often placed in a difficult situation that requires tact on their part. If they do not take into account the demands of Lébou families (supported by their notables), they have to reckon with serious resistance. This is all the more problematic because the customary leaders are strategic partners in the execution of all kinds of municipal activities, such as the mobilization of the population for public manifestations, and bad relationships with the customary authorities may result in the loss of votes on election day.

The following case illustrates the complex interaction between the different authorities in land matters in Yoff.

The APECSY (Association pour la Promotion Economique et Culturelle de Yoff) was set up in the 1970s as a community association by educated youngsters⁸ supported by the frey Yoff. With the support of the khaliffe of the Layennes, APECSY received authority from the state to give out and manage 1160 new lots in the Yoff extension zone in 1996. Everything went well, according to the association's representative, until 2006 when the notables of Yoff, under the guidance of the djaraff, criticized the group's management because they said there was a lack of transparency in the assigning of plots. In addition, they claimed the association had bought land for FCFA 1 million and sold the plots for FCFA 18 million to FCFA 25 million per parcel. From then on, the conflict was out in the open and the contesters subsequently got hold of plots that, the association said, had been destined for public infrastructure projects. The matter went to court but has not yet been resolved. APECSY members claimed to be astonished by the course of events as the final allocation of a plot by APECSY had been in 2001. When asked, inhabitants thought that the djaraff, in all good faith, had initially wanted accountability and more transparency but that later, influenced by others in his camp, he had allowed them the appropriation of the last tracts of land in the extension zone. The people remain divided about the whole issue. Those living in the extension zone say they are quite satisfied: they had never thought of having a house of their own, but thanks to APECSY they now have one. Others claimed that they did not understand how the state could give an organization like APECSY such a mandate on the sensitive issue of land allotment. An official at the préfecture thought that it had been a 'poisoned present'.

⁸ In the Lébou gerontocratic system, this can be anybody under the age of 55 (Billaud 2009).

This case can be interpreted as an example of competition between different traditional authorities (*djaraff, frey*) and between the traditional authorities and the youth who are excluded from the traditional hierarchy but who have gained in power because of their good relations with the state and their ability to adapt to the modern environment of national state bureaucracy, and also due to their good relationships with the *khaliffe* of the Layennes (with whom traditional leaders generally had an antagonistic relationship). From the point of view of the state authorities and national politicians, the authority given to APECSY indeed seems to be a present to grease patron-client relationships. The non-transparency of the rules and criteria concerning the allocation of the plots by APECSY hints at another layer of clientelism.

The allocation and status of plots is a more general problem. Our field research demonstrated that there are many problems related to the identification of real rights over land, and surrounding the various transactions made on the land market, which has developed over the last few years. Various actors are active here: Lébou land owners and brokers, high-level officials who through their work often have a good knowledge of commercial opportunities, investors in housing, migrants and other new elites looking for land on which to construct a home, and state agencies in need of land for urbanization and construction projects. The illegally acquired plots and the houses that are constructed without any adherence to rules and regulations (such as cadastral plans, required provisions) lead to many conflicts, for example in new neighbourhoods built near, or even on, the strip of land that ought to be left empty as it borders the airport. People build their houses too close to each other or even on public roadways, and an informal acquisition from a Lébou may lead to a conflict with another member of the same family who wants to reclaim the plot as family land. Often the municipality tries not to become involved for reasons of politics or sensitivity but the state sometimes dispossesses and/or destroys houses that are the object of serious dispute. However state officials may just as easily reassign the same plot to others, a practice that generates anger amongst the local population.

The local Lébou are also adding to the confusion and complexity themselves. While land until quite recently was considered as patrimonial and inalienable, it is nowadays sold and rented out. Many feel that the Law on the National Domain has resulted in the Lébou losing a great deal of land, a large part of which has over time been taken by the state for urbanization purposes.⁹ As a consequence, a number of the Lébou sold their land illicitly before the state could use it for its own plans.

⁹ The Law on the National Domain states that the state may withdraw land from the national domain for the good of the public or for general interest (Hesseling 2009).

These monetary transactions, particularly sales, are most often taking place in non-transparent ways, not only from the perspective of the buyer but also in view of the seller's family members. In the past, patrimonial land had been managed by the head of the family but increasingly, and helped by registration under the Law on the National Domain,¹⁰ family representatives may use land as their own personal property. A family representative may for instance sell land without reporting the fact to his family, or inform them but not evenly distribute any profits between those who, from a customary perspective, are co-proprietors. The precarious situation in which many families and individuals find themselves can lead to short-term calculations and the selling of land in order to meet immediate urgent financial commitments but to the detriment of longer-term family interests.

In the following section, we will see that the increase in the commercial value of land is not confined to the urban areas but has also had an important impact on land conflicts in the rural area of Ross Bethio.

Ross Bethio: External investors contributing to a complexification of land conflicts¹¹

Ross Bethio is in the fertile Senegal River delta in the north of Senegal. The population's income comes from agriculture, fishing and cattle. Given its sufficient water resources, the area is suitable for agriculture all year long, and is well known for its *riziculture*, the large-scale production of rice. For the development of the latter, the parastatal organization SAED (*Société d'Aménagement d'Exploitateurs des Terres de Delta*) was established in the 1960s. Its role was to prepare land for cultivation and redistribute it amongst the local population. Under pressure from the structural adjustment programmes implemented by the World Bank and the IMF, SAED was severely cut in the 1980s. In 1987 its activities regarding the distribution of land were transferred to the rural community of Ross Bethio¹² although SAED continues to offer technical assistance (Quatrida 2009: 64-65).

Ross Bethio covers two ecological zones: the *walo* (the fertile zone along the river where land was allocated under SAED's supervision) and the *diery*, the drier zones further away that are often traditional family lands. Most land in Ross Bethio has been acquired through inheritance of customary family land, allocated by SAED or assigned by the rural council. The chances of obtaining

¹⁰ Registration is normally done under an individual's name.

¹¹ Fieldwork in Ross Bethio was done by Marieke Kruis between August and October 2010.

¹² The rural community of Ross Bethio was restructured in 2008 and became the urban commune of Ross Bethio and the rural communities of Diama and Nguith.

land in these ways are not evenly distributed among the population, and women, youth, and migrants who are not important *marabouts* or politicians, have particular difficulty in accessing land and have to resort to alternative strategies. Some simply start working on 'abandoned' land, with the risk that the owner will turn up at harvest time. If people have sufficient financial means, they may rent land (about FCFA 60,000/65,000 per hectare per year, depending on the distance from a source of water) or buy a plot with *remboursement de peine*. This type of transaction involves the informal purchase of an allotment where the investments that have been made on the land are refunded in addition to a fixed price per hectare. The aim is to have the transaction legalized with the rural council afterwards. Wealthy farmers who want to enlarge the area they have under cultivation may also resort to renting land or to buying official allotments.

Purchasing land is thus common practice in Ross Bethio and is accepted by all parties, including the local state authorities. Negotiations are an important strategy for accessing (additional) land and resolving land issues. Conflicts frequently arise because people do not have written proof of informal transactions. In such cases, provisional solutions are often negotiated. The relative weight of the different parties in such processes depends very much on their position in the local hierarchy. This is well illustrated by the following case, in which a local female agrarian entrepreneur opposed a local Mouride *marabout*. Both parties in the conflict were important in the community: the entrepreneur is the wife of an imam and one of the few female farmers with a significant amount of land and, in this sense, is a female pioneer. At the time of the fieldwork, she was cultivating 80 ha of rice. The *marabout* is one of the biggest economic players in Ross Bethio, cultivating about 350 ha. Given the people involved, this conflict is one of the more important cases in Ross Bethio.

The conflict revolves around 140 ha of land that the woman bought from a third party 'avec remboursement de peine'. She indicated that she had started out with the strategy of obtaining land in 1992 when she bought 5 ha for FCFA 25,000. Three years later she bought another 40 ha for FCFA 60,000. She explained that she was motivated by the wish to provide long-term financial security for her ten children. She had explored this alternative strategy because the official channels of the *communauté rurale* did not offer women the chance to access land at the time. She eventually sold the 45 ha she had started working on, and bought 250 ha under the same conditions. She financed 50 ha of this land herself, while purchasing the other 200 ha with the help of her son, who lives in Italy. The dispute between the female entrepreneur and the *marabout* revolves around 140 ha of this land.

At the time the woman bought the land from a third party, she did not check at the *communauté rurale* in Ross Bethio whether the vendor had official ownership of the land. Moreover, the *déclaration de vente* that she received at the time of the sale was never regularized and put in her name. In spite of all these legal insecurities, the woman paid the vendor an advance of FCFA 500,000. This was part of FCFA 5

million that were provided by her son in Italy, who also bought two machines to prepare the land for agriculture. After making the down payment, the entrepreneur prepared part of the land and started to cultivate onions. After the first harvest she handed over the remaining FCFA 4.5 million to the vendor.

According to the woman, the problems started at this point, when she was getting ready to prepare the rest of the land. One of the *marabout*'s employees came to see her, claiming that 140 ha of the land she was preparing for the cultivation of rice belonged to the *marabout*. According to him, he had been given user rights to this land in 1989 by the former *communauté rurale* of Ross Bethio. He claimed he had the papers to prove it. When he asked the female entrepreneur to show him an official document from the *communauté rurale*, she was not able to do so. The *marabout* claims that the woman told him that she had noticed that no one was using the land and that she had just started working on it.

The female entrepreneur was summoned by the rural council but the only thing she could show the authorities was her *déclaration de vente*. She then tried to settle things informally with the *marabout* but he claims that all his papers are in order and refused to give up the land. At this point the woman turned to the police, who directed her towards the *sous-préfet*, who tried to contact the land committee of the rural council but could not reach them. The *sous-préfet* ordered all work on the disputed area of land to be put on hold immediately. According to the woman, the *marabout* respected this order for a week but then started cultivating the land. The *marabout* himself claims that he has the right to work the land because the case has been closed. The woman, however, claims that she is still waiting for the case to come to trial.

The case of the *marabout* and the female entrepreneur highlights the hierarchies of power in a rural community and how they influence people's access to land. Even if the woman is a relatively wealthy farmer, she seems to have little chance in the face of the *marabout*, who has close relations with the political authorities and the court.

Increasingly, however, competition and conflict over land are no longer restricted to local parties as investors from outside the community are becoming interested in the agricultural opportunities in this region of Senegal. The agricultural policies of the Wade government, particularly the GOANA initiative (*Grande Offensive Agricole pour la Nourriture et l'Abondance*), have been influential. This programme was launched in 2008 to develop Senegal's food security by promoting rice, maize and millet and offering subsidies on fertilizers and equipment. All rural communities were asked to contribute 1000 ha of land to the execution of the programme and, when distributing the land, to give priority to those with the means to cultivate it. In addition, the President declared that 'Ministers, high-level officials, directors and business executives are invited to cultivate minimally 20 ha and there is no upper limit'. This led to massive allocations benefiting political and religious dignitaries, both from the communities themselves and from outside. There are numerous stories about land having been taken from local farmers and given to important outsiders

although there are indications that not all the beneficiaries planned to contribute to the goals of the GOANA but were using the opportunity to acquire land for other (speculative) purposes (Faye *et al.* 2011: 10-11).

Investors from abroad have also recently shown interest in large-scale land acquisitions in the area to develop food crops and biofuels, a move that can be related to the so-called 'global land grab'. In Ross Bethio, 500 ha have been allocated to a private company under joint French, Moroccan and British ownership, and 110 ha to an Italian company (Faye *et al.* 2011: 23). In addition, a Nigerian company has been allotted 40,000 ha to cultivate sugar cane. Negotiations with a Chinese company are still underway (interview: Ross Bethio 2010).

The following case shows how existing hierarchies in the community shift with the arrival of wealthy entrepreneurs from outside.

One of the parties in the conflict is a very wealthy man in Ross Bethio who has 120 ha of rice under cultivation. He came to Ross Bethio to pursue large-scale rice cultivation in the 1970s using capital he had earned in commerce and the transport sector in Dakar. The entrepreneur is currently involved in a dispute about 500 ha of land with a GIE (*Groupeement d'intérêt économique*) called UGIED (*Union des Groupements Intérêts économiques du Delta*), an alliance of fifty GIEs made up of about 300 men and women. According to the entrepreneur, the 500 ha were assigned to him as an affiliate of UGIED in 1999. The land is part of a bigger area of 7000 ha (divided into 8 areas) that was allocated to UGIED in 1989. As this zone of Ross Bethio is a long way from a source of water, the members of UGIED have not been able to cultivate the land. When GOANA was launched in 2008, UGIED planned to create irrigation channels to prepare the 1200 ha in Ross Bethio for cultivation. To execute such a project, UGIED looked for partners with the president of the rural community of Ross Bethio, and an outside investor from Dakar was soon found. This partner was promised 500 ha for his own personal use if he would prepare the rest of the UGIED land as well.

As soon as work on the land began in 2008, the conflict started to unfold. At this point, the entrepreneur from Ross Bethio came forward, claiming that the 500 ha awarded to the investor were in fact his land. The entrepreneur claimed that he was a member of UGIED and that he had had the land allocated to him since 1999. According to him, he had paid FCFA 10,000 per ha. When he acquired the land, however, he did not have the financial means to work it. A representative of UGIED claimed that the entrepreneur was never part of UGIED. According to him, all UGIED members are known at the national office but the man has never been registered. Moreover, he pointed out that the entrepreneur claimed he had had the land since 1999, while the land had been assigned to UGIED in 1989. The biggest complaint by UGIED is that they risk losing a harvest as the authorities have summoned them to stop working the land because of the pending conflict. The case is currently with the court.

This case shows that claims to land are not often well documented and that this is increasingly becoming problematic as the stakes in land become higher. In addition, it seems as if the outside investor has been more powerful than the

entrepreneur from Ross Bethio. While in a case limited to local-level actors the latter would have a good chance of winning due to his status, with the advent of outside investors, hierarchies change and so do the dynamics of conflicts and their possible solutions.

Kaymor: An intensification of conflicts but (still) restricted to the local level

Kaymor is a rural community some 20 km north of the Gambian border in the Kaolack region and the department of Nioro du Rip. Its location, behind the natural barrier offered by the Grand Baobolon River and with only a connection to the tarmac N4 road by a laterite track, makes access rather difficult.

The main means of subsistence are agriculture and livestock husbandry. Millet is the most important subsistence crop. Peanuts were introduced as a cash crop in the colonial era and have remained the area's most important crop despite the dismantling of the state agricultural extension services in the 1970s and 1980s, and the failure to set up a more efficient private system for peanut cultivation and commercialization in the 1990s. Both millet and peanuts are grown on the higher sandy soils where family fields were traditionally situated. In the 1970s, people started clearing land in the valleys with their heavier clay soils for the small-scale cultivation of rice and vegetables (Kaag 2001, 2005). Rich farmers may have large herds of up to 100 cattle, while poor ones may have only a few sheep and/or goats. The extension of agricultural lands over the last decades means that increasing competition between agriculture and husbandry has developed.

Important problems are growing land scarcity, serious wind and water erosion that has resulted in the formation of large gullies, and reduced soil fertility. After the withdrawal of the state from the agricultural sector in the 1980s, many farmers have encountered difficulties in paying for seeds and fertilizer.

Most people in the community are Wolof although some 10% are Toucouleur. According to customary law, land belongs to those families that first cleared it. Apart from these hereditary rights, several temporary rights to land have emerged. Firstly, a family could lend out a piece of land for a period of time that was limited but not agreed on beforehand and the person who received the plot in usufruct was not obliged to pay. This occurred when a family had more land than it could cultivate at a certain time. The practice was called *dink*. Another was called *dogal*. In this case, the duration of the loan was clearly determined in advance (usually one year) and some form of payment was involved. In addition to these practices, land is also distributed within the family. The land that is distributed each year by the head of the family or household to his dependents is given in *abal* (Venema 1978).

The introduction of the Law on the National Domain has not had much effect on customary rule and practice. Family lands are still not usually registered, nor are most of the newly cleared plots in the valley. However a few are officially registered, such as the orchards of the village chief and the imam of Kaymor, for which the *sous-préfet* financed a well on condition that the land would be registered. Some women's groups also registered their gardens with the rural council when they started to work with a foreign NGO. Registration is still rare though and the almost total lack of virgin land makes allocation by the rural council practically impossible. An area in which the Law on the National Domain has had an impact, however, is on the granting of long-time usufruct rights, such as *dink*. The latter has practically disappeared as land owners do not want to risk the other party claiming the plot after cultivating it for three years.

The rural council, set up in 1974, was initially composed of the old elite and representatives of noble families, and as such acted in a unified manner. It functioned very much as a customary council of the elderly, for whom working towards consensus was a common strategy. It was only in the mid-1980s that factionalism started to emerge in the community when national politicians started to look for local clients. This led to a council in which all members were from the ruling *Parti Socialiste* at the time, but were divided into Faction A and Faction B, each linked to a national PS politician. It was also in this context that the first people of slave or caste origin and/or of Toucouleur background made it onto the rural council. Factionalism thus permitted certain social categories to gain seats on the council. However, factionalism also led to a weakening of the council's power, as the councillors no longer spoke with one voice (Kaag 2001).

Some fifteen years ago, most land conflicts were concerned, firstly, with problems of inheritance within a family (usually between brothers) and, secondly, with conflicts between cattle holders and farmers about cattle going on to the fields and the delimitations of cattle paths. Most disputes were solved within the family or with the help of the village chief or one or some rural councillors. Provisional and open-ended solutions were normally devised in order to prevent people losing face in the local community and not to endanger local peace. If the help of the council was requested, often only councillors from the majority faction were called on, which resulted in decisions being very one-sided. This evidently led to supporters of other factions not taking issues to the council for resolution.

In 2010, the most frequent conflicts were still those between herders and farmers, and inheritance problems within families. There seems to be a certain hardening of conflicts, however, because alternative options for acquiring land are increasingly difficult to find. In the past, people could migrate to the Casamance in southern Senegal where land was still available. People are however now starting to come back as it is becoming more difficult to obtain land there.

As a result of a rush towards land in the valley that can be partly explained by the collapse of the organized cash-crop sector, the valley has been entirely cleared since early 2000 and all the reserves on the territory have been exhausted.¹³ Since then, increasing numbers of conflicts between farmers over plots in the valley have been reported, with some farmers trying to claim other people's land there by simply enlarging their own area under cultivation, for example by moving the demarcation signs between the plots. Despite the fact that these conflicts often concern small areas, they can have a big impact, as is shown by the following case.

The village chief of Kaymor was the first person to clear a plot in the valley in the early 1970s and to start an orchard. As a former World War II combatant and a police officer in different parts of Senegal, he had visited many places and his experiences had helped him see the possibilities for horticulture in the valley. The local people did not see any agricultural value in the valley and it was only when they saw that production was good that they themselves progressively started to clear land for themselves. Nowadays, the valley is entirely under cultivation and makes up a small but qualitatively important part of people's property. The soil is fertile and offers the possibility to diversify crops and cultivate beyond the rainy season. The village chief worked in the orchard, which produced well, and his son continued to do so after his father's death at the end of the 1990s. He had just been elected president of the rural council at that time. The village chieftaincy went to the oldest male representative of the next generation, the son of the deceased village chief's brother. When the son of the former village chief was not re-elected president of the rural council in 2002, the family of the new village chief started to claim part of the land adjacent to the orchard. (The orchard itself had been one of the rural council's first allocations – the previous village chief had asked for official recognition in order to dig a well.) The conflict concerning the ownership of the plot has not yet been settled but has resulted in increasing alienation within the extended family. The cousins in both lineages who used to be good friends are now trying to avoid one another.

In spite of the increasing pressure on land and regular conflicts surrounding it, these are restricted to local actors and can normally still be settled at the local level, within the family or by involving the village chief or asking rural councillors to mediate. This holds true particularly in the smaller villages of the rural community. In the village of Passy Kaymor, for instance, people who had migrated to the Casamance in search of land but returned after a few seasons were given tracts of land to cultivate by their fellow villagers after communal deliberations within the village. This solution was facilitated by the village being small and consisting of only a few families. But in larger villages too,

¹³ The rural community was thus also not able to respond to the President's call to contribute 1000 ha to activities in the framework of GOANA (Faye *et al.* 2011).

people have to live with each other and by not allowing conflicts to reach a head, try to maintain a certain degree of peace.

Conclusion

During their fieldwork in 2007, Hesseling & Eichelsheim concluded that people in Ziguinchor, the capital of Senegal's southern province of Casamance, were still experiencing tenure security in the sense that even if legal entitlements were not in place, they could rely on a system that worked, socially at least. They could be certain that their social relationships and the mechanisms for social peace in the community would prevent them from being driven off the lands they considered their own (Hesseling & Eichelsheim 2009). From our cases, however, it appears that in other areas of Senegal, particularly where land has developed an increasing monetary value and where competitors from outside the community have come on the scene, this is no longer the case.

Conflicts in Kaymor seem to have become more intense recently but still remain confined to the local level as the area does not have any land left and does not have any other assets at its disposal that could interest outside actors. The local system appears to still be providing sufficient tenure security.

In Yoff, there is clearly huge pressure on land but with the high numbers and diversity of actors involved and various authorities and institutions having power in land matters, no one party seems to have the upper hand. All the actors need to continuously negotiate and look for allies in land issues. Everybody seems to be in an insecure position, which paradoxically offers a buffer against unbalanced exploitation of some by others.

Particularly in Ross Bethio, insecurity has increased greatly due to the arrival of outside investors in the context of the GOANA initiative. The state, rural councils and outside investors appear to have similar interests in developing large-scale agriculture that do not correspond with those of the small-scale farmers who are seeing their claims to land vanishing in the face of powerful competitors.

In view of current developments including land-grabbing practices by non-locals, be they national elites or investors from abroad, the question is how to increase land tenure security for (different categories of) the local population. The findings of our research call for measures to make rules and practices work for every citizen, not only for those who are best situated in patron-client relationships and most skilful at playing the power game. In the context of the land reform in preparation, the propositions made by experts have mainly focused on the securing of individual rights by developing a cadastre and a system of fixed and written property rights. Many of the people in the rural communities that we studied, however, feel that the solution lies in restoring the

power of the village chief, as he is considered to work for peace in society and not to act on the basis of a partisan logic. Yet we have seen that the strategies currently being implemented to achieve peace, such as the formulation of provisional and flexible solutions, are no longer working well in many instances, particularly when there is growing pressure on the land by a variety of local and non-local actors and land is increasingly being given a monetary value. The challenge is therefore to retain the objective of social peace but to develop better means for achieving this. In our view, an improved traceability of rights and decisions concerning land through a form of cadastre is important, as are enhanced accountability mechanisms – the improved capacity of citizens to scrutinize their administrators – at both local and national levels. To achieve the latter, it is important to increase knowledge relating to land legislation, including the rights of the different parties involved, the control mechanisms provided by the law and the ways these mechanisms can be used in practice. It is clear that people can only monitor those who govern them if they know the rules. Strengthening the public debate on land governance, both at the local and the national level, would help civic education and the creation of more transparency, and provide a vehicle for real debate on current land-governance practices and the desired land reform.

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‘More punitive penalties should be given to urban farmers’: Laws and politics surrounding urban agriculture in Eldoret, Kenya

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The significance of urban agriculture (UA) to the livelihoods of urban households and potentially to the urban economy and environment is being increasingly recognized. Yet many national governments and urban authorities have continued to view it unfavourably, ignoring it in urban land-use planning and restricting or even criminalizing its practice through prohibitive, punitive policies. This chapter provides an overview of national and Eldoret Municipal Council (EMC) laws and policies related to UA and considers how they have shaped the context in which urban farmers in Eldoret town are striving to make a living. It shows how contradictions and inconsistencies inherent in Kenya's national legal and policy framework concerning UA, unfavourable official attitudes on the EMC, the power relations and politics underpinning the practice of UA, and the application of existing laws and policies have frustrated the evolution of a more responsive legal and policy framework for urban farming in the town. The chapter ends by reflecting on recent developments towards a more facilitative and supportive policy framework for UA at national level and the implications for the practice not only in Eldoret but also in other urban centres in Kenya.

Introduction

The impact of the neoliberal economic policies of the 1980s and 1990s, notably Structural Adjustment Programmes (SAPs), on the developing economies of Sub-Saharan Africa have been well documented (Rono 2002; Kaseke 1998; Ihonvbere 1996; Kanji 1995; Ndulu & Mwega 1994; Obidegwu 1989). Suffice here to note that, at least in the short term, the policies have exacerbated precarious situations for the populations of the countries affected, with the effects being disproportionately felt in urban areas (Owuor 2006; Meikle 2002; Rakodi 2002; O'Connor 1991). Many livelihood studies have focused on the negative impact of macro-economic policies on people's livelihood opportunities and the coping strategies they have adopted at the micro level and how these have subsequently shaped the dynamics of macro-economic change (Oberhauser & Hanson 2007). Due to the high percentage of their income that the urban poor spend on food (Steckley & Muleba 2003; Maxwell 1999; Potts 1997; Mlozi 1997; Freeman 1993), 'issues of income and livelihood are directly linked to food security' (Maxwell 1999: 1950). For this reason, the increased involvement of many urban households in urban agriculture (UA) has been conceptualized as one of the micro-level livelihood strategies adapted by urban households to cope with dwindling incomes and rising food costs occasioned by macro-economic change (Foeken & Owuor 2008; Simatele & Binns 2008; Foeken 2006; Page 2002; Flynn 2001; Obosu-Mensah 1999; Maxwell *et al.* 1998; Denery 1996; Mudimu 1996; Drakakis-Smith *et al.* 1995; Mbiba 1995).

It has increasingly been recognized in livelihood studies that the extent to which different individuals at the household level as well as at the community level are able to access and deploy assets in pursuit of livelihood strategies is differentially shaped by the context in which they live, while at the same time this context is shaped by people's livelihood strategies (Oberhauser *et al.* 2004; Meikle 2002). Contexts are a complex interplay of policies, institutions and processes that govern people's everyday lives and shape their vulnerability and livelihood opportunities and options. As Rakodi (2002: 16) pointed out, '[t]he policies, organizations, institutions and processes that are relevant to livelihood strategies operate at all levels, from the household to the international arena'. They also operate 'across the public and private (commercial and civil) sectors' (Meikle 2002: 37). Emphasizing the importance of policy and institutional arrangements and their cross-scale (macro-micro) linkages in shaping people's livelihoods is a defining feature of recent studies and development work using the Sustainable Livelihood Approach (Bingen 2000).

This chapter highlights different policies and legislation at macro (national) and micro (municipal) levels and its interaction, and assesses how they have responded to and shaped the development of UA as a livelihood strategy for

urban dwellers in Eldoret town. Fieldwork was carried out between 2007 and 2010 in Eldoret town which, with 250,000 inhabitants, is Kenya's sixth largest urban centre. Interviews were held with key informants on the Eldoret Municipal Council (EMC), with staff at the town's Physical Planning Department, at the local branch of the Ministry of Agriculture and Livestock, the Catholic Diocese of Eldoret, and the provincial administration. It also consisted of a survey among 160 urban farming households involving 200 respondents in Langas, Eldoret's largest informal settlement. As a follow-up to the survey, in-depth household interviews were also conducted among 24 urban farming households that were selected from among the survey participants.

The following sections provide a brief review of the literature on the importance of UA for urban residents and its (potential) contribution to the urban economy and ecology in Sub-Saharan Africa. National legislation and the policy setting for UA in Kenya are then reviewed to show how they have been interpreted and applied at the local level. Eldoret Municipal Council's by-laws, policies and regulations relating to UA as well as official attitudes towards the practice are used as a case study. This is followed by an analysis of the practice of UA in town, which demonstrates how urban farmers have responded to different aspects of the legal and policy framework as well as the contradictions inherent in its application. The case study of Eldoret UA highlights the relevance of Gerti Hesseling's point in her analyses of land law in the Senegalese city of Ziguinchor (Hesseling 1992; Hesseling & Eichelsheim 2009) that urban land rights are particularly contested due to the complex interface between customary or use rights and 'modern', statutory law. The final section of this chapter presents the main conclusions and offers some policy recommendations.

Urban agriculture and household livelihoods

Many studies have cast UA as an important livelihood strategy for urban households, especially for the poor who have been found to dominate the sector (Mougeot 2000; Mbiba 1995). Although non-poor groups have in certain instances been well represented among urban farmers (Kiguli *et al.* 2003; Obosu-Mensah 1999; Maxwell *et al.* 1998; Mudimu 1996) or even over-represented (Mkwambisi *et al.* 2010; Foeken 2006; Flynn 2001), UA is of particular importance to the urban poor who rely more on cash incomes to purchase food (Bryld 2003; Maxwell *et al.* 2000) and for who expenditure on food takes up a relatively large proportion of their (irregular) income (Maxwell *et al.* 2000; Maxwell 1999; Mlozi 1997; Freeman 1993). UA thus insulates poor households against adverse food insecurity and malnutrition if an income is no longer forthcoming (Foeken 2006; Maxwell *et al.* 1998).

Any savings that result from poor households' own food production can constitute a significant proportion of their household income (Freeman 1993) and allow them to attend to other non-food household needs and social obligations (Page 2002; Lynch *et al.* 2001; Obosu-Mensah 1999; Dennery 1996) such as school fees, rent and medical, water and energy bills. They can then also buy foodstuffs they do not produce to diversify their diet (Foeken 2006; Bryld 2003; Dennery 1996; Lynch *et al.* 2001). For some households, such savings (or indirect income) are, in fact, more important than any direct income (Foeken 2006; Dennery 1996).

Although the motives behind UA and the needs of non-poor households may be different, its significance should not be downplayed. Non-poor households engage in UA as a means of diversifying and subsidizing income as well as securing and sustaining their families' well-being (Foeken 2006; Bryld 2003). They also engage in it to access fresh produce, for ornamental reasons and for pleasure (Page 2002). Undertaken as an agri-business in some high-income households, UA can also constitute an important accumulation strategy (Bryld 2003; Lynch *et al.* 2001) and can generate incomes comparable to or even higher than those in senior positions in the public sector (Simatele & Binns 2008).

Urban agriculture, the urban economy and ecology

While UA's contribution to household livelihoods is becoming increasingly recognized, its contribution to the urban economy and ecology has been less widely noted. Many urban planners and city authorities view UA as an activity of only marginal value to the urban economy (Bryld 2003) and as a transitional urban land use that would rather make way for more legitimate and productive land uses (Foeken 2005).

Various studies point, however, to UA's significance to urban well-being. For instance, Smit *et al.* (1996) estimated that 61% of urban families in Dar es Salaam were involved in urban farming in 1991, making it the most important income-generating activity after petty trade. In 1998, urban agriculture provided part-time and full-time employment for an estimated 13,000 people constituting about 9% of Nakuru town's labour force and supplying about 8% of the total energy requirements of the town's entire population 'at prices that are likely to be lower than the normal market prices' (Foeken 2006: 83). Ssebaana (2002, cited in Kiguli *et al.* 2003) reported that 60% of Kampala's population 'consumes either a crop or animal product produced in the city, while 70% of all poultry products consumed are produced within the city' (Kiguli *et al.* 2003: 1).

Regarding urban ecology, many urban authorities have long viewed agriculture as belonging solely to the rural areas (Bryld 2003) and therefore of being

incompatible with and detrimental to the urban environment. It was seen as spoiling the beauty of the urban landscape, which is intended for residential, commercial, industrial and formal income-earning activities (Simatele & Binns 2008; Kiguli *et al.* 2003; Mlozi 1997) and as an activity fraught with public health risks. Livestock keeping is associated with the transmission of disease, is seen as being a nuisance, as creating bad smells and being a safety threat for pedestrians as well as for destroying urban gardens and infrastructure. Urban crop cultivation is also believed to pose health risks due to the use of chemicals, untreated waste water and sewage and also because of the concentration of heavy metals in crops grown on contaminated soils and those exposed to industrial pollution and vehicle exhaust fumes. Crops supposedly also present a breeding ground for disease-causing vectors such as mosquitoes. Excessive use of chemical fertilizers and insecticides and cultivation along river banks are considered causes of environmental degradation, while tall crops are thought to provide hiding spots for thugs, thereby contributing to urban insecurity.

While such ecological concerns have been echoed by some (Simatele & Binns 2008; Flynn 2001; Mlozi 1997), the overall picture remains less clear-cut, due to limited research on the environmental impact of UA (Foeken 2006; Lynch *et al.* 2001) and inconclusive research findings (Nyamari & Simiyu 2007; Foeken 2006; Pasquini 2006). More research on environmental and public health issues is thus required and ways need to be found to mitigate any risks in an attempt to make urban farming safer and more sustainable. Our premise is that not only do the benefits accruing to urban farmers and (potentially) to the urban ecology from UA far outweigh the health and environmental risks but that most of these risks are also manageable.

Urban agriculture's potential for ecological renewal and environmental sustainability through urban greening, the clearing of bushes, the recycling of organic waste, the turning of unproductive, smelly and dangerous dumps into productive and secure sites, and the clearing of bushes have been cited (Brock & Foeken 2006; Pasquini 2006). Brock & Foeken (2006) have also shown how bush clearance for urban crop cultivation not only removed the potential for open spaces being put to informal uses such as squatting and human waste disposal, thereby reducing pollution of nearby water sources, but also enhanced the aesthetics of the urban landscape in affluent areas of Cotonou (Benin) by bringing the beautiful ocean frontage into view. In their study of UA in Kano, Nigeria, Lynch *et al.* (2001: 169) noted the potential of UA to 'protect neighbouring built-up areas from the effects of seasonal flooding'.

Practical, policy and legislative responses

Despite UA's benefits for urban households and the potential contribution it can make to the urban economy and ecology, many urban authorities have continued to stick to colonial urban laws and policies and omit UA from urban land-use planning, restrict its practice and sometimes even repress it, for example, by slashing crops without compensation (Kiguli *et al.* 2003; Mudimu 1996; Dennery 1996). Ironically, such responses have not only limited the development of UA into a productive and profitable livelihood activity (Steckley & Muleba 2003; Mubvami *et al.* 2003) but have also further exacerbated some of the negative environmental impact by preventing the development and implementation of programmes that could make it more sustainable and environmentally friendly (Kiguli *et al.* 2003; Mougeot 2000; Maxwell 1995). The importance of a pro-UA policy and legal context for urban ecological improvement has been demonstrated in Kampala where its legalization and subsequent promotional campaigns and waste recycling programmes have increased awareness of waste recycling (van Beek & Rutt 2007).

Overall, the emerging trend in many countries and cities is one of official attitudes softening towards urban farming, especially since the implementation of SAPs in the 1980s and 1990s. In recognition of the negative impact of SAPs on urban dwellers' livelihoods, but also because of the political implications of potential urban unrest due to deteriorating economic conditions, governments and city authorities have begun to relax their restrictions on UA (Page 2002; Mlozi 1997; Drakakis-Smith *et al.* 1995). This has been done either tacitly with the non-enforcement of by-laws and official tolerance, as in Buea (Page 2002), or by overtly reviewing constraining legislation and policies and/or enacting enabling ones (van Beek & Rutt 2007; Pasquini 2006; Kiguli *et al.* 2003; Mougeot 2000). In other instances, urban residents have been publicly encouraged to produce their own food, as in Tanzania (Mlozi 1997), Ghana (Obosu-Mensah 1999) and Kampala (van Beek & Rutt 2007). However, some urban authorities have dragged in national pro-UA rhetoric, legislation and policies at the local level, while in other instances, implementation of policies for the actual support and promotion of UA at the local level has been found wanting. In the case of Blantyre and Lilongwe in Malawi, UA provision through national legislation has not been matched by practical regulations to guide and support urban food production (Mkwambisi *et al.* 2010). Writing about the situation in Tanzania, Mlozi (2003: 41) pointed out that 'the national government pursued a generally favourable policy and even tried to encourage people to do urban farming during periods of severe economic recession. Yet, by-laws at the local level pose many restrictions to the practice.'

This demonstrates how external shocks and threats to people's livelihoods are responded to by different actors at multiple levels and how an interplay of policy, institutions and processes obtaining at multiple (often intersecting) levels shape individuals' livelihood opportunities and the totality of individuals' micro context for livelihood construction. On the other hand, the various policy responses mentioned above – from official toleration to the crafting of pro-UA legislations and policies – illustrate how livelihood response strategies may in turn impact on macro-micro policies, institutions and processes.

The national legislative context of urban agriculture in Kenya

There is legislation in Kenya that is relevant to urban agriculture at a national level.¹ First, the Agriculture Act² (Section 2) offers the following definition of 'agricultural land':

(...) all land which is used for the purpose of agriculture, not being land which, under any law relating to town and country planning, is proposed for use for purposes other than agriculture.

This does not rule out the possibility of practising agriculture within a town's boundaries. Any doubt seems to be taken away by the definition of 'agricultural land' given in Section 2 of the Land Control Act,³ namely 'land that is not within (...) a municipality or a township'. However, in the same section of the same Act, provision is made for urban agriculture because 'agricultural land' can also be

(...) land in Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act.

Related to this, Section 29 of the Physical Planning Act⁴ provides 'each local authority' with the power

- (a) to prohibit or control the use and development of land (...) in the interest of proper and orderly development;
- (c) to formulate by-laws to regulate zoning in respect of use and density of development;

¹ Appendix I of the 'Draft National Urban and Peri-Urban Agriculture and Livestock Policy' (Ministry of Agriculture, May 2010) lists some 20 Kenyan laws with implications for urban agriculture. Only the most important ones are mentioned here.

² Laws of Kenya: The Agriculture Act – Chapter 318, Revised Edition 1986. Nairobi: Government Printer.

³ Laws of Kenya: The Land Control Act – Chapter 302, Revised Edition 1989. Nairobi: Government Printer.

⁴ Laws of Kenya: The Physical Planning Act – Chapter 286, Revised Edition 1996. Nairobi: Government Printer.

(f) to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.

What is crucial here is how a local authority defines ‘proper and orderly development’ and whether there is room for agriculture as a form of urban land use in the ‘physical development plan’.

While these Acts offer local authorities the legal framework to allow urban farming, other Acts allow for control of the activity. The most important one, the Public Health Act,⁵ deals with anything that causes ‘nuisance or other condition liable to be injurious to health’. Section 118 of this same Act defines nuisance regarding animal keeping:

- (f) any stable, cow-shed or other building or premises used for keeping of animals (...) which is so constructed, situated or kept as to be offensive or which is injurious to health;
- (g) any animal so kept as to be a nuisance or injurious to health;
- (h) any accumulation or deposit of refuse, offal, manure or other matter whatsoever which is offensive or which is injurious or dangerous to health.

As for the cultivation of crops in town, Section 157 provides the Minister of Public Health, ‘after consultation with the Minister of Agriculture’, with the power to prohibit this ‘where it is shown (...) that the growing of any crop or the irrigation of any land being within the boundaries of a township or within three miles of such boundaries is unhealthful or insanitary’. It also provides legalization prohibiting irrigation with sewage water.

Another important section in the Public Health Act for urban crop cultivation is 168A, which deals with the breeding of mosquitoes and flies:

Every municipal council may (...) make by-laws for preventing and abating conditions permitting or favouring the breeding of mosquitoes and flies and, generally, for the prevention of malaria and other insect-borne diseases.

Although at first sight, there would seem to be no direct link with urban agriculture, this Act, which dates from the colonial period, provides the basis for prohibiting maize growing in town on health grounds as mosquitoes were thought to breed in the water that collects in the plants’ axils.

The Public Health Act also deals with ‘pollution related to health’. For instance, Section 130 provides the Minister with the possibility to prohibit the erection of ‘stables, cattle-kraals [or] pig-sties’ and the deposit of ‘any manure’ likely ‘to entail risk of harmful pollution’. And Section 129 requires each local

⁵ Laws of Kenya: The Public Health Act – Chapter 242, Revised Edition 1986. Nairobi: Government Printer.

authority to prevent ‘any pollution dangerous to health of any supply of water’. Water pollution is also included in the Water Act,⁶ with Section 94 stating that:

.... no person (...) shall throw (...) any rubbish, dirt, refuse, effluent, trade waste or other offensive or unwholesome matter or thing into or near to any water resource in such manner as to cause (...) pollution of the water resource.

The Public Health Act and the Water Act thus both provide a legal framework that forbids the use of chemicals in urban agriculture.

Perhaps the most important national legislation in relation to UA is the Local Government Act⁷ that provides local authorities with full decision-making powers related to crop cultivation and livestock keeping within municipal boundaries. For instance, Section 144 states that:

.... any land belonging to a local authority (...) may (...) be appropriated for any other purpose for which the local authority is authorized to acquire land.

In other words, by means of urban-agriculture-friendly by-laws, a local authority may invoke this Act and temporarily provide its urban dwellers with land for urban agriculture. More specifically, Section 155 provides that every municipal or town council ‘shall have power (...) to engage in livestock and agricultural undertakings’ and

.... to require the planting of any specified crops by persons for the support of themselves and their families *in areas which in the opinion of the (...) council are suffering from or likely to suffer from shortages of foodstuffs*. [authors’ emphasis]

In other words, if willing to do so, a municipal council has the legal possibility to engage in or allow crop cultivation by the (very) poor and in areas where the poor live. However, growing crops on land that does not belong to the cultivator, which is quite common, is illegal. Every municipal or town council has, according to Section 154, the power

(...) to prohibit the cultivation by unauthorized persons of any unenclosed and unoccupied land in private ownership and of any government land and land reserve for any public road.

Another provision to forbid, restrict or control crop cultivation is offered in Section 160 that states that ‘every (...) council shall have power to plant, trim or remove trees, flowers and shrubs in or on any public space’. This may appear harmless in relation to urban crop cultivation but not if vegetables are considered to be ‘shrubs’, as a Nairobi mayor once did. The Local Government Act also

⁶ Republic of Kenya: Kenya Gazette Supplement No. 107 (Acts No. 9), The Water Act, 2002. Nairobi: Government Printer.

⁷ Laws of Kenya: The Local Government Act – Chapter 265, Revised Edition 1998. Nairobi: Government Printer.

provides the legal framework for banning the use of sewage water for irrigation as Section 173 states that ‘any person who (...) makes or causes to be made any opening into any (...) sewer (...) shall be guilty of an offence’. And, like crop cultivation, the local authorities can also ‘prohibit or control the keeping of animals, birds and bees so that their keeping shall not be a public nuisance or injurious to health’ (Section 162).

In summary, according to Kenya’s national legislation, urban agriculture can be forbidden, restricted, allowed, controlled, facilitated or even promoted. Which line is followed at the local level depends entirely on the by-laws and ordinances made by the local authorities. The local authority’s power to draw up such a local legal framework is provided for by the Local Government Act, while the various other Acts discussed above form the legal handle for the provisions made in these by-laws.

The local context: legal and policy framework for UA in Eldoret

Crafted on the basis of ‘the manoeuvring space allowed by national legislation’ (Foeken 2008: 239), the legal and policy framework for UA in Eldoret is reflective of the confusion inherent in the national framework. It is restrictive and punitive regarding certain UA activities, tolerant or permissive of others, but for the most part is ambivalent. Overall, the legislative framework for livestock keeping is clearer compared to that for crop cultivation.

Livestock keeping

The latest set of EMC by-laws, which were approved in 2009 by the Minister of Local Government, makes a wide range of specific provisions relating to livestock keeping in town. The General Nuisance by-laws prohibit livestock keeping where animals or poultry are involved and are ‘a nuisance to any of the residents in the neighbourhood’.⁸ In any case and except for poultry,⁹ a person can only keep livestock in town if/when they have been granted permission by the Council and they must adhere to any conditions laid down.¹⁰ However, according to the EMC Director of the Environment,¹¹ under no circumstances is livestock keeping allowed within built-up areas. In peri-urban areas, prospective livestock keepers must specify the exact number of animals they intend to keep when applying for a permit, with the number allowed usually being determined

⁸ The Municipal Council of Eldoret (General Nuisance) by-laws, 2009, para. 7 & 8.

⁹ Although the by-laws do not expressly state that poultry can be raised in town, this can be inferred from the fact that poultry is not mentioned among the livestock for which one requires permission: ‘ox, bull, cow, goat, sheep, or pig’.

¹⁰ The Municipal Council of Eldoret (General Nuisance) by-laws, 2009, para. 8.

¹¹ Interviewed on 4 July 2007.

by the farmer's plot size. If granted permission, farmers are then required to confine their animals to their compounds, preferably under zero-grazing.

The General Nuisance by-laws also prohibit the grazing of animals in planned areas¹² as well as the roaming of animals and birds in town as they may 'cause obstruction or inconvenience to traffic'.¹³ The Parking Spaces and Omnibus Stations by-laws specifically outlaw livestock in parking areas and bus stations. EMC officers also discourage the keeping of animals in town, presumably because they destroy gardens and trees, damage urban infrastructure and defecate, thus impeding urban greening. They are also considered a public health risk. The Chief Public Health Officer¹⁴ pointed out that although no particular outbreak of disease has previously been attributed to livestock keeping within Eldoret town, an outbreak of African swine fever in 2006 – which wiped out almost all the town's pig population – indicated that the health risks of keeping pigs in town are real as the disease is highly infectious and can be transmitted to humans.

From time to time, the Council has confiscated loose animals and fined offenders. The scavenging habits of pigs mean that they are particularly disliked: they are considered dirty, a nuisance and a risk to public health and traffic. The EMC has tried to limit their numbers by shooting and poisoning them. For example, in 2003/2004, the EMC in collaboration with the veterinary department, the provincial administration and the police shot a total of 20-30 pigs. When asked whether they had ever been personally harassed or witnessed another urban farmer being harassed by EMC officers in the five years preceding the survey, 46% (N=200) of the respondents surveyed said they had. 44% of these incidents had involved the confiscation of roaming livestock, particularly cows (22%) and pigs (21%), while 45% involved the killing of pigs. Interviewees in Langas also recounted suspected baiting/poisoning of roaming pigs by EMC officers in 2006/2007. Mhubiri,¹⁵ a pig farmer for whom the keeping of pigs constituted an important source of income, recounted how he had lost eight pigs over a period of three days. He estimated his loss at Ksh 60,000,¹⁶ which is a considerable level of asset depletion for a household in a Ksh 5,000 to Ksh 10,000 monthly income bracket.

Other relevant by-laws include those relating to the Control of Stock that stipulate conditions under which stock may be grazed in town, for example when awaiting slaughter, prior to an exhibition at the Eldoret agricultural show-

¹² The Municipal Council of Eldoret (General Nuisance) by-laws, 2009, para. 8.

¹³ The Municipal Council of Eldoret (General Nuisance) by-laws, 2009, para. 8.

¹⁴ Interviewed on 26 July 2007.

¹⁵ All the names of the respondents in this chapter have been changed.

¹⁶ At the time, Ksh 100 was the equivalent of € 1 or US\$ 1.3.

ground, or when they have been impounded by the Council.¹⁷ The by-laws also prohibit the use of ‘any building or other premises or place within the Municipal Council of Eldoret (...) as cattle shed or pigsty or as other place for keeping sheep, goats or pigs without Council authority’.¹⁸ One wonders what the implication of this is, given that this is what many urban farmers do. Finally, Paragraph 7 of the same by-law stipulates that keeping livestock is prohibited ‘under any portion of any building or other premises or place used for purposes of human habitation with Municipality planned areas’.

It is perhaps the General Nuisance provisions relating to milk and dairies that demonstrate just how stifling a legal framework for urban livestock keeping can become. The following are some of the provisions:

No person other than the company registered by the government for the purpose shall sell milk or fresh cream in the Municipality unless such a person is a licensed purveyor of milk and the milk or cream has emanated from a source approved by the Council or has not been sold by the Council. (para. 60)

No licensed purveyor of milk shall sell milk for human consumption in the Municipality unless such milk has been pasteurized, and transferred, immediately after pasteurization, to a sterile approved container and therein sealed to the satisfaction of the Council. (para. 61)

No milk may be pasteurized within the Municipality unless such milk [is] from a source approved by the Council; provided that all milk, other than that emanating from a source approved by the Council, produced in (...) the Municipality for sale or for consumption shall be delivered for inspection and testing to the Municipal dairy within such hours as may be determined by the Council. (Paragraph 64)

No doubt these are overly stringent measures whose strict enforcement would almost certainly phase out dairy farming by poor, small-scale urban farmers. That most of these 2009-approved by-laws are a replica of by-laws in Kisumu town that came into effect in the early 1950s before Kenya’s independence (Mireri *et al.* n.d; Ishani 2009) underscores the inertia within the EMC about modernizing its legal and policy framework in line with the new challenges in urban planning and food security in Eldoret. It is important to note that even when a prospective urban farmer satisfies all the conditions set out by the Council in respect of a livestock enterprise for which s/he applies to the Council to undertake, ‘the Town Clerk may, in his absolute discretion, refuse to issue any permit’.¹⁹ Having senior Council officers expressing contempt for urban farming and calling for tougher penalties does not augur well for urban farming in Eldoret.

¹⁷ The Municipal Council of Eldoret (Control of Stock) by-laws 2009, para. 4-5.

¹⁸ Para. 6.

¹⁹ The Municipal Council of Eldoret (Control of Stock) by-laws 2009, para. 11.

Crop cultivation

At the time of fieldwork (2007-2010), no written by-law relating to urban crop cultivation could be found at the Eldoret Municipal Council. Neither the department responsible for enforcement of by-laws nor the other relevant departments of planning, the environment and public health had a compilation of the relevant by-laws. An EMC Enforcement Officer confessed to never having seen written by-laws related to urban crop cultivation since he started working in the Enforcement Department in 1996!²⁰ However, all the EMC officers and councilors we spoke to mentioned *this* or *that* activity being allowed (and the conditions that had to be fulfilled) or outlawed, often in a matter-of-fact fashion. Moreover, they all seemed to agree on the need to update the Council's by-laws (which implied that they existed) to bring them into line with the changing times, as had started happening elsewhere. In particular, they pointed at Nakuru Municipal Council as being worth emulating.²¹ It is noteworthy that Nakuru Municipal Council has in recent times instituted measures aimed at legitimizing and regulating urban agriculture within its jurisdiction (Foeken 2008).²² In the case of the EMC however, some officials argued instead for a review of the by-laws with a view to imposing stiffer penalties to curb urban farming. As one official explained:

Some by-laws are old and need revision. More punitive penalties should be given to urban farmers. Currently, offenders are fined a very small amount of up to only Ksh 200, so they always continue with farming activities because they can easily afford the fine.²³

By and large, whether an UA activity is outlawed, controlled, frowned upon, allowed or simply tolerated appears to depend on the type of activity and its location, and on the perceived environmental, security and public health concerns involved.

It was noted that the growing of tall crops (those, like maize, that grow to more than a metre in height) in built-up areas is prohibited, supposedly because they offer hiding places for thugs. To underline this concern, the EMC's Senior Enforcement Officer explained that incidents of insecurity peak in August, September and October when the maize reaches its maximum height.²⁴ For this reason, the EMC resorted in the past to slashing maize in open spaces in town to

²⁰ S. Nyang'au, interviewed in May 2010.

²¹ Acting Assistant Town Clerk, EMC, interviewed on 26 July 2007; Senior Enforcement Officer, EMC, interviewed on 31 July 2007.

²² The Nakuru Urban Agriculture by-laws were a direct result of a study on UA carried out by the University of Nairobi and the African Studies Centre, Leiden (Foeken & Owuor 2008).

²³ Chief Public Health Officer, EMC, interviewed on 26 July 2007.

²⁴ Senior Enforcement Officer, interviewed on 31 July 2007.

deter people from cultivating it, but such incidents are said to be rare nowadays.²⁵ In the 91 cases of farmer harassment referred to above, a negligible number (3%) involved crop cultivation with only one incident of maize slashing having been suffered/witnessed in the five years preceding the survey.

Shorter crops like beans and vegetables, on the other hand, while not prohibited, are not openly encouraged either as some officials remained apprehensive about permitting farming of any kind regardless of its merits, as this might increase all manner of farming activities with negative consequences for urban areas. The cultivation of short crops was not allowed along river banks because this would expose the soil to erosion and cause siltation and water pollution. Roadside farming in town was also prohibited as the crops are exposed to vehicular exhaust fumes that can contaminate the crops and cause health problems for humans. *Sukuma wiki*²⁶ on road reserves was singled out as posing a health risk to consumers.

Unlike in built-up areas, farming in peri-urban areas was allowed subject to certain conditions. The prospective peri-urban farmer is required to apply to the municipal council for a permit to cultivate and s/he is supposed to show evidence of ownership of the plot that will be cultivated. If the farmer wants to cultivate a plot belonging to someone else, agreement by the owner is required. In both cases, the plot should not be smaller than one acre and a permit can only be granted if the applicant's neighbours do not object to his/her plans.

Although there was no trace of written by-laws governing urban crop cultivation, such accounts by EMC officers imply that by-laws may have previously existed but were probably dropped at some point. Interviews suggested that the beginning of official tolerance of UA and leniency towards offending urban farmers in Eldoret can be traced back to the period of national economic restructuring in the 1980s and 1990s with the introduction of SAPs that wrecked the livelihoods of many urban residents, not only in Eldoret but also nationally. The EMC Senior Enforcement Officer alluded to this when he lamented the challenges of enforcing by-laws related to UA in town:

Sometimes people who have been arrested by Council officers for illegal farming and subsequently arraigned in court have ended up receiving very lenient sentences or fines. We have experienced such problems with people farming on the Council's open spaces in the West Indies estate. Many people who farm there are former Council employees, retrenched civil servants, workers made redundant by the clo-

²⁵ Extension Officer, Pioneer Location, interviewed on 22 August 2007. This officer is in charge of a farmers' information desk in Langas settlement in the Pioneer administrative location.

²⁶ *Sukuma wiki* is the local name for a green, leafy vegetable in the cabbage family (kale). Literally it means 'to push the week', referring to its importance in the diets of low-income households due to its high yield and low price.

sure of such factories as Rivatex and so on. When such people are arrested and taken to court for farming illegally in town, they usually plead for leniency from the magistrate citing their circumstances. Often the magistrate will pass lenient sentences such as one or two hours of community service. In the circumstances, council officers see it as a waste of time arresting such people.²⁷

Clearly, it is doubtful whether such punitive measures as slashing crops would be taken without some form of legal backing. Nor would people be arraigned in court let alone have judgment passed against them without any legal basis. An officer at the EMC noted:

The restrictions on maize cultivation used to focus more on farming on railway land. Council officers used to even slash crops. But it appears that by-laws that allowed them to do that no longer exist. I do not see that in the latest by-laws.²⁸

Were it to turn out that the by-laws and guidelines referred to by EMC officers were in fact non-existent at the start of this fieldwork, then one could characterize the continued references to and the ‘enforcement’ of restrictions and exceptions as a hangover from long-entrenched anti-UA traditions, possibly carried over from colonial days and reinforced by the whims of individual officers. What is more, the latest set of EMC by-laws (approved by the Minister of Local Government in 2009) contains no by-law on crop cultivation, which betrays a lack of clear official policy on urban crop cultivation in Eldoret. Given the EMC’s own rationale for previous restrictions on urban crop cultivation and what is already known about the activity in the literature, the EMC’s decision to omit urban crop cultivation from its legislative framework and in effect allow it to proceed in an unplanned and unregulated manner is both surprising and injudicious. In any case, and as Table 9.1 indicates, urban farmers themselves shared most of the same environmental concerns on unregulated urban farming when their views were sought about why some of the reasons that restrictions on UA were imposed in Eldoret and elsewhere. The only exception was their rejection of the notion that UA is not compatible with the urban environment.

The fact that urban farmers recognize the environmental and public health risks associated with UA bodes well for attempts to regulate UA and make it environmentally sustainable while at the same time facilitating its development into a more productive and profitable enterprise. Key to the success of any such attempt will be the effective participation of urban residents in its design and execution.

²⁷ Senior Enforcement Officer, EMC, interviewed on 31 July 2007.

²⁸ Mr Wanyama, Committees Office, EMC, interviewed in May 2010.

Table 9.1 Urban farmers' perceptions of UA's environmental impact

Reason for restricting UA	Responses as % of total (N=200)		
	Agree	Disagree	Unsure
Tall crops like maize pose a security risk	64	27	10
Crop cultivation using polluted water is harmful to health	68	15	18
Crops provide a breeding ground for mosquitoes	56	35	10
Farming along river banks causes siltation	61	14	25
Roadside farming exposes crops to contamination from exhaust fumes	55	19	27
Roaming livestock may cause traffic problems and accidents	87	8	6
Livestock waste makes the town appear untidy	73	22	6
Livestock destroy gardens and trees and spoil the town's appearance	74	17	10
Livestock transmit disease between animals and humans	49	27	26
UA is not compatible with the urban environment	26	60	15

Politics and the practice of urban agriculture

Notwithstanding legal and official restrictions and repression, UA is omnipresent across Eldoret's municipal spaces, both in the peri-urban and built-up areas. As elsewhere in Sub-Saharan Africa (Mlozi 1997; Mbiba 1995; Simatele & Binns 2008; Mudimu 1996), the prevalence of UA in Eldoret partly relates to urban farmers' conscious defiance of the legal and official restrictions on urban farming. The vast majority of farmers in Eldoret have continued to cultivate crops and rear livestock without seeking permission from the Council or adhering to any regulations. For instance, only three urban farmers had sought permission to undertake farming in town out of the 133 who were aware that they needed to do so. Due to a lack of grazing space and financial capital to purchase (adequate) feed supplements, many urban livestock keepers have resorted to free-range animal grazing/feeding. Roaming animals are a common sight in Eldoret, with cows grazing in open fields and along road reserves. It is common to find sheep, goats and pigs scavenging for food unattended on estates, garbage heaps and dumpsites. Farming along river banks and roadsides is also common and, despite security concerns over cultivation related to its height, maize is one of the two most common crops cultivated in Eldoret town, the other being *sukuma wiki*. Both crops were grown by two-thirds of all 160 households in the survey, or more than 80% (n=115) of all the crop-cultivating

households surveyed. Maize is the staple crop used in Kenya's popular *ugali* dish (maize meal or tough porridge), while *sukuma wiki* is its regular accompaniment.

When asked whether the legislative and policy framework for UA had affected their practices, a large majority (84%, n=133) of the respondents who were aware of the regulations (and/or the consequences suffered by some offending farmers in the past) said it had not. The remaining 16% of the respondents whose UA activities were affected responded to the restrictions and the EMC's harassment in different ways. They either changed their farming practices to conform to the regulations, scaled down activities that were subject to control or continued with the activities, albeit anxiously.²⁹ In-depth interviews also revealed that some farmers devised ways around the regulations and because of the generally negative attitude towards pigs, some poorer pig farmers were forced to restrict their animals' movements during the day and release them only when it was safe to do so. Mhubiri, mentioned above, was one such farmer. Since he could not afford the cost of feed, Mhubiri released his pigs every morning at around 5:00 to scavenge for food and brought them back to the confines of his compound for the rest of the day at about 8:00. In his case, however, this strategy did not fully protect him from the authority's wrath as he eventually lost his eight pigs to suspected poisoning by the EMC.

Many urban farmers consciously defy the by-laws and restrictions related to urban farming or devise ways to circumvent them because UA is too important to their livelihoods given their economic circumstances and because 'other people are also farming in town', including senior Council officers and government officials. Two reasons were given by 47% and 37% of the 133 respondents respectively who understood that urban farming in built-up areas was outlawed and that prospective farmers in peri-urban areas required clearance from the Council. The Town Clerk, the Mayor, the District Commissioner and the Officer Commanding the Police Division were among the senior municipal council officers and civic leaders who were themselves cultivating crops and keeping livestock in town. The upshot of this is that the Council lacked the moral authority and the muscle to enforce its own by-laws. As Mlozi (2003: 41) noted in a different East African context, '[T]he fact that there are many senior government and ruling party officials among the livestock keepers who break the by-laws with impunity, is probably the best assurance for most other livestock keepers that they will not be punished for breaking the law'. Indeed in some

²⁹ Eight farmers resorted to confining their animals within their compounds (with one turning to zero-grazing), four stopped keeping animals, one reduced the number of animals he kept, and five said they had continued (fearfully) with the same activities as before.

cases, as in Mwanza (Flynn 2001), participation in UA by powerful individuals could provide the necessary leverage for promoting it and placing it higher up the policy agenda.

Urban farmers' defiance of the EMC and the latter's ambivalence in enforcing the by-laws have been increased by the agricultural history of the town and its population's farming culture. In addition to its recognition of the value of urban agriculture to peri-urban landowners, the Council also tolerates farming because it appreciates the challenges involved in changing land tenure regimes and converting farmland into urban land usage, all the more so when this implies a cultural reorientation. In peri-urban areas in particular, not only has farming historically predominated and constituted an integral way of life for residents but most of those areas have only recently been incorporated into the municipality following the redrawing of municipal boundaries. One government officer put it this way:

Some farms in Eldoret Municipality are on ancestral land and have found themselves included in the municipality as the municipality boundaries expanded. It takes time for their owners to adjust to the fact that they are now located within the municipality and are therefore subject to municipal by-laws. It is difficult to convince the owners of such plots that they should not grow crops or keep animals on their land if they have been doing it all their lives.³⁰

Eldoret municipality is an area of multiple cultures defined mostly in terms of the population's ethnic diversity. Although the Kalenjin ethnic community is considered autochthonous to Eldoret and dominates municipal politics, the town has acquired a multi-ethnic character over the years. Not only do the different ethnic communities have varied preferences and needs regarding UA, they also see themselves as having different positions in the political power game. These facts have in the past fuelled ethnic tensions even in the context of UA. For instance, the keeping of cattle is considered a way of life among the Kalenjin community and as such its practice by Kalenjins in town is tolerated, if not justified and supported by the Kalenjin officials and civic leaders who dominate the Council. Thus enforcement of the by-laws relating to cattle keeping in town, and especially in areas represented by Kalenjins, is reportedly more lax.³¹ In contrast, pig farming, which is dominated by Kikuyus, is vehemently opposed by the municipal authorities.

Members of the Kikuyu community place a premium on pig keeping as an economic enterprise and view the harassment of pig farmers and other livestock keepers in areas dominated by non-Kalenjins as political injustice bordering on

³⁰ District Animal Production Officer, Uasin Gishu District, interviewed on 28 August 2007.

³¹ Councillor, Kapsuswa/Kidiwa ward, interviewed on 15 August 2007.

economic sabotage. As such, some Kikuyu politicians not only protest to the authorities but also cooperate with residents in affected areas to frustrate the enforcement of by-laws. A Kikuyu councillor noted:

In my ward, Council *askaris*³² are always arresting farmers and confiscating animals found grazing in open fields and along the road reserves (...) But the Council *askaris* never arrests grazers or confiscates animals in areas like Kimumu and Racecourse. When I raised this issue one day in a Council meeting, I was told openly that keeping animals is part of Kalenjin culture and as such they should be left to keep animals in town. Why should they favour only certain communities? I think we should forget all about enforcing this law since it is only my people who are being harassed because they are non-Kalenjins (...) Because of this favouritism, I also try to help pig farmers in my ward. There are many pigs in my ward and the owners are my supporters (...) Whenever the Council hatches a plan to impound or kill roaming pigs, I leak the information to pig keepers. I tell them to confine their animals.³³

Such actions by councillors show how the politicization of UA is being played out in the policy and legislative arena to frustrate the enforcement of existing by-laws and the evolution of a better regulatory framework for UA. Indeed, political interference by councillors was identified as the major obstacle faced by the municipal council in enforcing by-laws,³⁴ all the more so in election years when political pressure is brought to bear on enforcement officers to relax the rules as councillors fear antagonizing those who farm in town for fear of losing their votes. Thus, whenever enforcement officers impound roaming animals, the owners seek (and often secure) the intervention of councillors, and in most instances the animals are released without a fine being levied. Sometimes councillors go as far as placing ultimatums in council meetings on enforcement officers, demanding that they desist from harassing urban residents. Similar dynamics have also been reported in Harare (Mbiba 1995).

The politics of UA has also been defined by unequal power relations and competing – and sometimes contradicting – interests between the EMC and others operating in the municipality. For instance, some actors are involved in promoting UA activities in contravention of the EMC's official position. An officer at the municipal council was categorical that '[I]f there are any organizations offering agricultural extension services for farmers within the built-up area, then such organizations are violating the existing Council by-laws'.³⁵ Yet, this is exactly what the government's Ministry of Agriculture and Livestock Development has been doing.

³² Security officers.

³³ Councillor, Kapsuswa/Kidiwa ward, interviewed on 15 August 2007.

³⁴ Senior Enforcement Officer, EMC, interviewed on 31 July 2007.

³⁵ Director of Environment, EMC, interviewed on 4 July 2007.

The Ministry operates an elaborate extension-services programme in Uasin Gishu district, including Eldoret town, the district's headquarters.³⁶ It has established information desks in various areas of the municipality where farmers can access agricultural extension services on scheduled days (at least twice every month). One such desk is in Langas settlement and another is at the Kapsaret Divisional Office in the town's CBD. The Ministry's extension officers offer technical advice and information to farmers – and occasionally provide them with inputs free of charge, without distinguishing between urban and rural farmers. One officer clarified that her department offers assistance to 'whoever engages in any kind of farming' in the district including those in the municipality and regardless of the location of their activities.³⁷ In justifying why they offer services to urban livestock keepers, another officer noted that 'whenever urban farmers seek our services when their animals are sick, we respond promptly because the health of the animal is paramount'.³⁸ She also pointed out that the veterinary department was involved in the training of pig farmers on a wide range of issues covering the entire production chain (rearing, feeding and marketing).

While such activities clearly undermine the Council's resolve on UA, it nonetheless seems helpless when it comes to dealing with state actors whose legal mandate and jurisdiction appear to supersede its own. Moreover, the Council has time and again had to rely on some of these state actors, such as the veterinary department, to implement its own by-laws.

Recent national policy developments: New prospects for UA

'Sessional Paper No. 3 of 2009 on National Land Policy' provides the most progressive and coherent national policy statement to date on UA. It is intended to 'form the basis for, and overall guide to all other land-related policies' and the subsequent harmonization of 'land use planning functions of [all] local authorities', including the existing legislative framework for UA.³⁹ Besides addressing a wide range of issues related to land – land governance, management, utilization, access, equity, social justice, and tenure rights for various groups including women – that have a bearing on UA, the Sessional Paper goes a step further. Not only does it recognize that '[U]rban agriculture has not been properly regulated and facilitated', it also lays down principles on which a regu-

³⁶ Agribusiness Development Officer, Ministry of Agriculture and Livestock Development, Uasin Gishu District, interviewed on 3 July 2007.

³⁷ Divisional Crops Officer, Kapsaret Division, interviewed on 14 August 2007.

³⁸ District Beekeeping/Marketing Officer, Uasin Gishu District, interviewed on 23 July 2007.

³⁹ See Sections 254, 255, 270.

latory and facilitative framework for UA could be developed: (a) the ‘promotion of multi-functional urban land use, and (b) the introduction of an appropriate legal framework to facilitate and regulate urban agriculture and forestry’.

As a planning concept, multifunctional urban land use (MLU) promotes an intensification in the use of urban space by emphasizing the combination of diverse but synergetic and inter-dependent land uses in one area (Vreeker *et al.* 2004). In the context of UA, this principle ignores the notion that UA does not belong in the city and that it is incompatible with other urban land uses. It also departs from the oft-preferred ‘zoning’ model (Owusu 2007) that proposes the designation of particular areas as farming zones while excluding agricultural activities from areas designated for other residential, industrial and recreational purposes. Based on the MLU model, a case could be argued, for example, in favour of promoting UA within (or in closer proximity to) residential areas because of its predominantly subsistence nature as well as the existence of a ready market for any surplus agricultural produce. Allowing UA to be in closer proximity to their homes rather than zoning faraway areas for farming would also tap into women’s labour and enhance their participation in UA as they could then juggle their various domestic chores and farming tasks more easily (Bryld 2003; Mougeot 2000; Jacobi *et al.* 2000) and their agricultural activities would be more integrated in their other income-generating activities. Given their domestically based reproductive responsibilities, women are usually excluded from off-plot farming activities due to distance and time constraints.

The MLU’s first principle of focusing on maximizing urban space finds resonance in Section 109 (c) of the Sessional Paper which states that ‘the government shall (...) encourage development of underutilized land within urban areas’. To appreciate the importance of this provision, one has to realize that many urban farmers in Kenya cultivate plots in open, undeveloped public and private spaces but under circumstances of anxiety and uncertainty over precarious tenure rights and harassment by local authorities as well as landlords and their agents (Foeken 2006; Dennery 1996). In addition, as a custodian of some of the (undeveloped) public spaces, the government can actualize the provision by allocating land for UA. It is particularly instructive that, unlike in the past when bureaucracy, corruption and nepotism excluded the poor from benefitting from public land in Kenya’s urban centres (Musyoka 2004; Government of Kenya 2009), the Sessional Paper contains provisions that cushion poor urban dwellers, including women, against exclusion in the land allocation process. For instance, it spells out that public land will be allocated ‘through public auctions except for land earmarked for the support of livelihoods in urban and rural areas’ (Section 84, c). This means that if the government deems that UA is an important source of livelihood for the poor, then it would deliberately allocate land to them rather than release it for competition at public

auction that would, in all likelihood, favour those with greater financial resources. The position of poor, urban residents, and especially women, concerning access to public land for UA is further promoted by the emphasis the Sessional Paper places on 'equitable access to land in the interests of social justice' (Section 39, e).

Regarding the second principle, namely 'putting in place a legal framework to facilitate and regulate urban agriculture', the Sessional Paper makes clear the need to balance the benefits of UA with ecological and public health concerns. It highlights the need for land-use plans 'for orderly management of human activities to ensure that such activities are carried out taking into account considerations such as the economy, safety, aesthetics, harmony in land use and environmental sustainability' (Section 104, c). While such framing of the essence of spatial planning is more or less what has defined the policy and legal frameworks in many African cities thus far, the one aspect of the Sessional Paper that should bode well for UA is the treatment of land use and spatial planning as issues of governance.

The Sessional Paper emphasizes, for instance, public participation in the spatial plans' preparation and development control processes 'for all urban and peri-urban areas in the country'⁴⁰ as well as the democratization and consideration of public interest and stakeholder needs in land appropriation for public use.⁴¹ However, this does not in itself guarantee a favourable regulatory framework for UA, unless (aspiring) urban and peri-urban farmers find a way of engaging and negotiating with urban authorities (and other stakeholders in urban land-use planning) and articulating their interests in an organized and structured manner. However, organized groups and associations of urban gardeners are a rarity in urban areas in Kenya. Beyond participating in urban governance structures related to land-use planning and development control processes envisaged by the national land policy, organized farmers' groups could, as has been demonstrated elsewhere (Brock & Foeken 2006), also play a critical role, through collective bargaining, in accessing affordable farm inputs, extension services, new farming techniques and technologies, new markets and good produce prices for their members. The evolution of a facilitative legal and policy framework for UA will also require the urban authorities, which have hitherto frowned on UA, to see the value of UA for what it is. Any negative environmental impact may in this way be mitigated.

An important step in this direction is, therefore, the 'Draft National Urban and Peri-Urban Agriculture and Livestock Policy' document that was made public in May 2010 (Ministry of Agriculture 2010). In the foreword, the two

⁴⁰ Section 109, a; 59, h.

⁴¹ Sections 42-3; 51, b; 104, f; 105, c.

Ministers concerned⁴² emphasize that ‘urbanization is increasing without an equivalent improvement in infrastructure and services (...) Therefore, the question of organized urban land uses will be critical and this includes Urban and Peri-Urban Agriculture and Livestock activities’. And the preface outlines the radical policy change that this document represents:

In the recent past, urban agriculture (...) used to be regarded as an insignificant cultural practice adopted from rural life and was therefore ignored by policy makers. However, the complexity of urban life combined with high poverty levels has led to increased agricultural activities in the urban and peri-urban areas, and it is now seen as livelihood strategy. Urban and Peri-Urban Agriculture and Livestock farming thus plays a crucial role towards improved livelihoods of the urban poor, since farmers cultivate a wide range of crops and rear large number of livestock with substantial yields.

The overall objective of the policy document is ‘to promote and regulate sustainable UPAL⁴³ development to improve incomes, food security, create employment and reduce poverty to enhance living standards; while focusing on land use, public health and the environmental management’ (p. 8). The document distinguishes eight policy fields relevant to the sustainable development of urban agriculture,⁴⁴ and constraints as well as policy intervention measures are outlined for each.

How does this affect the local decision-makers who, like those in Eldoret, may not be keen on suddenly embracing urban agriculture? After all, the Local Government Act still provides them with the power to forbid, restrict or control urban farming practices. Even if there are by-laws, these can be restrictive and make it difficult – if not impossible – for the poor to engage in the practice. There is, however, one provision in the ‘Draft National Urban and Peri-Urban Agriculture and Livestock Policy’ document that may be important in this respect: the so-called Municipal and Town Councils Agriculture and Livestock Committee (MALC).

To mainstream UPAL planning and implementation in all urban and peri-urban areas, a department of agriculture and livestock will be established in each municipal and town council. The MALCs will be committees responsible for the management of UPAL programmes and projects at the municipal and town council level. These committees will comprise heads of departments of relevant line ministries, local authorities and representatives of key institutions within the municipal and

⁴² The Ministers for Agriculture and for Livestock Production.

⁴³ UPAL stands for Urban and Peri-Urban Agriculture and Livestock.

⁴⁴ These are the policy, legal and regulatory framework; land use; crop and livestock production; technology development and dissemination; markets and marketing; the safety of UPAL practice and products; environmental pollution; and the provision of support services.

town council jurisdictions. The convenor will be agriculture and livestock heads of departments. (pp. 26-27)

This may at least solve the contradiction between the local authorities' negative perception of urban farming, on the one hand, and the Ministry of Agriculture's view and practice regarding the sector, on the other.

Conclusions

This chapter has demonstrated how the interplay of laws and policies at national and municipal levels has shaped the context in which residents of Eldoret municipality are striving to make a living from urban farming. It also shows how urban farmers negotiate policy and institutional constraints, and how their persistence with urban farming has occasioned changes in UA policy at the national level and policy implementation at the municipal level.

The contradictions and inconsistencies inherent in the national policy and legislative framework for UA, negative official attitudes towards the practice within the EMC and the power relations and politics underpinning the practice of UA have not only engendered contradictions in the application of existing laws and policies within Eldoret municipality but have also impeded the evolution of a more responsive legal and policy framework for urban farming. In exercising its discretion about which national laws and policies to effect within its jurisdiction, the EMC has in most cases restricted and criminalized UA. However, it has tended to enforce its by-laws selectively, favouring certain sectors of the farming community, while harassing others. In addition, the EMC and some government officials are also practising UA, and some government agencies and non-governmental organizations are participating in promotional activities for urban farming against the EMC's wishes. These dynamics have emboldened the resolve of urban farmers who are continuing to farm despite the restrictions they face because farming is an important livelihood strategy for them.

Whether due to a lack of moral authority or the capacity to enforce its own by-laws against a resilient farming community or to its appreciation of the value of urban farming to the households involved and the challenges implied in land-use change in areas newly incorporated into the municipality, the EMC has had to tolerate UA, which is now omnipresent in Eldoret's municipal space. However, this has not been accompanied by a change in official attitude, which remains unfavourable and, at best, ambivalent, as is reflected in the EMC's latest set of by-laws (2009). These do not make any provision for the support or regulation of crop cultivation and, being a replica of pre-independence by-laws relating to livestock keeping, are prohibitive and out of step with the present-day needs of urban farmers.

Compared to the EMC, the national government has responded to the growing phenomenon of UA in a more pragmatic way. It recently adopted the 'Sessional Paper No. 3 of 2009 on National Land Policy' and made public the draft 'National Urban and Peri-Urban Agriculture and Livestock Policy' (UPAL) document. The policies in it reflect the national government's recognition of UA as a viable livelihood strategy that needs to be supported and integrated in urban planning and that this can be done without compromising the urban environment. It is instructive that the policies, and especially the proposed UPAL policy, address the broad range of UA-related constraints and challenges and outline appropriate government intervention measures.

However as evidence from elsewhere on the continent suggests, such favourable national policy frameworks for UA and promotional activities surrounding them may remain hollow unless concrete steps are taken to translate them at the local level. In light of the prevailing negative official attitudes within the EMC, educational and advocacy programmes targeted at municipal officials should thus form an integral part of the implementation process. The purpose of such programmes should be to raise awareness among officials of the importance of UA for urban households and of ways in which the practice could be integrated into urban planning in a manner that enhances the urban environment. The involvement of civil-society organizations and research institutions will be critical in this process. Not only have such programmes yielded results in Kenya's Nakuru town (Foeken 2008) and in many other urban centres in Sub-Saharan Africa (van Beek & Rutt 2007), but some municipal officials have also viewed the example of Nakuru in a positive light.

Effective implementation of the national policies at municipal level will also require improved coordination among various stakeholders in UA, including the EMC, relevant government departments, research institutions and civil-society organizations (including farmers' organizations) operating in the municipality. In this regard, the strengthening of public-private partnerships and the establishment of an institutional arrangement – such as Municipal and Town Council Agriculture and Livestock Committees (MCALs) as proposed in the UPAL policy – is important in the process. What is also promising is the proposed coordination mechanism of the implementation process, including regular monitoring, evaluation and feedback mechanisms with clearly spelt-out reporting timelines at both national and municipal level.

And finally, greater participation by the farming community in the design and implementation of a UA support and regulatory framework is imperative. This is best realized by farmers' organizations, which are currently rare in urban centres in Kenya. Non-governmental and civil-society organizations can play an important role in raising awareness among farmers and organizing them and/or strengthening the capacity of farmers' organizations as vehicles through which

farmers can participate in the policy implementation process as well as access resources and other forms of support for UA.

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Settling border conflicts in Africa peacefully: Lessons learned from the Bakassi dispute between Cameroon and Nigeria

Piet Konings

This chapter analyzes one of the most protracted border disputes in Africa, namely the conflict between the Cameroonian and Nigerian states over sovereignty of the oil-rich Bakassi Peninsula. The eventually peaceful settlement of this conflict was hailed by the international community as proof that political liberalization has resulted in African states becoming increasingly inclined to rely on the rule of law than on armed struggle to solve potentially explosive inter-state boundary disputes. This study criticizes this position in two respects. First, it provides evidence that the 2002 International Court of Justice (ICJ) ruling in favour of Cameroon faced grave implementation difficulties so that other mechanisms of conflict resolution were needed to arrive at a peaceful settlement between the two states. Second, it clearly shows that the 2002 ICJ verdict overlooked the stakes of other parties in the dispute. Two stakeholders – the predominantly Nigerian population on Bakassi and the Anglophone Cameroon secessionist movements – still claim ownership of the peninsula and thus present a persistent threat to sustainable peace in the area.

Introduction

Africanists of late have developed renewed interest in the study of colonially negotiated borders due to an increase in boundary disputes between and within African states (cf. Nugent & Asiwaju 1996; Bach 1999; Mbembe 1999; Herbst 2000; Nugent 2002; Bennafla 2002). After independence, border skirmishes and

wars between African states were relatively rare, with governments more or less adhering to the sacrosanct nature of the boundaries inherited from colonial times (the principle of *uti possidetis jus*), as laid down in the 1963 Charter of the Organization of African Unity (OAU). At present, however, African states are involved in numerous disputes, such as those between Ethiopia and Eritrea in the Horn of Africa (Abbink 1998, 2003, 2009), between Nigeria and its neighbours, and the Democratic Republic of Congo and its neighbours. According to Mbembe (1999: 9), most of these disputes have their origins 'not in the desire to make an ethno-cultural space coincide with the space of the state, but rather in the struggle to control resources considered to be vital'. Moreover, the recent political liberalization process has created more space for separatist and irredentist movements within African states, as has been evidenced in Senegal (Casamance), Cameroon (the Anglophone region), Angola (the Cabinda enclave) and Namibia (Konings & Nyamnjoh 2003; Forrest 2004; Englebert & Hummel 2005; Keller 2007).

This chapter analyzes one of these protracted border disputes in Africa that could have escalated into a major inter-state war had it not been settled in a unique showcase of conflict prevention. The dispute, which gained international attention in the 1990s, is the conflict between Cameroon and Nigeria over the sovereignty of the Bakassi Peninsula, an area rich in oil reserves and other natural resources. Following a series of military confrontations between Nigerian and Cameroonian troops, the Cameroonian government filed a case at the International Court of Justice (ICJ) in 1994 and eight years later, in October 2002, the court ruled in its favour.

The eventual agreement reached by the heads of state in 2006, the so-called Greentree Agreement, on the modalities of the Nigerian withdrawal from the Bakassi Peninsula in accordance with the 2002 ICJ verdict seems to substantiate Gerti Hesseling's thesis (2006) that respect for the rule of law, which she considered to be vital in settling the numerous intra-state and inter-state conflicts in Africa and building up sustainable peace, has improved in some African states during the current process of political liberalization. The international community also hailed the agreement between the two heads of state as proof that African states are increasingly relying on international law and not armed struggle to resolve potentially explosive inter-state boundary disputes (Udogu 2008).

This study supports Hesseling's thesis to a large extent but also offers some critical comments. It attempts to show that Hesseling may not have paid sufficient attention to the complex nature of border conflicts in Africa and thus failed to recognize the following observations made in this present study:

- First, the implementation of the rule of law in border disputes is likely to meet serious obstacles in Africa. The Bakassi dispute demonstrates that an

ICJ verdict may not be enough to bring about a sustainable agreement between two parties. Other factors that may also play a decisive role in the peaceful settling of border conflicts include: (i) the strategic role of an impartial mediator (in this case, the former UN Secretary-General Kofi Annan) in providing an environment of trust through their 'good office' role; (ii) the importance of strong leadership and a determination to overcome domestic reluctance; (iii) the valuable role of the Cameroon-Nigeria Mixed Commission (CNMC) (a commission of Cameroonian and Nigerian representatives chaired by the UN Secretary-General's Special Representative for West Africa) in monitoring the implementation of the 2002 ICJ verdict and the 2006 Greentree Agreement; and (iv) the importance of sustained international commitment to preventive diplomacy and the rule of law in compliance with the 2002 ICJ verdict (International Peace Institute 2008).

- Second, respect for the rule of law does not automatically lead to the achievement of sustainable peace in border disputes in Africa. This study demonstrates that the international community's view that the 2006 Greentree Agreement was going to settle the Bakassi dispute once and for all was too optimistic as it overlooked the stakes for other parties in the conflict. Two stakeholders, namely the predominantly Nigerian population on the Bakassi Peninsula and the Anglophone Cameroonian secessionist movements, have continued to strongly contest the 2002 ICJ verdict and the 2006 Greentree Agreement. The Nigerian inhabitants allege that the implementation of the rule of law fails to take into account their overwhelming desire to remain Nigerian citizens in the Nigerian political entity, and they vehemently resist the idea of incorporation into the Republic of Cameroon. Anglophone Cameroonian secessionist movements argue that the Bakassi Peninsula should never have been a point of issue between Nigeria and Cameroon because the territory forms part of the Southern Cameroons, which used to be the name of the Anglophone territory prior to independence and the country's reunification in 1961. The various modes of resistance by both groups to the 2002 ICJ verdict and the 2006 Greentree Agreement raise serious doubts about the international community's acclamations of a peaceful settlement to the Bakassi dispute.

This chapter is divided into three sections. The first describes the development of the Bakassi dispute. The second discusses the implications of the 2002 ICJ verdict and the 2006 Greentree Agreement, while the third documents the fierce resistance by Nigerian inhabitants on the peninsula and Anglophone Cameroonian secessionist movements to the ICJ verdict and the Greentree Agreement.

The development of the Bakassi dispute

The Cameroon-Nigeria border has been a source of regular conflict between the post-colonial Cameroonian and Nigerian states (Anene 1961; Weladji 1974-1975; Nwokedi 1984-1985; Owolabi 1991; Ngoh 2001). Similar to other colonially negotiated boundaries, the border, and the maritime border in particular, has been neither unambiguously defined nor satisfactorily demarcated (Asiwaju 1998). Sovereignty over the Bakassi Peninsula has been a major bone of contention in the long history of Cameroon-Nigeria border disputes.

The Bakassi Peninsula is an area of approximately 1,000 km² that is made up of mangrove swamps and half-submerged islands protruding into the Bight of Bonny (formerly known as the Bight of Biafra). It is part of Ndian Division in the South West Province of Anglophone Cameroon, with a population estimated at between 250,000 and 300,000. The vast majority are Efik-speaking Nigerians who eke out an existence as fishermen. The peninsula lacks basic infrastructural provisions: there is no electricity, no potable water (this has to be fetched from the mainland), no roads and few educational or health facilities. At first sight, it might seem surprising that such a neglected and unpromising area should have excited such attention from the governments of Cameroon and Nigeria over the past thirty years, to the point where full-scale war at times appeared imminent (Anene 1970; Cornwell 2006).

Bakassi seems to have been part of the ancient Kingdom of Calabar but during the 'Scramble for Africa', the Obong or King of Old Calabar signed a Treaty of Protection with the Queen of England on 10 September 1884. Despite the Obong's protests, however, the British eventually ceded the Bakassi Peninsula to the German Kamerun Protectorate in a series of bilateral treaties and other legal instruments in 1913.

Following the First World War, the erstwhile German Kamerun Protectorate (1884-1916) was partitioned between the British and French victors, first as 'mandates' under the League of Nations and later as 'trusts' under the United Nations. The British territory was much smaller than the French, comprising about 20% of the total area and population of the former German colony. It consisted of two narrow, non-contiguous regions bordering Nigeria and stretched from the Atlantic Ocean to Lake Chad. The southern part was christened Southern Cameroons, and the northern part became known as Northern Cameroons. Bakassi became part of the Southern Cameroons (Konings & Nyamnjoh 2003).

A complicating factor for future territorial claims on Bakassi was that the Southern and Northern Cameroons were administered as integral parts of Nigeria. As a result, there was no real border between the British Cameroons and Nigeria, which promoted a free flow of goods and labour between the two territories. During this period, a large number of Nigerians, notably of Igbo and

Ibibio origin, migrated to the Southern Cameroons where they came to dominate the local economy, a development that was deeply resented by the Southern Cameroonian population and exploited by regional politicians during nationalist struggles after the Second World War (Konings 2005). This shared colonial history encouraged the Nigerian post-colonial state to lay claim to the Bakassi Peninsula.

In the run-up to independence in the late 1950s, the United Nations asked Britain to organize a plebiscite in the British Cameroons to ascertain the wishes of the local population as to which country it would like to be part of following independence. While the Northern Cameroons decided to join the independent Federation of Nigeria, the Southern Cameroons decided on 11 February 1961 to join the already-independent Republic of Cameroon (the former French trust territory), which was to become the Federal Republic of Cameroon on 1 October 1961 (Konings & Nyamnjoh 2003). It is worth noting here that there were 21 polling stations on the Bakassi Peninsula during the UN-organized plebiscite in the Southern Cameroons. Evidently, the international community at that time was in no doubt about the fact that Bakassi was part of the Southern Cameroons and that, after reunification, it would become part of the newly established Federal Republic of Cameroon.

Significantly, sovereignty over Bakassi itself was not an issue between Cameroon and Nigeria for some time after independence (International Court of Justice 2002). Several Nigerian authorities and scholars publicly confirmed Cameroonian sovereignty over Bakassi, and Nigerian maps had the peninsula marked as part of Cameroonian territory right up until the 1990s (Essombo 1995; Mbome 1996; Mgbale 2001; Olagunju 2009). It was only after the discovery of large reserves of oil in the Bakassi area, albeit a decade after independence, that Nigeria started publicly claiming ownership of the peninsula.

Initially, the post-colonial Nigerian and Cameroonian states were more concerned with demarcating the colonially negotiated borders than with sovereignty over Bakassi. One of the major issues was the maritime border between the two countries, which had only been vaguely defined in the Anglo-German agreements of 1913. From the mid-1960s onwards, a newly created Joint Cameroon-Nigeria Commission tried to resolve the boundary dispute, but very little was achieved. The agreements concluded by the two governments were either contested or denounced outright. One of the principal factors that hampered any peaceful solution was the mutual mistrust shown by the leaders, something that dated back to pre-reunification days. The territorial losses suffered in the UN-organized plebiscites in the British Cameroons had created deep and long-lasting bitterness. Against the expectations of the Francophone Cameroonian and Nigerian leaders, Southern Cameroons then voted for reunification with Francophone Cameroon, and Northern Cameroons for integration with Nigeria.

The Cameroonian President Ahmadou Ahidjo was particularly aggrieved by the loss of the British Northern Cameroons, where the local population was of the same ethnic and religious extraction as in his home region, namely the northern part of Francophone Cameroon. Instead of strengthening his position, the plebiscite results appeared to weaken it. He strongly suspected that the Southern Cameroons vote for reunification would cement an alliance between the Southern Cameroons elite and the ethnically related opposition in the south-western part of Francophone Cameroon (Konings & Nyamnjoh 2003). He accused the British-Nigerian colonial administration of having manipulated the elections in the British Northern Cameroons to its own advantage and took the matter to the International Court of Justice (ICJ) in The Hague and to the United Nations, but lost his case. For several years, he declared the anniversary of that verdict as a day of mourning, much to the displeasure of Nigeria's leaders. Ahidjo was also reluctant to improve relations with his neighbour because he perceived the close cultural and historical connections between Nigeria and Anglophone Cameroon as a potential threat to reunification and to a strong central state and national unity. He was particularly worried that the connection might encourage secession among the Anglophone population, all the more so because there was a growing dissatisfaction among the Anglophone minority with Francophone hegemonic tendencies following reunification (Konings 2005).

Nevertheless, Ahidjo's support of the Gowon regime during the Biafran civil war did bring about a temporary improvement in bilateral relations. This led to an intensification of border talks, which eventually resulted in the 1975 Maroua Declaration that delimited the maritime boundary and recognized Cameroonian sovereignty over Bakassi (Owolabi 1991; Mbome 1996). The overthrow of the Gowon regime in a military coup five weeks after concluding this accord was clearly connected with the terms of the agreement. The new Nigerian leader, Mohammed Murtala, falsely accused Gowon of having handed over Bakassi, which he claimed to be Nigerian property, to Cameroon as a gift in gratitude for the role played by Ahidjo in the Nigerian civil war, and he refused to ratify the agreement. He reportedly threatened that 'rather than accept the outrageous 1975 award, Nigeria would go to war if the Cameroonians refused to negotiate' (Nwokedi 1984-1985: 51). Although Murtala died in an unsuccessful coup just a year later, his successor, General Olusegun Obasanjo, was of the same opinion. This new Nigerian stance infuriated Ahidjo, who accused Nigeria of acting in bad faith, and he subsequently declined to enter into any further negotiations with the Nigerian authorities as long as he remained head of state. Bilateral relations improved very little under Ahidjo's successor, Paul Biya, mainly because of continuing border problems.

Sovereignty over the Bakassi Peninsula became more of an issue between the Cameroonian and Nigerian post-colonial states and tensions built up on both sides before finally culminating in armed conflict. Bakassi has become of enormous economic and geo-strategic importance due to not only its rich hydrocarbon and fish resources but also its pivotal interest in controlling access to the port of Calabar, which is currently being developed as Nigeria's Export-Processing Zone and the Eastern Command Headquarters of the Nigerian navy (Asiwaju 1998: 254; Ngang 2010).

The first serious skirmishes between Nigerian and Cameroonian forces occurred on 16 May 1981 and brought the two states to the brink of war. Three Nigerian patrol boats came under fire in the Bakassi area and five Nigerian soldiers were killed. Nigeria's demands for an apology and compensation were initially refused, and relations between the two countries took an ominous turn for the worse. In July 1981, however, Cameroon undertook to pay compensation and tensions eased, with plaudits going to Nigeria's President Shagari for his restraint and for containing his hawkish military. The incident led to the resurrection of the joint commission and discussions on the border dispute were officially reopened (Cornwell 2006: 51-52).

These discussions had little effect, however, as the Nigerian inhabitants of Bakassi continued to protest to the Nigerian authorities in Cross River State about the actions of the Cameroonian gendarmes who were demanding excessive payments for fishing licences. Later raids by the gendarmes were evidently more violent, involving looting, rape and the destruction of fishing equipment. And then in May 1991, the gendarmes entered nine fishing villages, hoisted their national flag and announced that they were renaming the settlements. They also promised that health and educational facilities would be provided, though they demanded the payment of taxes. The new Nigerian military leader, General Sani Abacha, then claimed that the Nigerian state had to protect the Nigerian population on Bakassi and ordered Nigerian troops to occupy part of the peninsula on 21 December 1993. In response, Cameroonian troops attacked the Nigerian occupying force, which resulted in several deaths and large-scale destruction of property. Fighting continued intermittently and both sides increased the quantity and quality of their weapons in the disputed zone. Ngniman (1996) details all the military events that took place between 1993 and 1996 and, in February 1996, the Nigerian forces clashed again with Cameroonian troops.

A number of initiatives were taken to prevent the dispute from escalating and to bring the two parties to the negotiating table. These included pressure from France, which was motivated by its determination to safeguard its own interests in both states (Mgbale 2001: 175), mediation by the Togolese President Eyadéma, and the adoption of resolutions by the United Nations and the Organization of African Unity, apparently with little success. On 29 March

1994, the Cameroonian government filed an application with the International Court of Justice (ICJ) in The Hague to institute proceedings against Nigeria for using violence to contest Cameroon's sovereignty over the Bakassi Peninsula. On 5 September 2002, just a month before the court's verdict was due, the UN Secretary-General Kofi Annan and the two heads of state, Olusegun Obasanjo and Paul Biya, met in Paris in the presence of the French President Jacques Chirac and the two African leaders pledged to comply with the court's verdict, irrespective of its ruling.

Implications of the 2002 ICJ ruling and the 2006 Greentree Agreement

On 10 October 2002 and after eight years of deliberations, the ICJ ruled in favour of Cameroon (International Court of Justice 2002), justifying its verdict as follows. The land boundaries between Nigeria and Cameroon had been established by treaties signed by Britain and Germany, notably the Anglo-German Agreement of 11 March 1913, and the court accepted the authenticity of these treaties. It also stated that Cameroonian claims had been given added weight by the 1975 Maroua Declaration signed by President Ahidjo and General Gowon. This declaration, though never ratified by Nigeria, clearly recognized Cameroonian sovereignty over Bakassi. According to the court, there was ample evidence that there was a certain measure of Nigerian acceptance of Cameroonian claims in the period preceding the outbreak of the conflict in the 1990s.

The court dismissed Nigeria's claims, which had been largely based on the legal principle of historical consolidation and the exercise of sovereignty after independence, with the acquiescence of Cameroon. During the court sessions, Nigeria's legal experts declared that the subjects of the chiefs of Old Calabar had occupied the peninsula since pre-colonial times and that, following independence, these chiefs had transferred their title to the peninsula to the Nigerian state, which had exercised sovereignty over Bakassi ever since without any protest from Cameroon. As proof of Nigeria's post-colonial sovereignty, they referred to a number of practices on the peninsula, including Nigeria's maintenance of public law and order, its collection of taxes, its introduction of local governance, the widespread use of the Nigerian currency, the holding of Nigerian passports by Bakassi residents, and the presence of schools and health centres subsidized by the Nigerian state.

The court ordered Nigeria to withdraw its administration, its armed forces and police from the peninsula expeditiously and without condition. However, it reminded the Cameroonian government of its pledge at the hearings to continue to afford protection to Nigerians living on the peninsula. It also rejected Camer-

oon's request that Nigeria be held responsible for the damage caused by its occupation of Bakassi.

While Cameroon was obviously satisfied with the verdict, it caused consternation in Nigeria, arousing vitriolic comments from Nigerian officialdom and the Nigerian media alike, which went as far as identifying a Western conspiracy against the country. For example, Chief Richard Akinjide, a former Nigerian Attorney-General and Minister of Justice who had been a leading member of Nigeria's legal team, described the verdict as being '50% international law and 50% international politics' and 'blatantly biased and unfair'. He made particular reference to the fact that the president of the court, Gilbert Guillaume, was a Frenchman who was likely to support the claims of the Francophone-dominated regime in Cameroon (Baye 2010). The outcome of the controversy was a *de facto* Nigerian refusal to withdraw militarily from Bakassi and to transfer sovereignty. The Nigerian government did not, however, openly reject the judgment but instead called for an agreement that would provide 'peace with honour, with the interest and welfare of our people' (Olagunju 2009: 14).

At this critical point, Kofi Annan appealed to the two countries to respect and implement the court's judgment and reaffirmed the readiness of the United Nations to assist both countries.¹ In his relentless efforts to achieve lasting peace, he once again invited the two presidents to a seminal meeting in Geneva on 15 November 2002 where they agreed to his request to set up a Cameroon-Nigeria Mixed Commission (CNMC) made up of representatives from both countries and UN experts, and chaired by a special representative of the Secretary-General. The CNMC was to work out ways of implementing the ruling of the court and to move the process forward. Its mandate covered the demarcation of the land and maritime boundaries between the two countries; the withdrawal of the Nigerian administration and armed forces from the peninsula and the transfer of authority to Cameroon; an eventual demilitarization of the territory; protection of the rights of the affected population; and the promotion of joint economic ventures and cross-border cooperation. Kofi Annan's proposal that his Special Representative for West Africa, Ahmedou Ould-Abdallah from Mauritania, chair the CNMC was accepted by both sides.

The commission began meeting every two months in the capitals of the two states. After a difficult start, some progress was made, such as Nigeria's offer to construct a cross-border road connecting Ikom and Mamfe, and the implementation of the demarcation of the boundary. One of the issues that impeded a

¹ The following sections are largely based on my 'Cameroon' contributions to several *African Yearbooks*. See A. Mehler, H. Melber & K. van Walraven, eds, *African Yearbook: Politics, economy and society south of the Sahara*, vols. 1-4, Leiden/Boston: Brill Academic Publishers.

major breakthrough was Nigeria's refusal to withdraw troops from Bakassi until the protection of the legitimate rights of the Nigerian population on the peninsula was assured. Cameroon proved unwilling, however, to accord Nigerian residents in the area special privileges or status.

Under a working plan drawn up in 2003 and approved by the UN Secretary-General Kofi Annan and the heads of state of both countries at a third tripartite meeting in Geneva on 31 January 2004, Nigeria was to withdraw its forces from Bakassi by the end of May. But at the 11 February 2004 session of the CNMC, Nigerian members requested a revision of the ambitious timetable and a new deadline of 15 September 2004 for the transfer of sovereignty to Cameroon was agreed. Nonetheless, Nigeria failed to respect the new deadline, citing technical problems. The Nigerian authorities referred in particular to the vehement resistance by the majority population on Bakassi to Cameroonian rule and on 13 September 2004, the Nigerian House of Representatives called for a UN-organized plebiscite on Bakassi as a more democratic way of deciding on an eventual transfer of sovereignty to Cameroon.

Although both presidents pledged their commitment to a peaceful solution to the problem at a meeting on 28 July 2004, Cameroon and the United Nations began to express their impatience with Nigeria's foot-dragging over its withdrawal from the disputed area during the October session of the CNMC in Abuja. Nigeria's failure to respect the 15 September 2004 deadline for the withdrawal of its administration and troops led to a complete standstill in bilateral negotiations within the CNMC. It took the intervention of the UN Secretary-General Kofi Annan to bring the presidents of both countries together on 11 May 2005 in Geneva where they reaffirmed their willingness to resolve the dispute by peaceful means and requested the commission resume negotiations as soon as possible.

However, renewed acts of aggression by the Nigerian army on the Bakassi Peninsula on 5, 17, 18 and 21 June 2005, which left one Cameroonian corporal dead, threatened the resumption of talks, and the Cameroonian government announced on 23 June 2005 that it would lodge a complaint with the UN Security Council. It was only after successful mediation by Ahmadou Ould-Abdallah, the UN chairman of the CNMC, that bilateral negotiations were resumed. Relations between Cameroon and Nigeria improved following the meeting of the Commission in Abuja on 13-14 October 2005, which produced a draft agreement and a new timetable for the withdrawal of Nigeria's troops and administration.

These developments laid the foundations for a landmark agreement between the heads of state on the modalities of the Nigerian withdrawal from the Bakassi Peninsula in accordance with the October 2002 ICJ judgment and with due respect for the well-being of the Nigerian inhabitants there. The agreement was

concluded on 12 June 2006 at a summit meeting on the Greentree Estate in Manhasset, New York, under the auspices of the UN Secretary-General and in the presence of representatives of four witness states (the US, the UK, France and Germany).

The Greentree Agreement, which was widely commended as a shining example of peaceful conflict resolution in Africa, contained the following provisions. First, Nigeria would withdraw its estimated 3,000 troops from the territory within 60 days and formally cede the territory to Cameroon. Second, the islands of Atabong and Akwabana, which were inhabited almost exclusively by Nigerians, would be administered by Nigeria for two years. Third, the Nigerian inhabitants of Bakassi would have two years to decide whether to remain on the peninsula as Nigerian citizens, take Cameroonian nationality or relocate to Nigeria. Fourth, a special transitional provision granting Nigerians free access to the Bakassi region would be in force for five years. Fifth, a follow-up commission of ten representatives – two each from Cameroon, Nigeria and the United Nations plus one from each of the four witness states – would be set up to implement the agreement (International Peace Institute 2008; Olinga 2009).

As a result of the agreement, Nigeria began its military withdrawal on 1 August 2006 and a ceremony on 14 August 2006 marked the formal handing over of the northern part of the peninsula. Credit must be given to the two presidents for recognizing that the border dispute had to be seen in the greater context of the overall relationship between both states. One can only speculate as to whether President Obasanjo's administration would have been quite as accommodating had he been preparing for a third term of office, as many of his supporters had wished. Certainly, the concessions he made were not popular domestically and were seen as an affront to the nation's considerable pride. Nevertheless, settlement of the dispute did a great deal to reinforce his reputation as a statesman whose skills seemed to be in growing demand on the African continent. His apparent concern for a peaceful solution of the Bakassi dispute and other violent conflicts in Africa undoubtedly contributed to strengthening Nigeria's candidature for the desired African seat on the UN Security Council.

Relations between Cameroon and Nigeria improved even further when, on 11 May 2007, the CNMC reached an agreement on the maritime boundary between the two countries. However, the Bakassi issue threatened to strain relations again on 12 November 2007 when unidentified assailants attacked a Cameroonian military post on the peninsula, killing 21 Cameroonian soldiers and wounding many others. The Cameroonian authorities immediately held the Nigerian army responsible for this attack, but the Nigerian government denied any involvement in the incident. Both countries promptly agreed to work together to identify the attackers. An initiative by the Nigerian Senate a few

days after the attack soured relations between the two neighbours and on 21 November 2007, it passed a motion requiring the Yar'Adua government to stop the transfer of the Bakassi territory to Cameroon. Even more importantly, it called for a review of the Greentree Agreement on the handover of the disputed area, alleging that former President Obasanjo had failed to put the agreement before the National Assembly for ratification, as required by the Nigerian constitution. The chairman of the Nigerian delegation in the CNMC, Prince Bola Ajibola, reacted by assuring the Cameroonian authorities on 29 November 2007 that Nigeria had no intention of revoking the transfer of the Bakassi Peninsula to Cameroon.

Despite a court order ruling that Nigeria delay the handover of the remaining parts of the Bakassi Peninsula to Cameroon until accommodation for the resettled Nigerian citizens had been provided, the Yar'Adua administration decided to withdraw from the area completely on 14 August 2008, in accordance with the Greentree Agreement, and to bring the long-standing dispute to an end.

Regional resistance to the ICJ verdict and the Greentree Agreement

With the Nigerian withdrawal of its administration and troops from the Bakassi Peninsula and recognition of Cameroonian sovereignty in the wake of the 2002 ICJ verdict and the 2006 Greentree Agreement, the international community widely believed that the Bakassi dispute had been resolved once and for all. This soon proved to be wishful thinking since it had overlooked the interests of stakeholders other than the Cameroonian and Nigerian states in the dispute. These stakeholders were the predominantly Nigerian population on the peninsula and the Anglophone Cameroonian secessionist movements which had, from the start, vehemently resisted the 2002 ICJ verdict and the 2006 Greentree Agreement.

The Nigerian inhabitants of the Bakassi Peninsula

According to Prof. Boniface Egboka who hails from the area, the 2002 ICJ verdict was a tragedy of unimaginable magnitude for the Nigerian population on the peninsula. He considered the ICJ judgment to be ill-fated, godless and unjust as well as humiliating and demoralizing for the Nigerian inhabitants (Sama & Johnson-Ross 2005-2006: 115). His views were shared by the Nigerian inhabitants on the peninsula.

Their political leaders and traditional rulers repeatedly called on the Nigerian government to maintain control over Bakassi and even threatened to secede from Nigeria and create an independent Bakassi state if the Nigerian govern-

ment failed to protect their interests. For example, in November 2003, Joe Atene, the Bakassi representative in the Cross River State House of Assembly, publicly declared that the Nigerian residents of Bakassi would regard a unilateral handing over of the peninsula by the Nigerian government to Cameroon as a serious betrayal:

We have always been Nigerians, and if Nigeria now decides to turn its back to us, we may not have any other option than to pursue self-determination. We will not be part of Cameroon.²

There appear to be several reasons for the Nigerian population's fierce resistance to Bakassi being handed over to Cameroon. One was a continuation of the historical consolidation argument put forward by the Nigerian state during the ICJ sessions: that Bakassi had been part of Nigeria since pre-colonial times. Another was their fear of becoming strangers in their own country after Nigeria's recognition of Cameroon's sovereignty over the peninsula. The Nigerian inhabitants have often stressed that they were not prepared 'to subject themselves to Cameroonian rule and the bondage of Cameroonian gendarmes'.³ Another reason was their belief that such a transfer would imply 'complete neglect and abandonment' of the peninsula and that Nigeria, rather than Cameroon, had made a contribution to territorial development.⁴

Significantly, many Bakassi leaders considered President Obasanjo's widely praised respect for the rule of law to conflict with their people's right to self-determination:

We are in support of the declaration of an independent state. The United Nations should realise that we have the right to decide where we want to be and the right to self-determination. We are Nigerians and live on our ancestral land. You can see some of the graves here dating back to the 19th century. How can you force a strange culture and government on us? We appreciate what Nigerian government is doing but let it be on record that they have betrayed us and we will fight for our survival and self-determination.⁵

For a long time, there had been no clear connection between the rebel movements in the nearby Niger Delta and Bakassi resistance movements but, from early 2006 onwards, there was growing evidence that militant activities in the Niger Delta had spilt over into the Bakassi region. Organizations like the Movement for the Emancipation of the Niger Delta (MEND) and the Niger Delta Defence and Security Council (NDDSC) joined forces with a shadowy Bakassi militia, the so-called Bakassi Freedom Fighters (BFF). While these

² *The Post*, 17 November 2003, p. 3.

³ *Ibid.*, 1 November 2002, p. 1.

⁴ *The Guardian Post*, 14 November 2002, p. 2.

⁵ *The Guardian*, 18 August 2006.

movements claimed to represent the interests of the people living in the oil-rich Niger Delta and the Bakassi region, they were also engaged in various, often criminal, activities to obtain a share in the region's oil revenues. They claimed responsibility for raids on Cameroonian military posts on the Bakassi Peninsula that resulted in the death of several Cameroonian soldiers and a civilian, and their sporadic attacks in the area have continued to the present day, leaving the Cameroonian military embarrassed, official diplomacy humiliated, the prospects for long-term peace in jeopardy and the inhabitants feeling insecure.

Under the terms of the 12 June 2006 Greentree Agreement, Nigerian inhabitants of Bakassi were given three options: keeping Nigerian nationality and remaining as foreign residents on Cameroonian territory; taking out Cameroonian nationality; or being resettled elsewhere in Nigeria. Soon after the Nigerian state's handing over of the largest part of Bakassi to Cameroon on 14 August 2006, a growing number of the Nigerian residents who were determined to remain Nigerian citizens and feared Cameroonian repercussions, especially from the Cameroonian gendarmes, fled to Nigeria. At the 15th session of the CNMC, Nigerian representatives alleged that Nigerian citizens living on Bakassi and in other parts of Cameroon were returning to Nigeria with stories of maltreatment by Cameroonian gendarmes. Between 22 and 30 August 2006, more than 6,000 Nigerians were shipped from Douala and Limbe to Nigeria. The Commission then resolved to send an observer mission of 15 UN representatives and 5 delegates each from Nigeria and Cameroon to the peninsula.

In the months leading up to the Nigerian handover of the remaining parts of the peninsula to Cameroon on 14 August 2008, the number of Bakassi refugees in Nigeria increased dramatically. Some reports put their number at about 100,000. Having abandoned their homes and businesses in Bakassi, they initially moved to overcrowded transit camps in Nigeria and, in an attempt to appease them, the Nigerian government began constructing a 'New Bakassi', which is contiguous with Cameroon's Bakassi territory. This project has been largely unsuccessful and has even resulted in the displacement of the original inhabitants' homes and property to make space for migrants from Bakassi. Given the history of hostilities between the Nigerian residents of Bakassi and the Cameroonian gendarmes and the violent clashes that have taken place in the area in recent times, it is safe to assume that practically all the Nigerians in the area will eventually leave.

Anglophone secessionist movements

The 2002 ICJ verdict and the 2006 Greentree Agreement have also been constantly contested by the various Anglophone movements that emerged during the political liberalization process in Cameroon in the early 1990s (Konings &

Nyamnjoh 2003). They claim that the nation-state project in the post-reunification era was driven by the determination of the Francophone political elite to dominate the Anglophone minority in the post-colonial state and to erase the cultural and institutional foundations of Anglophone identity. Most initially strove for a return to a federal state but later, following the Biya government's persistent refusal to enter into any meaningful negotiations, came to champion the creation of an independent Anglophone state. They provocatively reintroduced the name of Southern Cameroons to refer to the Anglophone territory to 'make it clear that our struggles are neither of an essentially linguistic character nor in defence of an alien culture but are aimed at the restoration of the autonomy of the former Southern Cameroons which has been annexed by the Republic of Cameroon'.⁶ The umbrella organization of all the Anglophone movements was subsequently named the Southern Cameroons National Council (SCNC). Since the violent confrontations between Cameroon and Nigeria over the Bakassi Peninsula, the SCNC has constantly emphasized that Bakassi is neither a part of the Republic of Cameroon nor of Nigeria but instead belongs to the Southern Cameroons.

The decision of the Cameroonian and Nigerian governments to submit their dispute over the Bakassi Peninsula to the ICJ for adjudication in 1994 offered Anglophone nationalists an opportunity to access legal space (Jua & Konings 2004). In 2001, the newly founded Ex-British Southern Cameroons Provisional Administration created a new body, the Southern Cameroons People's Organization (SCAPO), with the specific goal of pursuing legal avenues to achieve the independence of the Southern Cameroons. In its legal struggle for the recognition of an independent Southern Cameroons state, SCAPO filed a lawsuit against the Nigerian government in the Nigerian Federal High Court in Abuja. It had two main reasons for taking Nigeria to court. First, the Trust Territory of Southern Cameroons had been administered by Britain as an integral part of Nigeria. Consequently, SCAPO was inclined to regard Nigeria as a co-conspirator with Britain in the process that led to the annexation of the Southern Cameroons by *La République du Cameroun*.⁷ Second, Nigeria had ratified the African Union's Banjul Charter of Human Rights that lays down in Article 20 the right of all colonized or oppressed peoples to free themselves from the bonds of domination by resorting to any means recognized by the international community.

⁶ SCNC press release reprinted in the *Cameroon Post*, 16-23 August 1994, p. 3.

⁷ Reference to the incumbent regime as the government of *La République du Cameroun*, the name adopted by Francophone Cameroon at independence, has become a key signifier in the replotting of the nation's constitutional history as a progressive consolidation of the recolonization of Anglophone Cameroon by the post-colonial Francophone-dominated state. See Eyoh (1998: 264).

In this historic case, the plaintiffs sought the following relief from the Nigerian Federal High Court. Firstly, an order compelling the Nigerian government to place before the ICJ and the UN General Assembly and to ensure diligent prosecution of the claim of the peoples of Southern Cameroons to self-determination and their declaration of independence; and secondly a permanent injunction restraining the Nigerian government from treating the Southern Cameroons and all the people on the territory as an integral part of *La République du Cameroun*.

In the end, SCAPO scored a landmark victory in March 2002 when the Nigerian Federal High Court ruled in its favour on both issues. The court ordered the Nigerian government to ask the ICJ to rule on whether it was Southern Cameroons or the Republic of Cameroon that shared a maritime boundary with the Federal Republic of Nigeria (Konings 2005: 295-296). Clearly, the implication is that the ICJ cannot adjudicate in the dispute between Nigeria and Cameroon over the Bakassi Peninsula without first clarifying the international status of Southern Cameroons. It is only after clarification that a decision can be made about sovereignty over Bakassi. Regrettably, despite numerous requests by Anglophone secessionist movements, this clarification was never made. The Nigerian government was not prepared to execute the Federal High Court's judgment nor was the ICJ ready to suspend proceedings on the Bakassi case pending determination of the international status of Southern Cameroons.

It is interesting to note that the Anglophone leadership, which always strongly condemned Nigerian domination of Southern Cameroons in the pre-reunification era, was inclined to support Nigerian opposition to the 2002 ICJ verdict. Following press reports that the UN Secretary-General was about to discuss the ICJ decision with the heads of state of Cameroon and Nigeria in Geneva on 15 November 2002, the then chairman of the Ex-British Southern Cameroons Provisional Administration wrote to him on 12 November 2002 as follows:⁸

While we share your anxiety for good neighbourliness between Nigeria and *La République du Cameroun*, the people of the Southern Cameroons, under the banner of the SCNC, wish to make their stand on the disputed territory abundantly clear Our problem is undoubtedly that of preference for the Federal Republic of Nigeria to continue to retain the Bakassi peninsula until the State of the Southern Cameroons shall be restored. Then we shall ourselves negotiate the retrieval of Bakassi from the hands of Nigeria, in a process we believe shall be very friendly and easy as not to require arbitration. We share a common Anglo-Saxon political culture with Nigeria by virtue of having been governed by Great Britain together as a single entity for half a century On the other hand, the people of the Southern Cameroons do not want *La République du Cameroun* to lay hands on our Bakassi inheritance.

⁸ Letter from Dr Martin Luma, National Chairman of the SCNC, to the Secretary-General of the United Nations, Buea, 12 November 2002.

In 2006, the chairman of SCAPO, Dr Kevin Gumne, asserted that there would not be peace on the Bakassi Peninsula without an independent Southern Cameroons:

No permanent settlement can ever take place on the Bakassi peninsula unless the Southern Cameroons is accepted as a distinct and separate party to the settlement agreement. Furthermore, we believe that a long-standing settlement must take due cognizance of the concern of various parties which have legitimate interest in the peninsula (Orisakwe 2006).

He therefore called for the Southern Cameroons to be accepted as a third party at any talks regarding the demarcation of the boundary between Nigeria and Cameroon. Like the leaders of other Anglophone secessionist movements, he stressed that the Southern Cameroons would not respect any agreement between Nigeria and Cameroon on the maritime border if it ignored the self-proclaimed state of Southern Cameroons and its people.

The various Anglophone secessionist movements have also constantly expressed support for the Bakassi people, claiming them to be part of the Southern Cameroons. They strongly condemn the Cameroonian state for its lack of concern for the Southern Cameroons in general, and Bakassi in particular:

Cameroon has one single concern on the Bakassi peninsula and that is oil. They do not care about the Southern Cameroons or the indigenous Bakassians. They just want the oil at any cost. In order to achieve this goal, they want to use the verdict of the ICJ to accomplish the annexation of the Southern Cameroons (Orisakwe 2006).

Conclusion

A message from UN Secretary-General Ban Ki-Moon that was read out at the official handing-over ceremony of the remaining parts of the Bakassi Peninsula to Cameroon on 14 August 2008 announced that: 'This is a day of triumph for the rule of law, which lies at the very core of the values of the United Nations'. And the UN Secretary-General's Special Representative for West Africa, Said Djinnit, said that 'the handover should serve as a model for the resolution of other border disputes in Africa'.⁹ Undoubtedly, the respect shown by the heads of state of Nigeria and Cameroon for the 2002 ICJ verdict that confirmed Cameroon's sovereignty over Bakassi was a great achievement, especially if the importance of the peninsula for both countries is taken into account. Analyzing the explosive nature of the Bakassi dispute in the 1990s, the African magazine *Jeune Afrique* claimed that all the factors necessary for a major military conflict

⁹ AFP, 'Nigeria cedes Bakassi peninsula to Cameroon', 14 August 2008.

were present and went on to stress the area's economic and strategic importance for both countries as being a pivotal factor in any escalation of the conflict.¹⁰

This apparent success story in the peaceful settlement of African border disputes provides some proof for Gerti Hesselings's thesis (2006) that respect for the rule of law has improved in a number of African states following political liberalization. The relative advance of democracy in Cameroon and Nigeria has contributed to a climate of confidence. And both states want to be included in the international community and to be seen to respect the rule of law.

What Hesselings seems to have underestimated though is that a verdict based on international law may face implementation difficulties in a complex border dispute. The Bakassi dispute underscores the importance of the UN's continued engagement in the implementation process, of strong leadership, and regular interaction and consultation among the disputant states. Time and patience also played a role in the outcome of these negotiations. The former UN Secretary-General, Kofi Annan, was instrumental in establishing an atmosphere of trust, which attests to the importance of good offices in resolving disputes. The leaders of Cameroon and Nigeria recognized the long-term benefits of peaceful relations between their nations, whose geography, history and culture have been intertwined for centuries. The CNMC, which formed an original and innovative approach to the execution of international law, also played a positive role as an instrument for monitoring and implementing the ICJ's ruling and the Greentree Agreement. The Bakassi resolutions took a long time to reach but the degree of disaffection over the terms agreed would have been higher if the process had not been tempered with patience and sensitive timing.

Despite the Cameroonian and Nigerian governments' respect for the rule of law, their attempts to implement the 2002 ICJ verdict have, however, not yet managed to resolve the Bakassi dispute. Both the predominantly Nigerian population on the peninsula and the Anglophone Cameroonian secessionist movements continue to fiercely resist the ICJ verdict, claiming ownership of the peninsula and declining Republic of Cameroon citizenship. The Bakassi inhabitants remain strongly attached to their Nigerian citizenship and Anglophone secessionist movements are pursuing citizenship of an independent Southern Cameroons state. Both parties assert that there can never be peace in the area without Nigeria and Cameroon first recognizing their claims.

¹⁰ *Jeune Afrique*, 'Cameroun/Nigeria: La guerre secrète', no. 1871, 13-19 November 1996, p. 13.

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POLITICS AND CONSTITUTIONAL LAW /
POLITIQUE ET DROIT CONSTITUTIONNEL

Democracy deferred: Understanding elections and the role of donors in Ethiopia

Jan Abbink

This chapter revisits the issue of elections and democracy in Africa, a theme that emerged as dominant in scholarly discussions in African Studies in the 1990s. The trigger for featuring Ethiopia as a case study was the May 2010 parliamentary elections when the incumbent party, which had been in power since 1991, took 99.6% of all the seats. While the various Ethiopian elections will not be discussed in detail, the political culture or wider context in which they occur – and always produce the same overall result – will be highlighted to demonstrate the enduring mechanisms and problems of hegemonic rule and how difficult it is to create a democratic system that allows for changes in power (i.e. alternation). The relationship between one-party rule and economic development will also be discussed – the latter being a donor obsession that clouds the political agenda. The chapter closes with some reflections on the recurring donor-country dilemmas when it comes to dealing with electoral autocracies, such as Ethiopia.

‘One can neither plough the sky, nor take the King to court’
(an Ethiopian peasant proverb)

Introduction

While somewhat unfashionable nowadays, the issue of elections and democratization is still being discussed in comparative political studies (cf. Diamond & Plattner 2010; Lindbergh 2009a, 2009b; van de Walle 2009; Rakner & van de

Walle 2009). It also still appears in development policy towards Africa, especially when related to issues of governance that currently feature prominently in international donor discourse. The emergence of democratic structures is generally seen as the desired end to international development policies. Some authors have argued that overall economic development is enhanced by democratic rule in a country, including multiparty elections, a free media, responsive state institutions and a vibrant civil society (cf. van de Walle 2009), but I contend that there is not necessarily a relationship between the domains of economics and politics.¹ Many autocratic systems in- and outside Africa permit and enhance economic development that is often accompanied by human-rights abuse, rent seeking, patronage and corruption.² China is the most obvious example with its huge economic success, continued repressive and state-led politics, its illegal occupation of minority regions (e.g. Tibet) and huge social inequality. Ethiopia, Angola and Equatorial Guinea can be considered as examples of developmental autocracies in Africa and it is only when the social and political costs of these practices become too great that moves towards public accountability and democratic decision-making develop, but not in any predictable sequence. This uncomfortable truth has led to policy mistakes as well as contradictions in the approach of donor countries and international institutions towards developing countries, notably in Africa. A donor country or UN-sponsored focus on multiparty elections as a panacea or means of installing democracy in a developing or post-conflict society can be helpful but only if elections are seen as one element in a wider context of societal democratization. Seeing the existence of some form of elections as being sufficient *per se* to encourage democracy is a fallacy.

The general contention in this chapter is that elections in divided African societies marred by underdevelopment, poverty and elite autocracy are precarious and do not, by definition, enhance a democratic culture or institutional stability, especially not if a professional, independent judicial structure is not in place. For the elites in place it is not democratic political inclusiveness and equity that are the priority but rather their hegemonic and ostentatious display and exercise of power – these are the mark of success (cf. van Beek, this volume). Democratic systems in Africa exist but, apart from the longer-established positive exceptions like Botswana, Senegal, Ghana and Mauritius, the other examples are far from stable. Ethiopia may have started out well in 1991 after the demise of its military regime but it has not lived up to its initial

¹ I wish to thank Anneloes Viveen at the Netherlands Ministry of Foreign Affairs for her input in a draft conference paper that formed the basis of this chapter.

² As Robert Kagan noted (2008: 57): “Growing national wealth and autocracy have proven compatible after all. Autocrats learn and adjust”.

promises (cf. Aalen & Tronvoll 2008; Tronvoll 2011; Vestal 1996, 2008). To understand the reasons behind this, we need to recall the wider political context and political culture of power and governance in this complex society.

It may be wishful thinking but if the aim is to achieve a durable process of political democratization one might say that it would be better to support the creation and professionalization of a strong and credible justice system, preferably based on international rule-of-law principles as well as indigenous notions and procedures of just law and the rights of persons. An electoral process alone is not enough. In this view I follow Gerti Hesselning (2006: 36-37) who pleaded for an inventive reinforcing of the constitutional state, while recognizing the African specifics of history and culture that make up the 'living law' and preclude a direct 'transplant' of Western or other foreign rule-of-law ideas on African settings. But a constitutional state with core principles is shared fairly universally (*Ibid*: 31) and is recognizable too in African traditions of just rule and limits on the sovereign's exercise of power (cf. van Binsbergen, this volume).

A judicial system within a constitutional state should ideally protect citizens from the arbitrary use of power by the state or sovereign; maintain autonomy and distance from the Executive (the ruling government); enshrine liberal freedoms similar to those laid out in the UN Universal Declaration of Human Rights (1948) and the African Charter on Human and Peoples' Rights (1981). It should also allow the right of appeal to all by law; offer protection of property and investment; and make the Executive accountable to the judiciary. But it can also take inspiration from the local traditions of justice and rights that are formulated by collective and individual actors. A more serious consideration of the societal contexts of politics and law in Africa is therefore important, as Gerti Hesselning (2006: 39) noted.³

Whether the development of such structures of constitutionalism, the rule of law, and independent justice is still a realistic proposition for most African countries – or many other developing countries – is a moot point. Practice rarely matches rhetoric and the often-touted panacea of the 'rule of law state' for conflict-ridden and undemocratic abusive regimes sounds over-optimistic (Carothers 2006: 3). Conditions are not good (cf. Erdmann 2011). Despite a new economic dynamics, many African states are mechanisms for reconstructed autocratic elite rule and are 'fragile' or contain significant 'un- or under-governed' spaces where new and violent formations of power are emerging and

³ The same argument, but even less heeded, goes for development policies (cf. Bergendorff 2007: 195), that usually ignore cultural complexities, seeing them as irrelevant or cumbersome. The long-term result is (costly) resistance, sabotage or armed revolt by citizens.

holding sway. Here we could mention, for example, the bases of piracy in Somalia, bandit-ruled areas in central Africa and the rebel militia-run spaces in Nigeria and Chad.⁴ These will not soon turn into 'orderly states' as we like to see them in the West. One might also note that the popularity and feasibility of classic Western liberal democracies themselves, with their diffuse multiparty structures, sovereign parliaments, slow decision-making and the crucial role of elections, are strongly contested, both within and in the world at large, due to forces of globalization, transnationalism, populism, and the ethnic and regional fragmentation of domestic constituencies.⁵ Debates about new approaches to democracy and the constitutional state are thus also evident in the rest of the world (cf. O'Flynn 2006; Forst 2006). In addition, in the face of the more overriding global *economic* ideals, of growth, increased GDP, energy security, market expansion and poverty reduction that are touted daily by global institutions, issues of democratic governance and respect for political and human rights often appear secondary.

Ideally, an independent and professional judiciary, based on universal principles regarding equality before the law, legal rights and due process, and recognizable as such in most societies (cf. Hesseling 2006: 31), would contribute favourably to a democratic culture. It would enhance a safer judicial environment, thus furthering the protection of property, stimulating equitable socio-economic development and business growth, reducing patronage and corruption, and protecting civic freedoms (the human and social rights of citizens), as well as encouraging free and fair elections with the possibility for changes in power. An indirect result might also be greater social stability and the emergence of a middle class instead of a crony party-cadre class linked to the regime in place. A precondition to a functioning judicial system is a conducive political culture⁶ of tolerance of diversity and communication, i.e. some measure of leeway in the political system that allows conflict and does not suppress dissent. But this is an element of history that a country either has or does not have, and is relatively scarce in Africa beyond the level of local societies. Empirical

⁴ Compare also the new phase of war on the Nuba in South Kordofan, Sudan, by the North Sudanese army, which was starting in July 2011 as this chapter was being finalized.

⁵ The more than a year-long post-election crisis in Belgium in 2010-2011, which prevented a government from being formed, is a case in point.

⁶ Defined here loosely as: a value-based set of political ideas and practices among elites and the wider population relating to what legitimate authority is, how politics should function and how political consultation is achieved. But there is a split in political elite views and popular views of political culture: the political elite often appropriate aspects of it that buttress its rule and authority *beyond* the shared and accepted values of the political sphere.

assessment is required in every country to establish its nature and scope, and any emerging interaction with statutory (state) law.

The Horn of Africa

In her 2006 inaugural lecture at Utrecht University, Gerti Hesselting (2006: 6) discussed the case of Somaliland, which she found interesting because of its original democratic experiment rooted in a history of decentralized political practice and normative clan law mediated by elders. The country is indeed a remarkable example of an emerging democratic state of a hybrid nature that combines ‘modern’ and ‘traditional’ elements: parties, elections, an independent press and civil society, a negotiated political order, the incorporation of decentralized clan-organization elements in the legislative structure, and a relatively independent judiciary partly based on customary (*xeer*) law. It has in fact seen three peaceful changes of president and government in the post-1991 era. The contrast with Southern Somalia, which is mired in chaos and violence, is striking but it is not clear whether the experiment will last. Gerti hoped that resorting to rule-of-law principles and having a creative, adaptable state responding to ‘living law’ traditions would play a constructive role in conflict prevention. This normative legal argument has its merits but we need recourse to other factors to explain the recurrence of conflict, repression, inequality and political stagnation in economically emerging states and then to gauge the scope and chances of law.

Ethiopia, the most prominent economic and political player in the northeast African region has been less successful in establishing representative democracy than its neighbour, Somaliland. The Ethiopian political experience since the fall of the military *Derg* regime in May 1991 deserves close comparative scrutiny in order to assess its potential and its setbacks. It has indeed elicited many studies, among them: Aalen & Tronvoll (2008); Lefort (2007, 2010); Abbink (2009); Tronvoll (2011); Abbink & Hagmann (2011) and Merera (2011). In our joint book on election observation and democratization processes (Abbink & Hesselting 2000), which was edited at a time when optimism about political reform and democratic consolidation in Africa was still strong in both academic and policy circles, we were already pleading for a proper contextual analysis of politics and elections in African societies, and we were sceptical about democratic openings in the face of the unchanged societal conditions and the observed tendency of autocratic elites to manipulate ‘elections’ and democratic reform for their own purposes. Analytical assessments of democratization since 2000 have borne out our caution and shown the clear societal and historical impediments to political liberalization in unequal, divided societies, as well as the limited (and limiting) impact of donor countries and other global

powers. Most of the contributions to the international debate on the issue have increasingly touched on the social and cultural constraints of politics, showing the relevance of these 'context factors' (cf. Hesselning 2006: 29-30, 37).

The debate on democratization in Africa seems to be fading and is being replaced by one on 'failing states', 'ungoverned spaces' and, paradoxically, economic growth and foreign investment. Here a new and overstretched Afro-optimism is evident that is suddenly blind to the armed conflicts, environmental problems and the democratic deficits of Africa as well as to the dubious role that donors and other foreign countries are playing. Human-rights issues now feature as a largely rhetorical frame of reference that is perhaps generally being subscribed to but not actively pursued and is indeed difficult to put into practice, even by donor countries. Furthermore, in the wake of China's economic advances in Africa, the entire rights and democracy discourse has been put on hold and even donor countries, notably European ones, are reluctant to pursue moral political agendas. They seem to primarily become salesmen for their own countries.

The remainder of this chapter presents an overview of the state of play concerning democracy and elections in Ethiopia and, as Gerti advised in her 2006 work, calls for a better understanding of the long-term factors and attitudes that locally shape power, politics and law.

Ethiopia is probably the most important country in Northeast Africa. A relatively strong state with about 82 million inhabitants, it is a partner in international efforts against (Islamist) terrorism and has a growing economy under one-party leadership. It has also been receiving significant donor support – almost US \$ 2 billion annually – as well as growing Chinese and other foreign (agrarian and infrastructural) investment in recent years. In the first half of 2011, when popular uprisings rocked some of the countries in North Africa, Ethiopia (and Eritrea) remained out of the spotlight and their populations showed no wish to join in the fray. One might contend: why should they? The last elections in May 2010 demonstrated overwhelming support from the voters (545 out of the 547 parliamentary seats) for the EPRDF⁷ ruling party and its allies. The same happened in the local elections in 2008 (Aalen & Tronvoll 2010). So the Ethiopian people have apparently been happy with their rulers since 1991. At least, the government and the EPRDF party (they are virtually identical) have tried to convince themselves and the outside world of this.

The phenomenon of repeated massive election wins for the incumbent is part of a broader trend of 'successful' authoritarian restoration in Africa over the last

⁷ The Ethiopian People's Revolutionary Democratic Front developed out of the insurgent Tigray People's Liberation Front. For a recent history by a former insider, see Aregawi (2009).

several years. It is undoing most of the post-1989 gains made in political liberalization and freedoms for civil society. The flexible, adaptive behaviour of old and new political elites has yielded mutations of the neo-patrimonial systems of power and hegemony (cf. Erdmann 2001). This time the elites have been buttressed by intensified global economic competition by other powers for land and mineral resources, fears of declining security in conflict-prone zones, and a resurfacing appreciation of stronger state influence in economic development (e.g. in the guise of the developmental state) provided the state cooperates with global capital and economic forces. The post-1991 regime in Ethiopia has shown itself to be a prime example of this process. It has neither the inclination nor the capacity to share power with other parties and is increasingly orienting itself economically and politically towards the Chinese model to escape the conditionalities or governance demands tied to classic donor-country funding.

Ideology unchanged

In 1993, the new EPRDF-led Ethiopian government issued a document on its ideology of governance, containing the following clause:

*We can attain our objectives and goals only if Revolutionary Democracy becomes the governing outlook in our society, and only by winning the elections successively and holding power without letup can we securely establish the hegemony of Revolutionary Democracy. If we lose in the elections even once, we will encounter a great danger.*⁸

In accordance with this principle, the EPRDF regime is still in power and has ensured that all elections since 1991 have gone in its favour. In this chapter, I contend that the incumbent EPRDF regime in Ethiopia *cannot be voted out of power* in elections with the current institutional arrangements. Regardless of the preferences of the voters, elections will always favour this party, as was confirmed in the May 2010 elections. Nevertheless, the regime, like any other authoritarian regime that is part of the world order and a member of the UN, is regularly engaged and challenged on its record, as it carries the risk of generating instability, serious inequality and human-rights transgressions in the country, as well as hampering inclusive growth. The challenging mainly happens in the international arena and rarely domestically. Within Ethiopia, for example, the government has not allowed public demands or claim making for redistributive economic policies. The country knows no meaningful political

⁸ Source: TPLF-EPRDF, 'TPLF-EPRDF's Strategies for Establishing its Hegemony and Perpetuating its Rule' (English translation of a 1993 document in Amharic), first published in 1996 in *Ethiopian Register* (a US magazine) 3(6): 26, which is also available on various websites.

forces that could voice alternative claims regarding the political-developmental path and the national economy. For various reasons, the opposition has not gained a strong foothold. But pressure for redistribution and wider stakeholder participation is a key element in successful democratization processes. The regional and local administrations in Ethiopia offer no alternative basis for politics or power formation, being integral, closely monitored parts of the national political structure. The claim making that does exist is channelled through the ruling party and linked dependent parties, which are ethno-regional in nature.⁹ Elections either for Parliament or for the local authorities (*k'ebeles*) have not yielded a voice of opposition, as will be seen below.

Ethiopia is an interesting case in Africa. While it has participated in the new wave of elections in Africa since 1990, it has not seen a decisive breakthrough in electoral reform or sustained democratic politics. The political process offers little room for opposition groups, civil-society organizations or parties to help formulate or even freely debate policy alternatives. It does not yet allow for a change of power to any other party than the incumbent, or for the institutionalization of a really independent justice system. In 1991 the victorious EPRDF regime announced a programme of democratization but this was of a special variant. Led by largely the same group of leaders since 1991 (even during the armed struggle of 1975-1991, see Aregawi [2009]), the EPRDF's line is 'revolutionary democracy', an ideology spawned by Marxism-Leninism, with an ever-dominant role for the party in national politics and overall control of the country's political and economic domains of life.¹⁰ It was combined with the trappings of democracy by allowing ethnic groups' rights and ethnic parties, a freer press, a more mixed and liberal economy and a rhetorical bow to the Western donor community. In this, it has always been compared favourably with the previous, military regime (1974-1991) and that is seemingly enough for most Western donor countries. But Ethiopia is not considered to be evolving towards a *liberal* democracy by its leaders: this form is not seen as feasible or applicable in the underdeveloped and ethnically diverse (not to say divided) country that Ethiopia still is. Furthermore, the stakes of political power are so high that the incumbent party feels that it cannot afford to lose its position of privilege and its political-economic networks of control of economy and society that have been built up over the past twenty years. Donor-country partners and external observers are probably chasing chimeras and have little understanding of the importance of 'revolutionary democracy' as a governance ideology in Ethiopia. It could also simply be the case that they are indifferent, as long as

⁹ The exceptions are some rebellions in parts of the Oromo areas and in the Ogaden where armed insurgent movements are active.

¹⁰ See Bach (2011) for an analysis of this ideology.

good economic growth figures are delivered. They often ignore issues of human rights, freedoms and due processes of law and economic equity as being relevant for their policy of supporting what they see as stability and economic growth. They make recurrent and similar policy errors when dealing with the country, hereby assuming that they (the donors) still *want* to see a more open and level democratic system. Their response to flawed elections is often ambivalence – they offer no unified response to crises in the political process (see Borchgrevink 2008: 209, 213)

The EPRDF-formulated ideology of revolutionary democracy in Ethiopia is based on three core principles: the unquestioned monopoly of state power by a vanguard party with an idea of ‘national mission’ that no one can change; top-down leadership and national policies with internal Leninist-like party control and self-evaluation of civil servants and party officials; and the co-opting of all political and state public sectors under its ideology. After the critical 2005 elections, the EPRDF started a mass drive for membership in order to co-opt as many Ethiopians as possible into its structure. The leadership often appears to adopt a God-like posture where no one can challenge them. The party has also tended to become the state, reminiscent of King Louis XIV’s statement *L’État, c’est moi*. A whole new system of political patronage and clientelism (cf. Paulos 2007) has been established since 1991 that makes autonomous political action by new actors and regional or local authorities very difficult. The problems faced by opposition politics in Ethiopia, which are frustrated and undermined by the incumbent party, have amply demonstrated this. Historically, Ethiopia has of course never had a ‘loyal opposition’ in a regulated, predictable political arena. While the post-1991 change created an unprecedented opportunity for coalitions and issue politics, this road was not followed by the dominant party. Opposition parties had great difficulty mobilizing a support base in the country (notably in the rural areas) due to persistent obstructions and attacks on their leaders and rural activists,¹¹ and have remained quite divided among themselves.

In addition, it should not be forgotten that elections everywhere, and especially in Africa, are just one part of the process of democratization (or democracy). As emphasized above, the role of a legitimate, independent judiciary is perhaps just as vital, also in Ethiopia.¹²

¹¹ Compare the case of the popular and promising opposition leader (of the CUD and later of the UDJ party), former Judge Birtukan Mideqsa, who was repeatedly imprisoned and held in solitary confinement since 2008. She was only released in October 2010.

¹² It is currently very precarious. Politics strongly pressurizes the judicial institutions, especially the High and Supreme Courts. In Ethiopia there is no constitutional court either. This role is played by the House of the Federation, the ‘upper chamber’ of

The context of Ethiopia's electoral politics¹³

Since 1991 Ethiopia has been a federal democratic republic, succeeding the Marxist-Socialist *Derg* government led by the former military leader Lieutenant Colonel Mengistu Haile-Mariam, who was universally reviled by the West and became deeply unpopular in Ethiopia itself due to his regime's violent record and economic mismanagement. Under this government, there was one unity party, the Workers' Party of Ethiopia (WPE), and parliamentary elections that were held for the *Shengo* (the then national parliament) displayed no sign of democratization. The only positive point was that the smaller, newly recognized (ethnic) minority groups were also invited to be represented by some of its own members in Parliament, albeit under the wing of the WPE.

The EPRDF, after having militarily defeated the *Derg* in May 1991, was seen as a breath of fresh air and as the dawn of a new democratic politics. Indeed, new liberties of the press and political organization as well as ethnic and religious expression were initially allowed. Economic liberalization followed, although tightly orchestrated by the party, which kept some core tenets of the *Derg* regime in place, such as the state ownership of all land, and it also started many party business ventures. The EPRDF political dispensation was based on the opening up of political space but also on the 'ethnicization' of politics. Citizenship was now to be primarily 'ethnic' not national, and sovereignty was invested in the 'nations', 'nationalities' and 'peoples' of Ethiopia (not in the 'Ethiopian people' as a whole). These were terms from Stalin's 1913 tract on *Marxism and the National Question* that have entered general Marxist political discourse. Ethnic (not regional, class or territorial) oppression and inequality were diagnosed by the TPLF/EPRDF as the root causes of Ethiopia's problems. All ethno-linguistic groups (a certain number of which are officially recognized in the 1995 Ethiopian Constitution and other documents) or 'nationalities' were to be represented in local government and in Parliament, and party formation among the population had to be on an 'ethnic' basis. This had the positive short-term effect of allowing people to use their own language and not forcibly 'hiding' their ethnic background, as well as, in some cases, releasing long-pent-up group emotions or tensions. But it soon discouraged the construction of an inclusive national political arena. Pan-Ethiopian, issue-based parties were ac-

Parliament, which is strongly influenced by the ruling party (cp. Mgbako *et al.* 2006).

¹³ Data in this chapter are based on intermittent field research, including surveys and the frequent interviewing of political actors and the general public in Ethiopia in urban areas (Addis Ababa, Awasa, Shashemenne, Addis Alem and Dessie) as well as in the northern and southern countryside over the past ten years, most recently in September 2010.

tively thwarted or undermined by the ruling party,¹⁴ and prevented from running campaigns in most regional states. For example, in Tigray Region, the home of the dominant TPLF, all the parties except the TPLF, were banned or later, in the 2010 elections, prevented from putting forward candidates.

While various rounds of elections at the local, regional and federal level were organized under the aegis of the government-controlled National Electoral Board, no broad national consensus was ever reached on the procedures and outcome of these elections and there were few positive evaluations by independent observers. Various reports by external observer missions from the EU and the US Carter Center have, however, stated that 'encouraging gains' were made after 1991. But few Ethiopians share this view. Indeed, in no case have elections led to a change in the incumbent regime. The closest Ethiopia has got to this was in the 2005 parliamentary and regional council elections where the newly formed opposition gained control of Addis Ababa regional council (notably the CUD party) and did well in certain other regions and among the emerging urban middle classes. But in the ensuing contestation of the election process and the vote counting as a whole by both government and opposition parties, the opposition felt excluded and either could not or did not take up all of the seats they won.¹⁵ These were watershed elections (Abbink 2006) but were not allowed to run their course.

The EPRDF, which was formally a coalition of four 'ethnic block' parties, the TPLF, ANDM, OPDO and SEPDP,¹⁶ has ruled alone for 20 years now and has not been seriously challenged in any round of elections except in 2005. To explain its power position and make the Ethiopian case the subject of meaningful comparison across Africa, a contextual understanding is needed of Ethiopian authoritarian political tradition, the country's socio-political hierarchies, the way the EPRDF came to power, and the practical implications of the new party's governance ideology (Bach 2011; Abbink 2009). Suffice it to say, historically the transfer of power in Ethiopia has never been peaceful: power is seen as indivisible and the (rural) masses are cautious about supporting op-

¹⁴ The first one with a mass following in 1991-1992, the National Democratic Union, was disbanded in 1992. See also Vestal (1999: 24f).

¹⁵ For instance, economist Dr Berhanu Nega, the Addis Ababa mayor-elect and a leader of the then strong CUD (Coalition for Unity and Democracy opposition party that had won 109 seats of the total 547 in the 2005 parliamentary elections), was barred from taking up his position. He is now living in exile in the US where he leads the Ginbot 7 opposition party.

¹⁶ The Amhara National Democratic Movement for 'the Amhara', the Oromo People's Democratic Organisation for 'the Oromo', and the Southern Ethiopian People's Democratic Front for the many ethnic groups in the South. They are basically satellites of the TPLF. Other such parties exist in the less important regional states like Afar, Benishangul-Gumuz, Somali and Gambela.

position to the powers-that-be unless they have a realistic chance of winning.¹⁷ The acceptance and institutionalization of a plural political system in conditions of economic scarcity and survival is near-impossible because the losers would economically (from loss of income and privileges) and judicially be at risk. Expectations of decisive democratization through the electoral system should thus be tempered.

Elections so far: Few openings, missed chances

After its military victory, the EPRDF called a national conference in 1991 at which a National Transition Charter was drawn up under its auspices. A non-elected EPRDF Council of Representatives was the result. And in June 1992 the new regime tried its hand at local and regional elections, which were judged unfavourably by external observers due to the lack of a level playing field and a lack of space for the opposition forces.¹⁸

Elections for a Constituent Assembly were held in June 1994, with the EPRDF taking 484 of the 527 seats (Kassahun 1995). This led to a new constitution that was adopted in December 1994 and published in August 1995. There have subsequently been four parliamentary elections: in May 1995, May 2000, May 2005 and May 2010. Their technical organization was of a high standard but, according to foreign and domestic observers, the vote was neither free nor fair. The 1995 and 2000 elections were marred by boycotts by the opposition parties that felt thwarted in recruitment, campaigning and media access. There were also registration problems among non-EPRDF candidates with the party-controlled National Electoral Board. And the opposition parties themselves were not sufficiently well organized. The May 2005 elections were the most interesting in that new opposition parties participated in the pre-election phase and leadership was demonstrated by both young and veteran politicians and public figures. There were political debates on television and oppositional campaigns in selected parts of the country, notably in Addis Ababa. The local press, including several independent private journals, reported in detail on the debates and opposition party programmes.¹⁹ Hopes were rising, but in the countryside, where there were hardly any donor-country election observers, state repression (arrests, harassment, intimidation and some targeted

¹⁷ See the response of peasants following the 2005 elections that is analyzed in the perceptive article by Lefort (2007).

¹⁸ See Gamst (1995) and the report by the National Democratic Institute (1992).

¹⁹ Most of the former independent journals have now disappeared, some due to financial problems, others to intimidation and repression and helped by the new and more restrictive 2008 Press Law.

killings) was commonplace and free campaigning was impossible.²⁰ The day after the elections and before the votes had even been counted, the EPRDF declared victory. The counting of votes after the election was fraught with tension. Demonstrations and gatherings were forbidden and the counting proceeded in secrecy and amid controversy. Some unpopular top government candidates who did not get elected in the first round in 'their' constituency were given a recount and then 'won' a seat. Nevertheless, the opposition parties, notably the CUD, UEDF and OFDM,²¹ won many more parliamentary seats than before: 174 out of the total of 547. Still, the opposition cried foul and an electoral process that seemed to have geared up for a free and fair election ran aground when the EPRDF reasserted its control, perhaps due to crucial interference with the counting process. It was thus returned to power with a comfortable majority. There was an opportunity to form a coalition government with opposition groups and this would probably have been the best way forward, but this was unacceptable to the EPRDF government.²² In the street protests in Addis Ababa in June and November 2005 when people contested the election results and gave vent to their general anger at the government, at least 193 people were killed and tens of thousands arrested.

After this dramatic election year, the EPRDF went on to restore its political monopoly and returned to business as usual. It invested in security and political officers (*cadres*) to increase domestic control and prevent a similar situation happening in future elections, especially in the countryside, which is usually ignored by donor-country monitors. Having duly expressed their concern at the 2005 violence, donor countries gradually started again offering the government loans and grants for development. Despite the fact that the Ethiopian leadership was challenged to give serious consideration to the development of a more democratic political system, no serious response was given by donor countries. This has remained the general pattern and since 2005, the EPRDF has shown no intention of relinquishing power and has even tried to convince the foreign donor community and public opinion of the 'lack of alternatives' to its rule.

²⁰ Information on such incidents is found in the annual US State Department country reports on human rights: www.state.gov/documents/organization/160121.pdf

²¹ United Ethiopian Democratic Front and Oromo Federal Democratic Movement.

²² A judgment like that of the Carter Center on these elections is typical of the unhelpful prevarication in donor-country discourse. 'The elections process demonstrated significant advances in Ethiopia's democratization process, including most importantly the introduction of a more competitive electoral process that could potentially result in a pluralistic, multiparty political system'. www.cartercenter.org/documents/2199.pdf

Many donor countries, for example the UK,²³ have bought this argument and are making few efforts to call for inclusive politics or constructive engagement with the opposition. The divisions within the Ethiopian opposition groups are indeed significant, as was evident in the run-up to the May 2010 elections and in the post-election period. But this is also in large part due to the divisive activities of government moles in the opposition parties and to the persistent discouragement, not to say obstruction, of opposition campaign activities by the EPRD government, especially in the rural areas.²⁴ The base line is that the streak of coercion and control present is a recurring feature in the political system in Ethiopia.

The May 2010 elections went ‘according to plan’: they were well organized by the ruling party and its cadres, with campaigning and voter mobilization being pre-empted by the opposition, few public debates, frequent co-opting of rural voters by the incumbent, and warnings throughout the election campaign period about voting ‘correctly’. The threat that voting for the opposition, which was not a unified movement that could rally all people, would entail great livelihood risks worked. In addition, the regime’s record in the sphere of national economic or infrastructural dynamics also appealed to many voters, despite the lack of freedom and livelihood stability. Millions were also dependent on the party for their jobs. The EU Election Observers Mission issued a critical report on the democratic content of the 2010 elections and their wider political context but after a few months, donors, including the IMF and the World Bank, went back to business as usual.²⁵

Regarding the negligible opposition vote in 2010 and apart from the failings in the electoral process (including the intimidation and repression of campaigning opposition members and the restrictions imposed by the National Electoral

²³ See ‘Britain Keeping Quiet about Ethiopia Repression’, *Daily Telegraph*, 23 May 2010 and the criticism on the Department for International Development (DFID) in HRW (2010: 84-85).

²⁴ Cf. 3 November 2009 Reuters news report: ‘Ethiopian Opposition Says Nearly 450 Members Jailed’: www.reuters.com/article/latestCrisis/idUSLT86250. They also recorded the assassination of seven members in that year. See also J. McClure (2010), ‘Ethiopian Opposition Leader Says Supporters “Hunted” After May 23 Election’; Bloomberg news message, 26 May 2010; and ‘Zenawi Crackdown on Opposition to Prevent Protests’, Afrol News message, 19 March 2011: <http://www.afrol.com/articles/37609>

²⁵ EU Foreign Affairs coordinator Ms C. Ashton gave a predictable statement: ‘The legislative elections in Ethiopia were an important moment in the democratic process in the country. I welcome the peaceful conduct of the elections and I congratulate the Ethiopian voters for showing their commitment to this process with a high turnout.’ Many wondered which elections she was talking about. www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/114624.pdf

Board), the issue of the political culture in Ethiopia needs to be borne in mind. As Clapham (1988: 21) has noted, historical heritage and engrained attitudes towards politics play a role in shaping political attitudes, and a reference to cultural factors is 'inescapable'. People in the rural areas in Ethiopia, who in many respects are dependent on the authorities, tend to fear and express support for the reigning powers in order to protect themselves. This is the meaning of the motto cited at the start of this chapter: one cannot openly accuse the government of anything. If people are known to have voted for the opposition, they will face adverse consequences. Lefort (2007) has convincingly made this point. Voting for the opposition is a risk and can endanger access to basic resources (land, state support, basic commodities, food aid) and thus reduces one's chances of survival.²⁶ This is all the more so because the opposition cannot deliver anything tangible as they are held outside the system.²⁷

This situation raises the familiar dilemma for foreign involvement. Can or should the international community support electoral processes in an authoritarian environment that does not deliver peaceful elections, let alone power change, and that is not conducive to democratization? If tensions are exacerbated and the threat of violence is present, would it not be preferable to desist from engaging with the regime? However understandable this position may be, it would amount to unreflexively supporting and legitimizing undemocratic politics, underestimating the Ethiopian public, and caving in to authoritarianism and intimidation (cp. Easterly 2010). China, one of Ethiopia's major economic partners and a self-declared 'great friend' of the regime, has adopted this attitude. It is not the model that is internationally acceptable in view of the UN charters and other global treaties and agreements on democratization and accountable government that even the Ethiopian government is partner to. While the options are indeed limited, critical engagement with the regime cannot but continue.²⁸ And the instruments in the development partnership, through the IMF, the World Bank and Western donor-country programmes providing funds to the Ethiopian government, should be more critically and consistently used.

Below I focus in some more detail on a few relevant analyses recently offered by political scientists Lindberg (2009b) and van de Walle (2009) on

²⁶ See also Eskinder Nega (2010) 'Notes from an Interstate Bus: A Farmer on Election 2010': www.abugidainfo.com/?p=14202

²⁷ Cf. the case of Inderaw Mohammed, an Ethiopian opposition candidate who was beaten up and refused food aid, cited in McLure (2010).

²⁸ This was to some extent done in the case of the *bona fide* and popular opposition leader Ms Birtukan Mideqsa (see Footnote 10), who was given a long prison sentence on the basis of 'evidence' that would not stand up in a serious court of law. Behind the scenes, this was criticized by donor countries and she was subsequently released from her (second) period of imprisonment in October 2010.

African elections and present a brief evaluation of Ethiopia's most recent experience with elections in May 2010 in the light of these contributions.

Policy experiences and theory

Lindberg (2009b) has offered an interesting study on elections in Africa and is, by and large, optimistic about the generally positive influence of elections on the democratization process in Africa. He sees trends such as continued high voter turnout, the improvement of governments' legitimacy through elections and the constraining and cajoling of political leaders by elections as encouraging. His main recommendations are that election observation is needed (and discourages polarization) and that it is useful to invest in opposition forces and their activities.

In theory, these recommendations are attractive but in practice it is not that easy. For example, investing in the capacity of opposition seems an objective, logical step in a process of institutionalizing democratic structures and competitive procedures but donors will be accused by the incumbent regime of not being neutral or unbiased, even if they do not say that they would be in favour of opposition forces. These kinds of activities are easily seen as 'interference in internal affairs', as was evident in the 2005 Ethiopian elections.

Van de Walle (2009) has analyzed two decades of multiparty electoral politics in Africa. He considered three main questions. First, is democracy generally 'a good thing' for Africa? He seems positive about this. Africa's last two decades of democratization have perhaps also seen the continent's best years for economic growth and poverty alleviation in the post-colonial era. Democratization has also resulted in an increase in social spending and there is some evidence of this in Ethiopia too. Over the last two decades, economic growth has been substantial, with a growth rate of above 8% on average in the past few years according to government data. Nevertheless, democratic freedom and rights have not developed well, especially since 2005, and there has not been any causal relationship with this trend.

Van de Walle's second question was whether one could have democracy without elections. He disagrees with the suggestion that the absence of multiparty electoral politics could ultimately lead to good governance. There is no democracy without elections and donors should increasingly focus on the demand side of governance. The best predictor of how well an African country is doing is the regularity of political alternation (i.e. an orderly change of ruling party or national president).

We note that Ethiopia has not seen any change of government since 1991 so this is, in itself, a sign that democracy is not optimal, or is perhaps even absent. The question is whether the ideology of the EPRDF is informed by basic

democratic principles or whether the party is just organizing elections to try to maintain a democratic image for its donors. If it is just about image building then one could say that dysfunctional elections might even contribute negatively to the democratization process. Meanwhile, the population has been losing trust and confidence in the electoral record of a 'façade democracy' and shows little willingness to voluntarily participate in future elections, and certainly not by risking voting for the opposition (cf. Lefort 2007, 2010) because the election results per voting constituency show the power-holders – via the EPRDF-controlled National Electoral Board – what the actual division of votes was. There are plenty of empirical indications that constituencies with significant numbers of votes for the opposition, notably since the 2005 elections, have faced reprisals.²⁹ Popular faith in the judicial system is even less obvious. In general, a constant refrain in answers given by ordinary Ethiopians to questions about the justice system is that 'there is no law' (Amharic: *higg yälläm*). This may be an exaggeration but there is certainly a deep-seated scepticism about the fairness of court procedures, also regarding election complaints, and about the ease with which many judges can be bribed. The statement also reflects the view of many Ethiopians that the government ultimately can over-rule anything without being called to account.

Van de Walle also considered whether Africa has been continuing to democratize or, on the other hand, is regressing. Based on the *Afrobarometer*, he has suggested a stable commitment on the part of ordinary Africans to democracy (cf. also Bratton 2001) and the election machinery does appear to be grinding forward more effectively with each election. In general, he concludes that democracy is progressing despite the inevitable problems and constraints. But while we see patchy incremental changes in several countries, the process is precarious and reversible, and so this conclusion is somewhat premature. In Ethiopia, for instance, progress has been very limited and there is no firm commitment by the governing party to open and deliberate democracy in evidence. The 2010 elections have in fact shown consolidation of a trend of decreased democratic space, which set in following the May 2005 elections and was confirmed in a spate of restrictive laws. Little room is left for alternative views and votes, and oppositional voices are all too often insulted and delegitimized.

Van de Walle's main recommendation is that donors increase their support to NGOs and maintain communication with African governments on abuses of

²⁹ The same accusations emerged in the 2011 BBC Newsnight TV documentary recorded in Ethiopia and screened on 4 August 2011, attracting a lot of media stir and debate: <http://news.bbc.co.uk/2/hi/programmes/newsnight/9556288.stm>. See also M. Tran, 'Ethiopia Using Aid as a Political Tool', *The Guardian*, 5 August 2011.

power, notably within the executive branch. Both recommendations are very general, and even on this front, governments can anticipate donor measures to minimize the impact. This has happened in Ethiopia, where the new 2009 NGO law, the Charities and Societies Proclamation, drastically restricts (inter)national NGO activity and prohibits them from being active in the domains of human, civic and women's rights or receiving more than 10% of their income from abroad.³⁰

Donor dilemmas:

Measuring elections as a criterion of development commitment

As part of the Horn of Africa, Ethiopia is in a region still plagued by deep-rooted conflicts, stemming partly from colonial intervention and partly from historical and geo-political fault lines. It has been affected by conflicts along the Eritrean border, the Somali civil war, rebellions, refugee flows, drought and famine. However it has been seen by most donors as the most promising entity in the Horn, where peace, stability and sustainable development, terms which are found in all donor documents, can and have to be promoted. The official aims of donor efforts are to enhance public service delivery by the Ethiopian government, strengthen and empower civil society and the private sector, and improve government accountability and transparency.

In the run-up to the 2005 elections, it appeared that multiparty democracy in Ethiopia was taking off: there was active, content-based campaigning in the media by the EPRDF and opposition parties, and an EU observation mission was invited. However, the election and its aftermath were not up to the standards demanded and abuses of power by the EPRDF were shown, probably via the rigging of vote-counting, and there had been serious violations of human rights among opposition voters and candidates. The international community was initially very concerned about these issues. The mechanism for coordination among donors to Ethiopia, the Development Assistance Group (DAG), issued a strong statement saying that it was collectively reviewing the development cooperation modalities to Ethiopia in view of the negative aftermath of the elections. In December 2005, after a second round of killings the previous month, when security forces shot dozens of protesters, the budget-support donors – the UK, Canada, Ireland, Germany, Sweden, the World Bank, the European Commission and the African Development Bank – even planned to withhold a total of US\$ 370-375 million of earmarked support. Donors were then briefly unified in protest against the Ethiopian government, and the EU

³⁰ Cf. 'World Bank Urges Ethiopia to Ease Rules on NGOs', *Wall Street Journal*, 18 May 2009.

later mediated pacts between the opposition and the EPRDF. The critical donor dialogue with the government and threats of withholding financial support resulted in a new governance matrix being drawn up in which 'good-governance' improvements and actions were identified. This matrix is now part of Ethiopia's current Poverty Reduction Strategy Paper (PRSP).

Donors and the government also agreed in 2006 to a package of measures to improve governance and democratic institutions: the Democratic Institutions Program (DIP).³¹ Ownership of the programme was with the government of Ethiopia and the UNDP. The DIP is sponsored by many donors but it has not generally been considered a success (HRW 2010: 70-71) due to its focus on government-defined criteria.³² And interestingly, little is said in this DIP programme document on the importance of party organization, the role of opposition or free and fair elections. Many donors decided *not* to withhold funds after May 2005 but to reallocate them to other programmes, with sector earmarking and monitoring procedures. In this respect, most of the money was reallocated to the Protection of Basic Services (PBS) programme at the local level in an attempt to bypass the central authorities. Most donors thus maintained their aid levels by reallocating funds to the local authorities (*woredas*). Ethiopia's largest donor, the US, has continued to give the country close to 30% of its total aid in bilateral support.

After the 2005 elections, several donors chose to sharpen their strategy towards Ethiopia with a two-track policy. They have sought to contribute to the country achieving the Millennium Development Goals of alleviating poverty and have, in effect, supported its economic programme while improving democracy and human rights. They have supported programmes geared at improving good governance and democracy by strengthening civil society, encouraged the process of decentralization and bolstered democratic structures and human rights. To combat poverty and achieve the MDGs, they have also pursued policy dialogues, provided services at the local level, strengthened rural economic development, improved the investment climate and the private sector, and supported the education and health sectors.

The effects of this strategy, carried out half-heartedly, are difficult to measure. There are many influencing factors, for example, the so-called independent mindedness and unwillingness of the Ethiopian regime to enter into real dialogue on democratic values and power sharing, the insecurity of field data, and the lack of a monitoring structure (and even of *permission* to carry out

³¹ See the DAG website: www.dagethiopia.org.

³² For example, support is expressed for strengthening the state's 'Ethiopian Human Rights Commission' but compared to the already existing, independent Ethiopian Human Rights Council (EHRCO) this is not seen as a sufficiently credible institution.

proper monitoring). The government has resented what it sees as the conditions and requests of donors and the international community in general, although these are in line with internationally accepted and UN-chartered norms for democratic development, rule of law and accountability. When, for instance, the donor-country Development Assistance Group's report on options after the 2005 post-election crackdowns was seen as 'too critical', PM Meles Zenawi explicitly told donors to shelve it. And amazingly, the donors, again led by the UK, did so (cf. Borchgrevink 2008: 216). Another example was when the Netherlands put the restrictive CSO law, which prohibited most NGO activities, on the EU's agenda in Brussels in June 2008. In direct response, the Netherlands ambassador was called to account for his actions by the Ethiopian Minister of Foreign Affairs, who said that the Netherlands was 'interfering in internal affairs'. After the 2010 elections when the opposition won only *two* parliamentary seats (and with one of these, an independent, later declaring for the EPRDF), the Ethiopian PM anticipated a critical EU monitors' report and forbade them from coming back to Addis Ababa to present it. In a speech in November 2010, he incorrectly described the report as 'useless trash that deserves to be thrown in the garbage'.³³

Secondly, it is difficult to unite donor efforts. In practice, their different national interests are too conflicting to allow them to adopt a common policy towards Ethiopia. There is no discussion about negative governance trends but there are also other considerations too. Ethiopia is perceived to be a loyal partner in the 'fight against terrorism' and in attempts to resolve the problems in Somalia. It is playing a significant role in peace missions too, for example in Darfur, and, in July 2011 in Abyei, also in Sudan. Prime Minister Meles is an active leader on the world stage and has participated in the G20, the 2009 Copenhagen climate conference, the 2010 Cancún climate change conference and the IGAD and has visited both China and India. The ideology of the EPRDF government, advocating a self-declared, reinvented 'developmental state', finds support with many donors and EPRDF policy is seen by many as delivering results, being pro-poor, being directed at achieving the MDGs, and leading to annual economic growth of an estimated 7%-9%.³⁴ Even though this is a tenuous judgment and is based neither on sufficiently broad research nor on a reading of all the available studies, economic growth has indeed occurred and has positive effects on education, infrastructure and service delivery.³⁵ How-

³³ See P. Heinlein, 'Meles Clashes with EU about Election Report', *VOA News*, 15 November 2010.

³⁴ According to the African Development Bank figures: www.africaneconomicoutlook.org/en/countries/east-africa/ethiopia; cf. World Bank (2009: i-ii, 1).

³⁵ Donor support of ca. US\$ 25 billion over the past two decades has played a role.

ever, it is also quite selective and non-inclusive, and is going hand in hand with high inflation (especially food prices) and perennial food insecurity for millions of Ethiopians every year. Nor is the quality of all statistical data and figures provided by the government beyond debate.³⁶ In July 2011, the government even ran into an argument with the IMF and the World Bank over these figures and also about the World Bank critique concerning the ‘unrealistic assumptions’ of some key government programmes, like the 2010 Growth and Transformation Plan.

In the end, the geo-political considerations and the economic and poverty-alleviation results in Ethiopia are more important for most donor countries than good-governance indicators or the achievement of democratic freedoms and respect for human rights.³⁷ In other words, Ethiopia has, comparatively speaking, ‘good enough governance’ for many donors. Other considerations, notably from the UK, are that there is ‘no serious alternative’ to the EPRDP and that if donors increase their pressure on Ethiopia there is a risk that this may lead to their own exclusion. Clearly, Ethiopia has become more confident now that Chinese, Indian and Middle Eastern investments are increasing and without any accompanying requirements or conditions on human rights, rule of law and good governance. The Ethiopian government is increasing its leverage and playing one off against the other and some donors are now afraid that if they are too critical, they will lose influence (and business interests). In this bleak situation, support for democracy falls by the wayside³⁸ and the Ethiopian people will ultimately suffer more. Recent trends in donor-country policy, for example in the Netherlands, represent a shift towards economic investment, business ventures, environment and water issues. Governance and rule-of-law issues are now secondary and, in view of the disappointing 2010 elections, there is a sense of despondency about them.

³⁶ See ‘Meles in a Row with World Bank, IMF on Economic Performance’, in: Capital (Addis Ababa weekly), 10 July 2011. See also W. Davison, ‘Ethiopia’s Investment Plan May Be Unsustainable, World Bank Official Says’, Bloomberg News Agency message, 8 June 2011.

³⁷ Many subscribe to the rather condescending TIA (This is Africa) myth (cf. Zimeta 2010).

³⁸ See the dubious and fearful response by the DAG on the 2010 HRW report on possible aid misuse: ‘DAG Statement – Human Rights Watch (HRW) report: Development without Freedom – How Aid Underwrites Repression in Ethiopia’, 21 October 2010, www.dagethiopia.org.

Concluding remarks

Elections in a political system that allows no real political communication, i.e. where citizens' voices cannot make a difference, have little meaning. Indeed, elections according to a Western model presuppose a society that is open to alternative views, institutional dialogue and incumbents that could be defeated. These conditions are absent, and while there was some prospect that the 2005 elections would further them the old autocratic pattern was fully confirmed in 2010. Lindberg's (2009b: 31, 45) general view that repeated elections create democratic momentum or are a 'powerful force for political change' cannot be corroborated.

It should be remembered that Ethiopia, like many other African countries, is a 'limited access' society and its political system and resources (including the business world, cf. the World Bank 2009 report) are quite closed and virtually monopolized. Elections are barely useful in such a non-enabling context where even communication about elementary policies is suppressed. As Helen Epstein noted in her discussions with World Bank Ethiopia director Ken Ohashi:

In order to survive, the poor farmers I met in southern Ethiopia may not need a change of government every four to eight years, desirable as this may be. But at the very least they do need the political space to negotiate grievances concerning everyday well-being, such as perceived unfair or politicized exclusion from jobs and humanitarian programs, overtaxation, and decisions about how to manage their land. Right now many Ethiopians don't have this space, and no vertically administered food aid or agricultural extension program will ever substitute for it.³⁹

The title of this chapter, 'Democracy Deferred', does not just refer to the Ethiopian leadership's strategy of delay or redefinition of democracy by closely organizing elections. The Western donor community seems to be following the same strategy of delay, judging Ethiopia either as 'not mature enough' for parliamentary democracy, fair and free elections or the rule of law (even according to Ethiopia's constitution), or not realistically seeing themselves as having the leverage required to influence events. They thus remain content with the economic growth figures and infrastructure investments that the government is pursuing. They also see the regime as a beacon of stability in the wider Horn in comparison with Sudan or the Somali mayhem, and while in the latter case there is a geo-strategic grain of truth in this approach, the argument is problematic. As a growing body of literature shows, even Ethiopia itself is not stable, with its rebellions, clashes and significant discontent. The moral and political issues are unresolved about whether and how to support countries with façade democra-

³⁹ H. Epstein, Reply to Ohashi, on 'Cruel Ethiopia', 24 June 2010: www.nybooks.com/articles/archives/2010/jun/24/cruel-ethiopia

cies or illiberal systems that impose policies top-down, insufficiently respect human rights, repress the media, co-opt the population into a one-party structure and prevent elections from running their course. Donor countries and their aid policies have not played a visible role in promoting rule of law in Ethiopia or in urging the regime to respect its own constitution. As van de Walle (2005: 83) already noted, the international aid system needs serious reform. But none has as yet been implemented unless we count the growing 'securitization' of development aid and the rapid rise of China as an economic competitor of traditional donors in Africa as such.

The 2011 wave of violence and destabilizing protest in various North African and Arab countries however shows that betting on the stability of (now toppled) autocratic regimes was risky and may come to revisit those who support them. Admittedly, the options in the international system are limited – political, let alone military, interference and pressure are fraught with problems – but continued engagement is necessary, even if illusions about meaningful change in the short term are not cherished. Democratization is a multifaceted and slow societal process that took a few centuries to yield mature and institutionalized systems in the West. But there is no *a priori* reason to suppose that it will need as long in today's developing countries in view of the democratic preferences of their citizens, and it would be condescending to claim that they cannot learn from the experience of others or deal with the totally different globalized setting of today. The Ethiopian government always speaks of the country being 'in a process of democracy' – this can be extended into the future indefinitely and they make no hurry. They are stimulated in this strategy of delay by the inconsistent if not indifferent approach of foreign players in Africa. The Chinese and other self-declared 'political non-interferers' in Africa have no strategy in this respect. Western donor countries, although betting on developmental dictators or autocrats, sometimes think that when economies grow nicely then in the long run democratic structures, constitutional rule and equitable redistribution policies will eventually emerge by themselves. They appear to run out of options and seem satisfied with 'good enough governance' (cf. Grindle 2004), but forget that regimes in developing countries are now so interlocked and influenced by global processes and developmental initiatives that many shortcuts to democratic governance improvement are available, if the political will is there. Ethiopia has also signed international treaties, has a constitution with many (in name) democratic clauses, has an overall developmental rhetoric and societal dynamism, is a partner in multilateral development programmes and international affairs, and should be encouraged to live up to the (basics of) international norms and practices of democratic rule. There is a global politico-legal discourse on rights and consensus governance that countries can no longer retreat from (cf. Merry 2006: 110). In this sense, some (aid) conditionalities

remain inevitable. Policies to enhance political representation and interaction, foster inclusive growth, realize more secure business conditions and create a trustworthy judiciary would produce more domestic and regional stability. In addition, the events in North Africa, Syria and Bahrain in 2011 have shown that the clamour for democracy, justice and law is growing globally. Donor countries that pride themselves on striving for democracy and growth for developing countries would do better to continue to critically engage the neo-autocratic developing countries to whom they give funds, as well as to redefine the terms of their engagement. As a recent World Bank (2009: 103) report on reforming the Ethiopian investment climate said: 'a tolerance for dissenting views and alternatives to established policies is an essential ingredient to the reform'. This is cautious criticism, and urges a general attitude from which Ethiopia, both in politics and in the economy, would greatly benefit. It also applies to civic and media rights, which still exist in the country but are under serious pressure.⁴⁰ More meaningful partnerships – not only with the government elite – could be built that would draw in and benefit the population. The development of a more independent justice system – not only on paper but also in practice – is key here.⁴¹ This is, however, very unlikely in the current political atmosphere in Ethiopia, and donors are not seen to be acting on it. Although explainable in terms of rapidly changing international business competition and a fixation on economic growth as a panacea for everything, donor countries, when dealing with autocratic regimes, cannot match their own alleged ideals of furthering democratic governance and rule of law with their own practices. This apparent incapacity is one of the enduring policy paradoxes marking their record in post-Cold War Africa.

⁴⁰ The latest bad turn was the 'anti-terrorism' law (FDRE, 'Anti-Terrorism Proclamation', *Federal Negarit Gazeta* 15(57), 29 August 2009) that criminalizes any reporting on or citing of people deemed affiliated to a 'terrorist organization' as defined by the government, with indications that this extends to designated opposition parties. The element of arbitrariness and intimidation is obvious, and this may close down independent reporting on opposition activities. See Argaw Ashine, 'Ethiopian media hit by new anti-terrorism law', *Africa Review* (Nairobi), 24 August 2011.

⁴¹ There have been various initiatives in this field but the aspect of democracy building via the judicial system is not entertained by donors. See the World Bank programme on 'Reforming the Ethiopian Justice System', where the emphasis again is on 'capacity building': <http://go.worldbank.org/VFRY47DIR0>.

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La production d'un nouveau constitutionnalisme en Afrique : Internationalisation et régionalisation du droit constitutionnel

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Depuis l'organisation de la première conférence nationale en février 1990 au Bénin, le constitutionnalisme semble avoir connu un essor en Afrique. Avant cette date, un trait du continent était en effet d'avoir des constitutions sans constitutionnalisme. Le droit constitutionnel n'a donc commencé à y jouer un rôle d'instrument de régulation du pouvoir qu'à partir de cette date. Mais, comme si le continent obéissait à la théorie des cycles constitutionnels, après cette période d'euphorie caractérisée par le renforcement du pluralisme politique, l'approfondissement de la décentralisation, la création de juridictions constitutionnelles autonomes et les premières alternances pacifiques au pouvoir, les États africains ont, pour la plupart, connu un certain recul de l'État de droit et de la démocratie. Il semble pourtant que ce constitutionnalisme africain connaisse, depuis un certain temps, un renouveau du fait que le droit constitutionnel s'internationalise progressivement. Ce mouvement se manifeste essentiellement de deux manières : D'abord, par une influence grandissante des normes du système juridique international sur l'ordonnement interne des États africains ; ensuite par une généralisation des meilleures pratiques constitutionnelles nationales à l'échelle du continent.

Introduction

A tort ou à raison, l'analyse de l'évolution des pays africains depuis un certain temps prend sa source implicitement dans les bouleversements qui sont intervenus sur le continent en 1989 et 1990 (Conac 1993, 2001).¹ Replacer cette évolution dans son contexte revient généralement en effet à reconstruire une connaissance du droit constitutionnel et de la science politique en Afrique autour des premières conférences nationales, notamment celle du Bénin en 1990.² Ce mouvement, il est vrai, a connu une ampleur phénoménale et des effets durables par sa ramification dans plusieurs pays de l'espace francophone.

Il s'est manifesté notamment par une implosion imprévue et imprévisible des régimes politiques africains, qui a eu une influence aussi bien sur les systèmes de gouvernance eux-mêmes que sur les organisations internationales. Les instances de concertation et de décision comme l'OUA (Organisation de l'Unité Africaine) et la CEDEAO (Communauté Economique des Etats de l'Afrique de l'Ouest), surpris par la profondeur du mouvement de revendication pour plus de démocratie, ont dû se réajuster en se donnant une nouvelle « raison d'être » (Bekoe & Mengistu 2002). Un des effets pervers de ce mouvement a été l'instabilité des Etats qui n'étaient pas préparés à répondre à cette quête de démocratie. La refondation des organisations internationales africaines s'est opérée pour l'essentiel autour de trois pôles : La résolution des conflits, la promotion de l'Etat de droit et des droits de l'homme et la lutte contre la pauvreté.³ Les deux premiers ont provoqué un regain d'intérêt pour le constitutionnalisme en Afrique. Ce dernier y était en effet purement formel jusqu'à ce qu'il est convenu d'appeler l'ouverture démocratique. Il sera désormais entendu sur le continent au sens d'un encadrement juridique et de limitation de l'exercice du pouvoir politique. C'est une nouveauté dans la mesure où on peut soutenir aujourd'hui, à la lumière de l'expérience des pays de démocratie avancée, qu'il a longtemps existé en Afrique des constitutions sans constitutionnalisme. C'est progressivement, sous la pression de cette demande de plus d'Etat de droit, de démocratie et de respect des droits de l'homme, qu'un droit constitutionnel substantiel commence à voir le jour sur le continent africain (Bourgi 2002: 721). A partir de ce moment, comme dans d'autres pays européens, le droit constitutionnel tend de plus en plus à devenir la branche maîtresse du droit public interne. Cependant, bien qu'étant en progrès par rapport au droit constitutionnel qui se faisait au début des indépendances, le nouveau droit constitutionnel sur le continent reste encore largement archaïque :

¹ Sur la transition démocratique en Afrique, voir Conac (1993) et Conac (2001: 29).

² Sur la conférence nationale du Bénin, voir Dossou, en Conac (1993 : 179).

³ Le passage de l'Organisation de l'Unité Africaine à l'Union Africaine est symptomatique à cet égard.

Il continue de privilégier les aspects formels et procéduraux de ce droit par rapport à son contenu matériel. Ce droit constitutionnel semble donner la primauté à l'organisation d'élections libres comme fondement quasi-exclusif de la légitimité politique (Kokoroko 2004: 152). Le droit constitutionnel classique revêtait, il est vrai, deux dimensions : Une partie consacrée à la théorie générale et un aspect institutionnel. Le droit constitutionnel moderne en revanche, qui correspond à la naissance du constitutionnalisme, ajoute deux nouvelles dimensions : Les droits et libertés fondamentaux d'une part, la justice constitutionnelle d'autre part.

Le renforcement de ces deux nouveaux aspects du droit constitutionnel en Afrique du moins a été, curieusement, en large partie, le résultat de la contribution des institutions internationales à la résolution des problèmes d'ordre interne des Etats. Il en a été ainsi notamment de la CEDEAO, de l'UA (Union Africaine) et de l'OIF (Organisation Internationale de la Francophonie) (Cf. Massart & Rossens 1990).⁴ Ces organisations ont, chacune avec les moyens dont elle dispose, participé à une internationalisation et à la régionalisation du droit constitutionnel. L'implication de telles institutions dans la construction d'un droit interne des Etats africains peut paraître étrange a priori, en raison de l'attachement viscéral de ces derniers au sacro-saint principe de la souveraineté et de la nature même de ces organisations. En réalité, les revendications des citoyens adressées aux pouvoirs publics sont relayées par des associations de la société civile qui interpellent les organisations interétatiques. Les grandes organisations internationales africaines comme le CEDEAO accordent ainsi de plus en plus un statut d'observateur à des associations chargées de la promotion des droits de l'homme et collaborent plus régulièrement avec elles dans le traitement des crises politiques. Ces organisations sont ainsi devenues, par la force des choses, soit des acteurs de la vie politique interne des Etats africains surtout, soit des arbitres du jeu. C'est à ce titre qu'elles sont aujourd'hui les observateurs reconnus des élections nationales. Comme les problèmes que rencontrent les Etats africains présentent, à plusieurs égards, des similitudes, ces organisations ont réussi, progressivement, à redéfinir leurs objectifs en tentant d'apporter une réponse adéquate aux nouveaux défis du continent. Des organisations, créées à l'origine pour favoriser la décolonisation du continent et son unité ou pour promouvoir l'intégration économique, se sont ainsi reconverties dans la gestion des conflits, la lutte contre la pauvreté et l'accompagnement des processus démocratiques. Cette création progressive d'une communauté inter-

⁴ Cf. L'Acte constitutif de l'Union africaine adopté le 11 juillet 2000, qui est entré en vigueur le 26 mai 2001, et la Déclaration de Bamako, adoptée le 3 novembre 2000 par les Ministres et Chefs de délégations des Etats et gouvernements des pays ayant le français en partage.

nationale africaine, plus ou moins efficace, est appelée à se renforcer (Bekoe & Mengistu 2002). De plus en plus, on assiste à la constitution d'un noyau de valeurs, de principes et de normes créés par ces organisations, généralement sous la pression de la société civile, au regard desquels le caractère démocratique des régimes politiques est apprécié.⁵ On pourrait ainsi parler de certaines exigences internationales dont l'ensemble constitue des normes de référence pour les citoyens mais aussi et surtout pour les partis d'opposition. Ces derniers ont revendiqué, du moins de façon théorique, des droits pour les citoyens et des obligations pour les Etats. Ces normes de référence correspondent en général à des droits pour les citoyens et à des obligations pour les Etats. Ces principes, bien que conçus pour l'essentiel par un système international, ont tendance à s'intégrer, même si c'est de façon souple et formelle, à l'ordonnement juridique ou à tout le moins politique (Olinga 1999: 61).

Cette création d'un nouvel ordre politique et constitutionnel soulève incontestablement un certain nombre de problèmes relatifs par exemple aux sujets du droit (les Etats, les organisations civiles, les citoyens) au contenu et à la valeur des règles créées par le système international, à l'application de ces règles et à leur sanction. L'opportunité de la création de principes politiques ou de règles juridiques à l'échelle régionale ne va pas de soi. Certaines questions relevant de la compétence domestique de l'Etat, se pose en effet le problème de savoir si la légitimité, qui était jusqu'alors une affaire de droit interne, ne risque pas de devenir une question relevant du droit international public. De même, les rapports internationaux sont devenus encore plus complexes, en raison notamment de la multiplication des acteurs intervenant dans les relations internationales. Il importe alors de savoir à quel titre et dans quelle mesure les personnes privées par exemple sont parties prenantes dans ce processus. On constate aussi que dans les systèmes politico-juridiques nationaux, il est souvent fait référence à un certain nombre de principes sans préciser ni leur contenu réel ni leur force juridique. C'est toute la question du sens à attribuer à certains droits et de leur place dans l'ordonnement juridique des Etats.

L'objet de cette réflexion est de rendre compte de cette internationalisation du droit constitutionnel en cours sur le continent africain. Elle passe par la réponse à quatre questions : Dans quel contexte se produit cette internationalisation du droit constitutionnel, par quel processus s'opère-t-elle, quel est son contenu et quelles en sont les limites ?

⁵ On remarque le même phénomène en Europe. A ce sujet, voir Dehousse (2001).

Le contexte de l'internationalisation du droit constitutionnel

L'étude de ce contexte est déterminante. Un des éléments structurants des sociétés politiques africaines actuelles est l'identité des défis auxquels ils sont confrontés et qui tournent autour du caractère pathogène des conflits sur le continent. Ces conflits ont généralement, de nos jours, une origine nationale ou intra-étatique, mais finissent par acquérir un caractère international. Ce sont donc des conflits nationaux qui s'internationalisent (Kanté 2003 : 37). Dès lors, leur résolution va appeler des solutions régionales. On l'a vu dans les cas du Darfour, de la presqu'île de Bakassi, de la Côte d'Ivoire et du conflit érythréo-éthiopien.

Des conflits qui s'internationalisent

L'application des indices servant à mesurer le degré d'exposition d'un pays à des probabilités de conflits montre que presque tous les pays africains sont potentiellement sujets à des risques de tension. La plupart de ces conflits sont qualifiés, de façon parfois artificielle, soit de politiques soit d'ethniques. En fait, il s'agit pour l'essentiel de conflits, de tension ou de crise ayant pour origine la lutte pour l'accès au pouvoir de régions ou de groupes dans une position d'infériorité ou d'inégalité ou aux sources de revenus ou pour des questions de redistribution. En milieu urbain, ce sont essentiellement des conflits opposant des partis en lutte pour le pouvoir. Les mesures considérées comme un « politicide », consistant en une élimination systématique d'opposants politiques, sont dénoncées par la société civile qui internationalise leur contestation. Les crises et tensions peuvent aussi naître, en milieu rural, de la dispute autour de l'accès et de la gestion des ressources naturelles. Mal gérées, elles dégénèrent en conflits nationaux tout en se politisant alors qu'au départ, il s'agissait d'une question économique et de survie.

Quelques exemples suffisent à confirmer cette nature et cette identité des conflits en Afrique. Le génocide au Rwanda en 1994 a eu comme conséquence, entre autres, d'embraser toute la région des grands lacs. On peut ainsi considérer que la situation actuelle de la République Démocratique du Congo (RDC) est, au moins, en large partie le prolongement des affrontements qui ont eu lieu au Rwanda. Paradoxalement, la situation s'est relativement normalisée au Rwanda et au Burundi, alors que la tension reste encore vive en RDC, aussi à cause de fractures sociopolitiques internes. Avec les conflits en Sierra Leone et au Liberia, tous les pays limitrophes, notamment la Guinée et la Côte d'Ivoire, ont été touchés. Dans le cas de la Côte d'Ivoire, le Mali et le Burkina en ont subi les conséquences. L'onde de choc de la tension au Darfour s'étend au moins jusqu'au Tchad et en Centrafrique. Enfin, au moment des troubles qui ont

suivi la disparition du président togolais, le Ghana et le Bénin ont connu un début de déstabilisation.

La cartographie des conflits en Afrique montre que leur internationalisation se fait en deux temps. La plupart du temps, ils naissent de la dispute pour l'accès et la gestion des ressources naturelles sur le sol d'un pays déterminé ; ensuite, ils provoquent à plus ou moins long terme des déplacements de populations qui, à leur tour, entraînent une promiscuité avec les autochtones. Cette situation finit par faire éclater des conflits d'intérêts. Ces confrontations, au départ purement locales, mais mal gérées, finissent par devenir un enjeu national. Chacune des parties fera alors appel à la solidarité internationale. Ainsi, au pire, les différentes composantes de cette communauté, en fonction de leurs intérêts, prendront partie chacune en ce qui la concerne pour une des factions en conflit. Au mieux, les institutions internationales, d'une seule voix, exercent des pressions sur le gouvernement du pays concerné pour l'amener à trouver une solution au problème posé. C'est alors que le conflit s'internationalise.

La nécessité de solutions régionales

Aucune solution nationale ne sera pertinente pour ce genre de conflit qui caractérise le continent africain. Les solutions régionales s'imposent en raison de l'impact des crises mais aussi de leur mode de règlement. Les organisations internationales sont saisies ou se saisissent et jouent le rôle soit de cadre de négociations soit d'instruments d'action pour la résolution de ces conflits. Elles se trouvent ainsi souvent en situation de proposer des solutions ou d'imposer des sanctions aux parties. C'est ainsi que pour la Côte d'Ivoire, sont intervenues, pour s'en tenir aux organisations multilatérales : La CEDEAO, l'UA, l'OIF et l'ONU (Organisation des Nations Unies). Plusieurs accords ont alors été signés dont celui de Linas Marcoussis est considéré comme la base du processus de règlement de la crise.⁶ La nature juridique de ces accords a peut-être été discutée, mais il reste incontestable que son contenu renvoie généralement aux principes de base qui régissent actuellement l'organisation et le fonctionnement des pouvoirs publics ivoiriens. Mais l'internationalisation résulte aussi en partie du fait que les termes de l'accord sont facilement transposables à d'autres situations sur le continent. Pour les cas de la Sierra Leone et du Liberia, l'ONU, la CEDEAO et l'UA ont été fortement impliquées et sont à l'origine des multiples accords de cessez-le-feu signés entre les différentes factions en guerre. Mais le retour définitif de la paix passait nécessairement par

⁶ Cet accord a été adopté au terme de la table ronde des forces politiques ivoiriennes qui s'est tenue du 13 au 23 janvier 2003 à Linas Marcoussis, en région parisienne.

des accords avec des pays voisins qui ont été parfois des bases de repli pour des « mercenaires » ou des « rebelles ».

Dans tous les cas, la solution régionale implique une pacification de la situation et un retour à la légalité constitutionnelle. Le droit en vigueur étant contesté, la solution consiste à lui substituer un autre droit, plus consensuel, qui tienne compte des aspects internes et externes de la crise. Ce droit négocié sous l'égide des organisations internationales accompagne généralement le pays en crise jusqu'à l'organisation d'élections démocratiques devant permettre la mise en place d'autorités légitimes. De ce point de vue, le droit généré par ces instances comportera des principes de droit constitutionnel d'inspiration internationale.⁷

Le processus d'internationalisation du droit constitutionnel

Il est relatif à la manière dont le droit constitutionnel s'internationalise. Le contexte détermine largement le processus. L'initiative revient soit aux Etats qui s'inspirent des principes et règles en cours dans d'autres pays, soit aux organisations internationales qui appliquent à un pays un certain nombre de règles de conduite ayant montré leurs vertus ailleurs dans les accords de paix (Sindjoun 1997; Chidjou 2004: 3). L'analyse du processus renvoie donc à l'identification de ses initiateurs et des techniques utilisées. On se rend compte alors qu'il obéit à deux mouvements allant en sens contraire : L'un vient d'en haut, alors que l'autre part du bas.

L'internationalisation par le haut

Comme nous l'avons vu, l'initiative de la création et du suivi de l'application de certaines règles relevant du droit constitutionnel appartient parfois aux organisations internationales, aux juridictions internationales ou à des puissances étrangères.⁸ Il s'agit d'une nouvelle donne. En ce qui concerne les organisations internationales, l'internationalisation est le résultat de l'affirmation, dans leurs chartes respectives, de principes relatifs à l'organisation et au fonctionnement des institutions publiques nationales. Deux exemples suffiront à démontrer cette pratique. Ainsi, l'Acte constitutif de l'UA prévoit, à l'article 3 (g), parmi ses objectifs, « la promotion des principes et des institutions démocratiques, la

⁷ C'est le cas en Côte d'Ivoire avec l'accord de Linas Marcoussis et ceux qui ont suivi qui se substituent sur certains points à la Constitution de ce pays. L'organisation et le fonctionnement des institutions politiques de cet Etat sont d'ailleurs fortement déterminés par les résolutions du Conseil de sécurité de l'ONU depuis un certain temps.

⁸ Pour l'Europe, à titre d'exemple, voir J.-F. Flauss (1995: 373).

participation populaire et la bonne gouvernance ». De même, à l'article 4 (m), dans la liste des principes qui régissent son fonctionnement, l'Acte cite « le respect des principes démocratiques, des droits de l'homme, de l'Etat de droit et de la bonne gouvernance ». Dans le même sens, on peut noter aussi des déclarations adoptées par l'OUA, allant dans le sens de la régulation du fonctionnement des systèmes politiques de ses Etats membres. Il en est ainsi de la Déclaration sur le cadre pour une réaction de l'OUA face aux changements anticonstitutionnels de gouvernement,⁹ de la Déclaration sur les principes régissant les élections démocratiques en Afrique¹⁰ et de l'article 30 de l'Acte constitutif de l'UA qui prévoit que : « Les gouvernements qui accèdent au pouvoir par des moyens anticonstitutionnels ne sont pas admis à participer aux activités de l'Union ».¹¹

La Déclaration de Bamako de l'OIF va encore plus loin dans cette nouvelle démarche qui consiste, de la part d'une organisation internationale, à régir le fonctionnement des institutions politiques nationales. Elle confirme en effet l'adhésion des Etats membres aux principes de la démocratie interne et comporte des engagements visant la consolidation de l'Etat de droit, la tenue d'élections libres fiables et transparentes, une vie politique apaisée et la promotion d'une culture démocratique intériorisée et le plein respect des droits de l'homme. Mais, en outre et surtout, la Déclaration a prévu un ensemble de mesures détaillées pour le suivi des engagements pris par les Etats membres et la sanction de leur violation. Dans le même ordre d'idée, on pourrait citer la Déclaration de Saint-Boniface adoptée le 14 mai 2006 par les Ministres et Chefs de délégations des Etats et gouvernements des pays ayant le français en partage lors de la conférence ministérielle de la Francophonie sur la prévention des conflits et la sécurité humaine.

Ces textes, il est vrai, n'ont pas tous une valeur juridiquement contraignante. Cependant, progressivement, ils répètent un certain nombre de principes qui, à force de se stratifier, finissent par constituer un corpus de règles admises par la communauté africaine. Tous les acteurs de la vie politique, notamment la société civile de plus en plus présente, s'approprient ce corps de règles qui

⁹ Déclaration adoptée par la 36^{ème} session ordinaire de la Conférence des Chefs d'Etat et de Gouvernement tenue à Lomé du 10 au 12 juillet 2000.

¹⁰ Déclaration adoptée par la 38^{ème} Conférence des Chefs d'Etat et de Gouvernement tenue à Durban le 8 juillet 2002.

¹¹ En réalité, cet article ne fait que reprendre la Déclaration de Lomé de 2000 sur le cadre pour une réaction de l'OUA face aux changements anticonstitutionnels de gouvernement. Mais avant même cette date, l'organisation avait déjà adopté des décisions allant dans le même sens à Alger déjà en 1999.

finissent par devenir des normes de référence pour tous.¹² C'est en effet à partir du respect de ces règles, plus qu'en fonction des constitutions, que se fait largement maintenant l'évaluation des régimes politiques africains. La création de nouvelles juridictions internationales africaines ne fait d'ailleurs que confirmer cette tendance à l'internationalisation du droit constitutionnel. Elles seront en effet amenées, dans les années à venir, à produire une jurisprudence qui va s'appuyer sur les principes dégagés par les organisations internationales et leur donner un contenu précis et une force juridique incontestable.¹³

L'internationalisation par le bas

Elle consiste, comme on l'a vu, en une tendance des pays africains à reprendre, sur des questions spécifiques, notamment les élections, des normes qu'on peut considérer comme appartenant au patrimoine commun des pays en transition démocratique (Cf. Drago *et al.* 2010). On relève en effet, à quelques nuances près, les mêmes dispositions dans les constitutions des pays africains. Il en est ainsi de la création d'autorités administratives indépendantes comme les Commissions Electorales Nationales (CENA) et la généralisation des juridictions constitutionnelles chargées du contentieux électoral.

Dans ces cas, l'internationalisation résulte moins de l'application de normes produites par des institutions internationales que de la reprise, par un Etat, de dispositions figurant dans les constitutions d'autres pays. Dans la même région, un pays ayant connu une trajectoire particulière peut servir de modèle aux autres, même si certaines règles font l'objet d'une nécessaire adaptation. Ainsi, le Bénin ayant ouvert le cycle des conférences nationales en Afrique francophone, le régime politique qui en est issu a servi de source d'inspiration à beaucoup d'autres pays (Cf. Dossou 1993: 205). La Constitution béninoise de la transition ayant prévu un régime présidentiel, ce type est devenu celui de la plupart des pays africains. On retrouve d'autres similitudes entre les constitutions des pays africains. Cet échange de pratiques a contribué à la formation et à la diffusion progressive d'un droit constitutionnel régional. Son maintien est

¹² Sur l'évolution du processus démocratique vers la constitution d'un corps de règles communes aux pays africains en matière d'organisation des élections, voir Organisation Internationale de la Francophonie, Bilan des Conférences nationales et autres processus de transition démocratique, Cotonou (Bénin) 19-23 février 2000, *Actes de la Conférence régionale africaine préparatoire, IVème Conférence internationale sur les démocraties nouvelles ou rétablies, Cotonou (Bénin) 4-6 décembre 2000*, 2^{ème} édition revue et augmentée sous la direction de Christine Desouches.

¹³ Cf. Le protocole relatif à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples, adopté le 10 juin 1998 et le protocole de la Cour de justice de l'Union africaine, adopté le 12 juillet 2003.

assuré par l'organisation de rencontres périodiques, à l'occasion desquelles une synthèse et un bilan des pratiques sont régulièrement faits.¹⁴ On peut cependant regretter que le droit comparé ne soit pas encore une source du droit constitutionnel sur le continent malgré le développement des juridictions constitutionnelles et d'une jurisprudence au moins quantitativement appréciable (Cf. Sindjoun 2009).

Le contenu du droit constitutionnel international

Le processus décrit plus tôt a donné naissance à un ensemble de normes communes à un nombre de pays de plus en plus important en Afrique. Cela signifie qu'aux normes purement internes, viennent se greffer de plus en plus souvent, sur le continent, des principes émanant du système juridique international. Le droit constitutionnel des années qui ont immédiatement suivi les indépendances est donc en pleine mutation. Le nouveau droit constitutionnel en voie de création reste encore classique à certains égards du fait qu'il revêt fondamentalement un double aspect : Institutionnel et relationnel. Le premier correspond aux modalités d'organisation des organes politiques ; le deuxième concerne les rapports entre l'Etat et les citoyens. Mais son contenu évolue.

Le droit constitutionnel institutionnel

L'aspect le plus connu et le plus étudié du droit constitutionnel africain, depuis 1990, concerne certainement le droit des élections.¹⁵ Les Etats africains, francophones notamment, ont formalisé un certain nombre de règles relatives à l'organisation des élections qui constituent un code de conduite pour tous. Les textes constitutionnels, législatifs ou réglementaires en la matière, bien qu'ayant une portée nationale, sont assimilés par les observateurs internationaux qui peuvent évaluer leur respect à l'occasion des différents scrutins. Presque toutes les élections sont organisées selon le même schéma. Il est ainsi devenu possible de juger du degré de transparence d'une élection sans connaître le code électoral du pays.

De même, en ce qui concerne le statut du chef de l'Etat, notamment la durée de son mandat, les Constitutions africaines tendent presque toutes aujourd'hui à la limiter à cinq ans, renouvelable une fois.¹⁶ Elles tirent ainsi les conséquences

¹⁴ Cf. Le bilan des Conférences nationales et autres processus de transition démocratique, op. cit.

¹⁵ Depuis que les élections sont devenues pluralistes en Afrique à partir de 1990, elles font régulièrement l'objet d'études en droit constitutionnel et en science politique.

¹⁶ Il en est ainsi de l'article 27 de la Constitution du Sénégal aux termes duquel : « La durée du mandat du Président de la République est de cinq ans ». « Le mandat est

de l'exercice du pouvoir pendant la période du parti unique avec son corollaire, la personnalisation du pouvoir. Curieusement, on note cependant une tendance, depuis quelques années, à la remise en cause de cette règle qui se développe. Il en est ainsi notamment du Tchad,¹⁷ du Togo,¹⁸ du Burkina Faso¹⁹ et du Gabon.²⁰ En ce qui concerne l'éligibilité, certaines constitutions limitent l'âge des candidats à un nombre d'années souvent choisi pour exclure un adversaire. Il s'agit de lois de circonstance et, par suite, de complaisance, qui font malheureusement de plus en plus partie de la réalité en Afrique. La société civile tente de s'opposer à ces pratiques, sans grand succès, sous le contrôle de juridictions constitutionnelles désarmées devant de telles situations.

Dans certains cas spécifiques comme celui de la Côte d'Ivoire, l'empreinte des normes émanant de l'ordre international est encore parfois plus forte. Ainsi, ce sont les accords complémentaires à celui de l'accord politique de Ouagadougou qui ont, d'une part, posé le principe du gouvernement d'union nationale, d'autre part, entériné la désignation par le gouvernement de la société SAGEM-SECURITE comme opérateur technique pour l'identification et l'inscription des électeurs sur les listes électorales et, enfin, fixé le calendrier pour le regroupement des ex-combattants de même que les échéances du redéploiement de l'administration territoriale avant les élections. De ce fait, des textes ont dû être pris parfois pour adapter l'ordonnancement juridique interne à ces accords. C'est le cas de l'ordonnance du 14 avril 2008 portant ajustement du code électoral pour les élections de sortie de crise.

Le droit constitutionnel relationnel

Pour l'essentiel, il s'agit du droit substantiel qui consacre les droits des citoyens face à l'Etat. De ce point de vue, on note une tendance qui se dégage parmi les pays africains. Aussi bien dans les résolutions des organisations internationales que dans les constitutions et les lois, on remarque l'affirmation formelle d'un certain nombre de droits en faveur des citoyens. Quel que soit l'Etat dont ils sont ressortissants en Afrique, les individus jouissent de plus en plus des mêmes droits. L'importance accordée à la faculté d'être titulaire de droits (et de plus en

renouvelable une seule fois ». Cette disposition se trouve maintenant dans presque toutes les constitutions des pays d'Afrique de l'Ouest.

¹⁷ Le Tchad a supprimé la limitation du nombre de mandats présidentiels le 26 mars 2004.

¹⁸ Le Togo a révisé sa constitution le 31 décembre 2002 pour supprimer la limitation du nombre de mandats présidentiels.

¹⁹ Une révision de l'article 73 de la Constitution du Burkina Faso limitant le nombre de mandats présidentiels a eu lieu le 27 janvier 1997.

²⁰ Une révision intervenue le 30 juillet 2003 permet une élection du président de la République du Gabon sans limitation de mandat.

plus souvent d'obligations) tend à faire passer la citoyenneté avant la nationalité. Ainsi, la situation des réfugiés dans les différents pays en Afrique est évaluée à partir du respect des conventions internationales auxquelles les Etats concernés sont parties. Cette évolution, comparable à celle qui se développe en Europe dans le cadre de l'intégration et tendant à une harmonisation des droits des citoyens, est extrêmement positive (Olinga 1999; Flauss 1995). Dans les contentieux qui se déroulent devant les juridictions nationales, on constate que les normes de référence invoquées par les requérants trouvent souvent leurs sources dans des conventions internationales relatives aux droits de l'homme : la Charte africaine des droits de l'homme et des peuples, l'Acte constitutif de l'Union africaine, la Déclaration de Bamako et bien d'autres textes à caractère plus général comme la Déclaration des droits de l'homme et du citoyen ou la Déclaration universelle des droits de l'homme. Le contrôle de « conventionnalité » devient, de ce fait, de plus en plus important dans le contentieux national des pays africains.

Il est difficile de présenter une synthèse exhaustive et cohérente de ces droits politiques autour de principes axiomatiques. Il reste cependant possible d'en retenir quelques-uns, qui semblent s'imposer aujourd'hui :

- Le droit à des élections libres et transparentes semble devenir aujourd'hui un des principes majeurs du droit constitutionnel africain (Kokoroko 2004; Kaiser 2000: 435; Garrone 2001: 1417). Il donne en effet un contenu effectif et substantiel au constitutionnalisme parce qu'il exprime le droit sous-jacent, pour les gouvernés, de demander des comptes aux gouvernants. Il permet de soumettre les autorités politiques à un contrôle périodique et donne un fondement à leur légitimité démocratique. Son importance est attestée tant par les dispositions normatives des constitutions que par les mesures pratiques d'organisation des scrutins. Au plan institutionnel, presque tous les pays africains ont mis sur pied, du moins formellement, des Commissions Electorales Nationales Autonomes ou Indépendantes.
- La liberté de candidature à des élections a aussi acquis une assise juridique dans tous les pays d'Afrique francophone grâce à la consécration du pluralisme. Ce droit, qui trouve sa source, en partie, dans la Déclaration des droits de l'Homme et du citoyen, a permis l'ouverture des élections aux candidatures indépendantes. Ce principe est reconnu presque partout, même si c'est à des degrés divers. Ainsi, dans certains pays, il est valable pour tous les types d'élection, alors que dans d'autres, il n'est valable que pour certaines élections seulement.
- L'obligation pour les autorités politiques de respecter les principes de la bonne gouvernance est aussi devenue un principe important du droit constitutionnel africain. Certains pays vont jusqu'à le consacrer dans leur constitution. C'est le

cas du Sénégal.²¹ D'autres envisagent un ensemble de mesures dont la mise en œuvre concourt à sa réalisation.

- La création d'un certain nombre d'autorités administratives indépendantes comme les commissions chargées de lutter contre la corruption et même la généralisation de l'institution du médiateur vont dans le même sens.
- La mise sur pied de juridictions constitutionnelles autonomes est aussi un début de consécration des droits fondamentaux au profit des citoyens (Fayoreu 1988; Mathieu & Verpeaux 1998). Certes, la jurisprudence sur ce point est encore hésitante, mais il ne fait pas de doute que des juridictions comme le Conseil constitutionnel du Bénin sont en train de constitutionnaliser un certain nombre de droits. De par l'étendue de son champ de compétence et l'autorité qui s'attache à ses décisions, cette juridiction contribue progressivement, mais de façon décisive, à la création d'une catégorie de droits fondamentaux au Bénin.²² La coopération judiciaire entre hautes juridictions francophones devrait aider à rapprocher les points de vue sur la constitutionnalisation de certains droits.²³

Le droit constitutionnel en Afrique devient de plus en plus un droit substantiel. Il s'intéresse aussi bien à l'organisation des pouvoirs publics qu'aux rapports entre l'Etat et les citoyens. Il s'agit encore d'un « droit mou », qu'il convient de consolider et d'harmoniser. Malgré l'inexistence d'une organisation d'intégration politique produisant un droit dérivé, le rapprochement entre les différents systèmes juridiques nationaux africains se fait progressivement. De ce fait, la politique en Afrique suit en ce moment un processus de « juridicisation » à travers une approche internationale.

Les limites de l'internationalisation du droit constitutionnel

La référence des pays africains au même corps de règles tendant à régir leur fonctionnement et surtout leurs rapports avec leurs citoyens constitue un progrès. Elle va dans le sens de la recherche de solutions identiques à des problèmes communs. En outre, elle permet une harmonisation du droit constitutionnel africain. Cette tendance rencontre cependant des limites. Malgré la communauté de référence et des dispositions relatives à la vie politique dans presque toutes les constitutions d'après 1990 en Afrique francophone, le droit constitutionnel qui se fait n'a pas encore les caractéristiques d'un droit transnational. Même dans le cas des résolutions prises par les organisations inter-

²¹ La Constitution sénégalaise affirme, dans son Préambule, « son attachement à la transparence dans la conduite et la gestion des affaires publiques ainsi qu'au principe de bonne gouvernance ».

²² Voir à ce sujet le Recueil des décisions de la Cour constitutionnelle du Bénin.

²³ Il existe plusieurs associations réunissant des juridictions francophones parmi lesquelles on peut citer l'Association Africaine des Hautes Juridictions Francophones (AA-HJF) et l'Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (ACCPUF).

nationales ou des accords signés entre forces politiques, leur valeur peu contraignante et l'ineffectivité des sanctions prévues pour leur violation affectent leur effectivité.²⁴ Deux facteurs expliquent essentiellement la difficulté à internationaliser le droit constitutionnel africain. Le premier est relatif à la forte territorialisation de ce droit marqué par la politique. Le deuxième est l'absence d'une approche transcontinentale des droits fondamentaux.

La forte territorialisation du droit constitutionnel

Tout ce qui touche à la renonciation à une parcelle de souveraineté de la part des Etats africains reste encore une question sensible. La conception que ces pays se font de la souveraineté dans le domaine politique est toujours vivace. Ils sont encore réticents à appliquer, dans leurs systèmes juridiques et politiques, les engagements pris à l'échelle internationale, particulièrement en matière de droits de l'homme.

Les normes engendrées par le système international africain dans le domaine politique ne sont pas directement applicables dans les ordres juridiques nationaux. Certaines conventions contiennent cependant des recommandations invitant les Etats à intégrer leurs dispositions dans leur ordonnancement juridique. Cette intégration reste cependant en général soumise au bon vouloir des gouvernements. Rarement ils prennent les mesures d'application pertinentes de ces engagements. En outre, en cas de non application ou de violation de ces règles, les sanctions prévues sont ineffectives. Il est vrai qu'il s'agit en général de situations de crise où une sanction peut avoir des effets contre-productifs. Cependant, les organisations internationales, plus que les Etats, condamnent les manquements aux engagements pris. Ainsi, pour tout ce qui concerne l'Etat de droit, la démocratie et les droits de l'homme, seules les pressions politiques des organisations internationales derrière lesquelles s'abritent les Etats, s'exercent sur l'Etat coupable de violation de certains principes (Raulin 2002: 204). Le droit constitutionnel de la crise a encore du mal à s'affirmer sur le continent. Son contenu est relativement clair et fait l'objet d'un consensus, mais les moyens de son application font défaut. L'absence de juridictions internationales opérationnelles, en mesure de condamner effectivement les Etats, affaiblit ce droit en création.²⁵

²⁴ Sur la nature de l'accord de Linas Marcoussis, voir Meledje Djedjro (2003: 204).

²⁵ La décision prise par les Chefs d'Etat ou de gouvernement de fusionner la Cour africaine des droits de l'homme et la Cour de justice de l'Union Africaine n'est pas nécessairement de nature à garantir une protection plus efficace des droits fondamentaux. Elle est d'ailleurs fortement contestée par les organisations de défense des droits de l'homme de la société civile.

L'Union Africaine a innové en consacrant le droit d'ingérence dans les affaires intérieures d'un Etat à l'article 4 (h) de son acte constitutif. Il est cependant permis de douter de la capacité de l'organisation continentale à mettre en œuvre ce principe chaque fois que de besoin, pour des raisons liées au processus décisionnel et à la faiblesse des moyens financiers et matériels de l'Union. Dans certains cas de violation massive et flagrante des droits de l'homme, les pays africains seront tentés de se recroqueviller sur eux-mêmes et de faire valoir leur souveraineté exclusive pour le traitement de ces questions. Dès lors, l'élan de promotion de la citoyenneté risque d'être brisé au détriment de la nationalité. Cette menace est d'autant plus sérieuse aujourd'hui qu'il n'y a pas, comme en Europe, de jurisprudence internationale africaine consistante à laquelle les juridictions nationales se réfèrent en matière de droits de l'homme.

L'absence d'une approche transcontinentale des droits fondamentaux

Vingt ans après l'ouverture de la transition démocratique, les Etats africains restent encore attachés à un paradigme anachronique et dangereux de la démocratie. L'élection libre et transparente est érigée en dogme car elle semble être encore aujourd'hui le fondement exclusif de la légitimité démocratique en Afrique.

Le danger de cette conception est qu'entre deux élections, il n'existe pas de critère d'évaluation du degré de démocratisation d'un régime politique. Elle signifie en effet que dès lors qu'une autorité est démocratiquement élue, sa légitimité devient incontestable jusqu'au terme de son mandat. On voit ce qu'une telle approche peut comporter d'excès surtout dans un contexte où le respect des droits de l'homme n'est pas encore fortement ancré dans la pratique des gouvernements.

Pour que les régimes politiques africains évoluent vers une démocratie majeure, il leur faut un renouvellement de ce paradigme, en lui substituant un autre plus moderne et plus substantiel. Le respect des droits fondamentaux du citoyen devrait pouvoir jouer ce nouveau rôle de fondement de la légitimité démocratique. Il présente en effet un double avantage. Le premier est qu'il donne la primauté à l'exercice du pouvoir et non à sa conquête. Une des faiblesses du droit politique africain est qu'il accorde une importance excessive aux modalités d'accession au pouvoir au détriment des conditions de son exercice. Le deuxième est qu'il offre la possibilité de vérifier la soumission du pouvoir à un contrôle permanent et non plus seulement pendant les élections. C'est seulement de la sorte que le constitutionnalisme, entendu au sens d'encadrement de l'exercice du pouvoir politique, pourra donner naissance à une démocratie substantielle et non formelle.

La contribution de la jurisprudence de ce point de vue est déterminante. Il suffit de se rappeler la part importante prise par les juridictions internationales européennes tant dans la conceptualisation que dans la mise en œuvre des droits fondamentaux en Europe.²⁶ La Cour de justice des Communautés européennes et la Cour européenne des droits de l'homme ont dégagé une conception typiquement européenne des droits fondamentaux, qui a fini par s'imposer progressivement aux juridictions nationales comme le Conseil constitutionnel, la Cour de cassation et le Conseil d'Etat en France (Dord 2001: 5). La primauté donnée aux droits fondamentaux d'une part, la collaboration verticale entre juridictions internationales et juridictions nationales d'autre part, ont fini par donner naissance à une approche transversale des droits fondamentaux en Europe. En Afrique, du fait que certaines juridictions internationales ne sont pas encore opérationnelles et que la collaboration avec les juridictions nationales est encore faible, on n'assiste pas à une émergence de cette approche transnationale des droits fondamentaux comme en Europe, dont peut se réclamer le citoyen quelle que soit sa nationalité.

Conclusion

Au terme de cette brève réflexion, un constat et deux propositions conclusives s'imposent. D'une part, l'internationalisation du droit constitutionnel, qui est aussi un mode de réception du droit, est, comme le soutient le professeur Gerti Hesseling, un processus récent qui est en cours en Afrique (Cf. Hesseling 1985). De ce fait, il est difficile d'en faire le bilan. Il progresse cependant à son rythme, grâce à l'accompagnement d'institutions comme l'UA, la CEDEAO, l'OIF, l'ONU sous la pression parfois de la société civile. Il convient de l'encourager et de le soutenir.

D'autre part, il est cependant nécessaire de faire bouger les lignes pour assurer un ancrage du constitutionnalisme et moderniser la démocratisation des régimes politiques en Afrique. La conception tendant à faire de l'élection libre et transparente le fondement quasi-exclusif de la légitimité démocratique, outre son anachronisme, présente un danger certain pour l'avenir des droits de l'homme en Afrique.

Une conceptualisation et une définition d'un régime juridique des droits fondamentaux, à travers une collaboration des différentes juridictions africaines, constituent une piste à explorer afin de donner naissance à un noyau dur de droits protégés contre les atteintes du législateur. C'est de la sorte que les pays africains pourront évoluer vers la constitution de régimes démocratiques modernes, correspondant aux standards internationaux.

²⁶ *Revue Pouvoirs*, n° 96, Les Cours européennes, Luxembourg et Strasbourg.

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Le juge constitutionnel et la construction de l'État de droit au Sénégal¹

Fatima Diallo²

Cet article part de l'hypothèse selon laquelle l'État de droit et le juge constitutionnel sont sur des chemins, à coup sûr, croisés. Il s'efforce de montrer jusqu'où le juge constitutionnel sénégalais a joué sa partition, comment et avec quel instrument. En ce sens, on remarque que le juge en question est un acteur incontestable au regard de son rôle de gardien de la constitutionnalité et de régulation des élections. En effet, ce dernier participe à la consolidation de l'État de droit par l'encadrement des différentes retouches de l'ordre juridique à travers lequel il promeut de plus en plus la protection des droits fondamentaux. Dans la même lancée, il a privilégié le contrôle de la définition des règles du jeu électoral en tant qu'assise importante de l'État de droit. Toutefois, il s'est rendu aussi célèbre par ses déclarations d'incompétence. Cette attitude qui, certes, ne manque pas de fondements juridiques, est désormais considérée comme une échappatoire pour cacher ses tactiques partisans.

¹ La première version de cet article a été présentée à la conférence annuelle du Réseau Africain de Droit Constitutionnel (RADC) d'août 2009 organisée à Cape Town (Afrique du Sud). L'auteure remercie le Professeur Babacar Kanté et Mr Moustapha Aidara pour leurs commentaires et critiques qui lui ont permis de l'améliorer et d'aboutir à la version définitive.

² Bien que cet article s'inscrive dans une démarche classique de droit constitutionnel, l'auteure est une doctorante qui s'est désormais engagée dans l'anthropologie juridique et l'analyse sociologique des institutions africaines. Une orientation prise à la suite des conseils et encouragements du Professeur Gerti Hesselting avec qui elle a entamé son projet doctoral. Ce texte est un modeste hommage au Professeur Hesselting pour son apport à la compréhension du droit et des institutions africains et surtout, une reconnaissance personnelle à celle-ci pour lui avoir « montré la voie ».

Les sages ou « les incompetents » juges constitutionnels reflètent ainsi une domestication par les forces politiques, d'où la réduction de leur importance dans une situation marquée par une croissante instabilité constitutionnelle. Cet état de faits conditionne l'urgence de son repositionnement tant au plan stratégique que politique pour rester au cœur de la construction de l'État de droit au Sénégal.

Introduction

Le droit constitutionnel moderne est marqué par l'idée de réalisation de l'État de droit qui est cet idéal quasi-mystique sorti de la dogmatique juridique systématisant des siècles de luttes socio-politiques et qui a su l'asseoir comme une réalité juridique et un but politique pour les États. Tous les aménagements des ordres constitutionnels convergent vers la concrétisation d'un système politique qui réponde aux critères de l'État de droit. Dans le même esprit, les systèmes juridiques contemporains sont marqués par une montée en puissance frappante de la place accordée au juge au sein de l'ordre juridique interne. Cette forte ascension du juge conduit à une « judiciarisation » de plus en plus étendue de la vie sociale. Celle-ci est étroitement liée à sa fonction plus qu'à son statut qui assure au juge un charisme nouveau : Le juge dit le droit et crée du droit en ce qu'il est amené à codifier les valeurs de notre temps et, en ce sens, « à exercer une sorte de pontificat laïc » (Badinter 2003).

Ces deux constats, qui s'appliquent à toutes les démocraties du monde, sont d'autant plus préoccupants pour celles, en Afrique, qui sont encore fragiles et dont la maturité politique demeure encore à consolider. Toutefois, que l'on soit en Afrique ou ailleurs, les lexicologies des notions « d'État de droit » et de « juge » semblent s'imposer de soi parce que chacun paraît détenir de ces concepts quotidiennement « répétés » un semblant de sens intuitif qui exonère de l'effort de définition. Pourtant, les définitions sont toujours à rechercher, surtout pour les concepts qui souvent ont tendance, en contrepartie de leur présence récurrente dans les pratiques discursives, à perdre leur vrai sens. Dès lors, on est amené à poser la question : Qu'est-ce qu'un État de droit ? De nos jours, il faut noter que la signification de l'État de droit³ a connu une évolution. Au début,

³ Il n'y a pas d'unanimité au sujet de la signification de ce qu'est un État de droit. Pour certains auteurs comme Hans Kelsen, ce concept est un pléonisme, une redondance, car tout État est un État de droit en ce sens que l'État est la personification juridique du droit. Jean Carbonnier estime que l'État de droit c'est quand l'État, par sa passion du droit, va jusqu'à lui-même s'identifier à lui. L'État de droit est pour lui cette « fusion passionnelle » entre État et Droit (Voir J. Carbonnier, 1996, *Droit et Passion du Droit* sous la Ve République, Flammarion).

l'État de droit était simplement un système institutionnel dans lequel la puissance publique est soumise au droit selon la théorie allemande du *Rechtsstaat*. L'autrichien Hans Kelsen le conceptualisait comme étant un État dans lequel les normes juridiques sont hiérarchisées de telle sorte que sa puissance s'en trouve limitée (Kelsen 1997). Il s'agit d'un système où le droit est l'élément de base d'organisation de la société ayant comme principales implications la soumission des institutions au droit et le contrôle de leur action par des mécanismes de sanctions en vue de protéger les individus en cas d'arbitraire ou en cas de violations arbitraires de leurs droits et libertés. Dorénavant, on retient des deux significations formelle et substantielle⁴ de l'État de droit que ce dernier renvoie à « un État régi par un ordre juridique qui, objet d'une hiérarchisation formelle et juridiquement sanctionnée, constitue une limite matériellement libérale au profit du statut individuel des citoyens ». Il ressort d'une évolution qui tend vers une certaine imbrication entre l'État de droit et les valeurs démocratiques.⁵

La constante dans cette évolution est que, si l'État de droit traduit un modèle d'organisation politique – actuellement aux allures démocratiques – *le transit par le droit* reste toujours l'élément d'objectivation de ces significations (Chevalier, 2005). Il devient dès lors moins surprenant que l'État de droit trouve une relation avec ceux qui sont en charge de dire le droit. Ainsi, en droit constitutionnel, la concrétisation de l'État de droit est fortement dépendante de l'épanouissement de la justice constitutionnelle, donc de la présence des « juges constitutionnels »⁶ avec laquelle il entretient une connexion plus ou moins intime.

Dans le cadre de notre réflexion, nous nous intéressons spécifiquement au juge du Conseil constitutionnel. La précision que l'on s'intéresse au juge du Conseil constitutionnel est utile à un double niveau matériel et temporel. D'un point de vue matériel, elle est utile du fait que même si on s'accorde sur la pluralité des juges constitutionnels et vu l'étendue des litiges qui peuvent être

⁴ Aujourd'hui, la notion d'État de droit comporte une double signification : une formelle et une autre substantielle. Dans sa première signification, elle renvoie à la soumission de l'État à l'ordre juridique et, dans la deuxième, elle s'intéresse au contenu de l'ordre juridique.

⁵ La notion semble avoir une certaine intimité avec l'idée même de démocratie dont pourtant l'État de droit n'était qu'un élément au départ. Ainsi Badinter pensait-il qu'il n'y a d'État de droit que d'« État de droit démocratique ». Voir R. Badinter, 1993, « Quelques réflexions sur l'État de droit en Afrique », in G. Conac (dir.), *L'Afrique en transition vers le pluralisme politique*, p. 9.

⁶ On considère généralement que seuls les juges des Cours constitutionnelles sont des juges constitutionnels car ils détiennent principalement la charge d'assurer le respect de la Constitution. Toutefois, cette charge n'interdit pas une intervention des juges ordinaires (judiciaires, administratifs, tribunal des conflits) pour statuer sur une norme constitutionnelle. Voir Mathieu Bertrand et Michel Verpeaux, 2002, *Contentieux constitutionnel des droits fondamentaux*, Paris, LGDJ, p. 116 et suiv.

résolus en faisant appel au droit constitutionnel et donc à la diversité des juges constitutionnels, nous ne pouvons épuiser par une réflexion exhaustive l'œuvre de ces différents juges dans la construction de l'État de droit dans cette contribution. D'un point de vue temporel, parce que, pour ce qui concerne le Sénégal, le juge constitutionnel à l'époque des Cours suprêmes se trouve hors de notre débat, il s'agit désormais d'une réflexion autour de l'œuvre jurisprudentielle du juge constitutionnel installé en 1992 à la suite du vent de démocratisation qui avait soufflé sur tout le continent.

En effet, en ce qui concerne ce juge du Conseil constitutionnel, comme le souligne Jean Gicquel, la justice occupant une place de choix dans les démocraties africaines marquées par un « regain constitutionnel », il est mis au péricule dans la construction de l'État de droit. En effet, la transition démocratique dans l'Afrique des années 1990 « s'incarne dans un double mouvement indissociable l'un de l'autre. Il s'agit, d'une part, de l'irruption du constitutionnalisme dans le débat démocratique, et d'autre part, de la consécration de la justice constitutionnelle » (cité par Bourgi 2002 : 523). La concomitance de l'ouverture démocratique et la promotion des valeurs de l'État de droit avec la préoccupation exaspérante pour la consolidation de la justice constitutionnelle renseignent à souhait sur leur possible connexion encore mieux traduite dans le renouveau du constitutionnalisme africain. En effet, les « juridictions constitutionnelles étaient, comme toute institution, censées logiquement répondre à une demande. Après de longues périodes caractérisées par le règne du parti unique et des régimes militaires avec toutes les conséquences qui s'y sont attachées, le juge constitutionnel africain était considéré, à tort ou à raison, comme devant être l'élément manquant qui devait assurer la stabilité des régimes politiques africains par une garantie du fonctionnement normal de leurs institutions » (Kanté 2008 : 630).

Ainsi, parce qu'il fait suite aux enjeux de démocratisation, le juge constitutionnel avait la charge de permettre la mise en place du nouvel ordre institutionnel recherché dans l'incantation de la légalité constitutionnelle et les références constantes à l'État de droit après des années de régimes politiques à tendance autoritaire sur le continent. Cela d'autant plus qu'au delà de la politisation du débat constitutionnel, l'un des faits marquants du constitutionnalisme africain est « l'affirmation de la prééminence présidentielle » et de ses velléités arbitraires (Bourgi 2002 : 729). Cette particularité contextuelle conditionne une différence voire « une singularité des préoccupations du juge constitutionnel africain par rapport à son homologue européen ». En effet, alors que ce dernier s'intéresse particulièrement à la protection des libertés fondamentales en phase de devenir une « question irritante », le juge constitutionnel africain, du fait du contexte politique et historique de son institutionnalisation et des enjeux actuels de la question politique pour les États, s'attache à réguler et à pacifier le jeu

politique. Par conséquent, il accorde plus d'importance à la promotion de la démocratie et de l'État de droit (Kanté 2008).

A ce titre, une évaluation du système politique permet de voir que la relative réussite de la trajectoire politique de l'État sénégalais doit beaucoup à la justice qui a longtemps joué un rôle singulier dans l'édification d'un État de droit. En effet, à l'époque même de l'unité de juridiction au sommet symbolisée par la Cour suprême, l'activité judiciaire attestait le dynamisme du Droit au Sénégal ainsi que la soumission de l'État au droit (Ngom 1989 : 15). Après « l'époque des cours suprêmes », le pays, à l'image de nombre de pays du continent africain, s'est doté d'une juridiction constitutionnelle autonome au début des années 1990. Cette juridiction avait comme finalité implicitement et/ou explicitement de contribuer à l'ancrage de l'État de droit et de la démocratie. Il n'est point innocent que la dernière réforme judiciaire opérée par la loi organique n° 2008-36 du 08 août 2008⁷ alors qu'elle procédait à la restauration de la Cour suprême⁸ ait laissé intacts le Conseil constitutionnel et la Cour des comptes tout en procédant au regroupement de la Cour de cassation et du Conseil d'État. Cette actualité du débat amène à une ré-interrogation au sujet de la pertinence du Conseil constitutionnel.

Mais, au delà de la participation à un débat plus qu'actuel, une telle préoccupation participe à la recherche d'une plus-value dans les réflexions jusque là faites sur l'État de droit. Il est certain que la problématique n'a pas manqué de susciter l'intérêt des chercheurs. Toutefois, comme le précise Babacar Kanté, des « questions de fond demeurent pourtant sur l'apport de ces juridictions au fonctionnement régulier des institutions, un problème récurrent des systèmes politiques africains » en ce sens que, malgré le contexte de leur création et le développement progressif de leur jurisprudence, même la question particulière « de leur raison d'être reste encore d'actualité » (Kanté 2008). En effet, force est de reconnaître qu'au départ, les analyses sur l'État de droit se sont le plus souvent focalisées sur les relations de pouvoir entre le Parlement et l'exécutif, la nature des systèmes à adopter pour asseoir une réelle démocratie ou les élections, mais qu'il n'a pas été très souvent à l'ordre du jour d'approfondir la réflexion sur la question de l'apport du juge constitutionnel dans sa construction. Cette contribution s'inscrit dans l'orientation des derniers écrits qui ont essayé de s'interroger sur la consolidation de l'État de droit, non plus à travers le

⁷ Cette loi remplace la loi n° 92-22 du 30 mai 1992 portant révision de la Constitution de 1963 qui avait fait éclater la Cour suprême en « trois juridictions souveraines » qu'étaient le Conseil constitutionnel, le Conseil d'État et la Cour de cassation. Elle sera mise en œuvre par le décret n° 2009-367 du 20 avril 2009 portant application de la loi.

⁸ Voir la loi organique n° 2008-35 du 7 août 2008 portant création de la Cour suprême.

prisme des élections comme il en a souvent été question, mais à travers l'apport de la justice constitutionnelle.

En ce sens, on constate que si, pendant longtemps, les constitutions africaines ont été marquées par leur ineffectivité que certains auteurs attribuent « autant à la transcendance du pouvoir qu'au blocage culturel et politique », aujourd'hui encore la question se pose de savoir si l'activité juridictionnelle pourrait servir de passerelle vers une meilleure consolidation de l'État de droit dont l'ambition est désormais inscrite de façon indélébile et en apparence irrésistible et irréversible dans nos Constitutions. En définitive, la conduite du juge constitutionnel permet-elle la construction d'un État de droit « achevé » où la justice en tant que contre-pouvoir veille à l'application d'un droit unifié et respecté ou nous laisse-t-elle dans une situation d'un État de droit « rapproché », ⁹ une « démocratie adolescente » dans un État paternaliste avec des sujets infantilisés ?

Au delà d'une lecture des textes et de leurs contingences, résoudre une telle problématique nécessite une analyse de l'œuvre jurisprudentielle du juge constitutionnel pour comprendre ses différentes positions sur les questions ayant trait à l'État de droit. Ce choix de l'approche fondée sur la jurisprudence se veut comme une adhésion à la promotion d'un droit constitutionnel jurisprudentiel¹⁰ en Afrique. C'est à travers elle que nous verrons que le juge essaye tant bien que mal de se positionner comme un acteur incontestable dans la construction de l'État de droit. Toutefois, cette position n'échappe pas aux imperfections liées à des facteurs de plusieurs ordres.

Le juge constitutionnel sénégalais : Un acteur incontestable dans la construction de l'État de droit au Sénégal

L'idée d'une consolidation démocratique au Sénégal directement inspirée de l'idéologie libérale occidentale repose sur deux notions : La promotion des droits fondamentaux et l'organisation d'élections libres et transparentes. Ces deux éléments sont par ailleurs les fondements de la démocratie constitutionnelle telle qu'héritée du constitutionnalisme occidental déjà clairement mis en lumière dans les réflexions de Gerti Hesseling sur la réception du droit constitutionnel en Afrique (Hesseling 1996 : 34). C'est ainsi que le juge constitutionnel,

⁹ Pour les notions d'État de droit « achevé » et d'État de droit « rapproché », voir Antoine Garapon, 2000, « La justice, point aveugle de la théorie politique française », in *Le juge entre deux millénaires*, Mélanges offerts à Pierre Drat, pp. 53-54.

¹⁰ Pour une explication plus détaillée du droit constitutionnel jurisprudentiel voir un texte un peu ancien mais très pertinent de Louis Favoreu : « Le droit constitutionnel jurisprudentiel en 1981-1982 », *Revue de droit public*, Chroniques constitutionnelles françaises, pp. 333-400.

installé dans un contexte de transition démocratique généralisée, semble tenir à la construction de l'État de droit qu'il s'est appropriée comme mission en réorientant ses préoccupations autour de la protection des droits fondamentaux et en privilégiant le contrôle de la régularité des élections comme élément axial dans cette entreprise.

L'évolution relative des préoccupations recentrées autour de la protection des droits fondamentaux

La légitimité du juge constitutionnel se construit de manière corrélative avec l'évolution de ses priorités. Dans l'exercice de ses attributions pour la régulation des activités des pouvoirs politiques, le juge constitutionnel sénégalais est passé de l'objectif central de cantonnement du pouvoir parlementaire à celui plus général de protection des droits fondamentaux. Il est clair qu'en comparaison avec le juge français, l'orientation vers le contentieux des droits fondamentaux reste encore timide pour la simple raison que le juge sénégalais n'a pas souvent l'occasion de se prononcer sur lesdits droits. Mais en comparant l'œuvre jurisprudentielle de ce juge constitutionnel durant la séquence temporelle d'avant les années 1992 et celle d'après, le glissement vers un contentieux des droits fondamentaux se dessine au point que, pour certains auteurs, on assiste à un « dépérissement de la conception « constitution-séparation des pouvoirs » dans le contentieux constitutionnel sénégalais pour une consécration de la conception « constitution-garanties des droits de la personne humaine » (Sy 2005).

Il faut dire que l'importance des droits fondamentaux est le résultat avant tout d'une évolution constitutionnelle. La constitution de 2001, s'inscrivant dans la tradition des précédentes constitutions, accorde une place importante aux droits fondamentaux. D'abord, le constituant affirme de manière explicite que « le préambule est partie intégrante » de la Constitution. Ensuite, dans le corps même de la Constitution, le titre II de la Constitution est très prolixe quant à la consécration constitutionnelle « des libertés publiques et de la personne humaine, des droits économiques et sociaux et des droits collectifs ». Toutefois, on peut noter que le juge n'est pas étranger à cette évolution. En effet, bien que la Constitution de 2001 soit adoptée par voie référendaire et que le juge constitutionnel ne joue pas de rôle déterminant dans le contrôle des opérations de référendum, il dispose néanmoins d'une compétence consultative lui permettant, quand il est saisi, de donner son avis sur le projet en cours. En 2001, le juge constitutionnel, à la demande d'avis du président de la République relative au projet de loi portant révision de la Constitution, suggère à ce dernier de saisir l'occasion offerte par la révision constitutionnelle pour faire inscrire dans le préambule de la Constitution la Charte africaine des droits de l'homme et des peuples.

Cette préoccupation pour la protection des droits fondamentaux, par l'inscription des instruments juridiques pertinents pour la protection de ces droits dans le préambule de la Constitution est certes une avancée, mais on peut noter que, bien avant même le cycle constitutionnel d'après 2001, le juge trouve fondement à ses décisions dans le préambule de la Constitution. Ainsi, les principes tels que la séparation des pouvoirs, la non-rétroactivité des lois, l'autorité de la chose jugée, l'égalité,¹¹ le droit à la défense, la présomption d'innocence,¹² l'équité, la dignité, le droit de propriété, sont souvent évoqués. Dans sa décision n° 3 /C/ 98 de mars 1998, quand des députés dénoncent les atteintes aux principes de la souveraineté populaire et d'égalité des citoyens devant la loi, de « la non-délégabilité de la qualité du mandat d'élu » et de « l'interdiction du mandat impératif » par la loi complétant le code électoral et relative à l'élection des sénateurs, le juge déclare la non-conformité partielle à la Constitution de certaines dispositions de la loi. Il estime qu'en instaurant la délégation du mandat d'élu « en faisant des remplaçants désignés en cas de cumul des mandats, des membres du collège électoral des sénateurs, l'article 116-6 leur confère la qualité d'électeur alors qu'ils ne sont pas des élus du suffrage universel comme le sont les autres membres du collège électoral ; qu'il en résulte, d'une part, une méconnaissance de l'article 49 bis de la Constitution en vertu duquel les sénateurs sont élus au suffrage universel indirect et, d'autre part, une discrimination entre les électeurs sénatoriaux contraire au principe d'égalité devant la loi garanti par l'article 7 de la Constitution, l'article 6 de la Déclaration des droits de l'homme et du citoyen de 1789, l'article 7 de la Déclaration universelle des droits de l'homme de 1948 et l'article 3 de la Charte africaine des droits de l'homme et des peuples de 1981 ». Le juge constitutionnel a été plus ferme encore quant à l'exigence du respect du principe d'égalité au regard du préambule de la Constitution dans sa décision n° 15/94 sur l'affaire n° 2/C/94 du 27 juillet 1994. Dans cette décision, le juge estime que la loi organique 92-27 qui pose en son article 69 que « les agents de l'État titulaires de la maîtrise en droit exerçant avant l'entrée en vigueur de la présente loi organique et désignés par le Garde des Sceaux, ministre de la Justice, pour combler le déficit du nombre de magistrats, dans certaines juridictions, peuvent, après un stage concluant dont les modalités seront fixées par décret, être nommés dans le corps des magistrats » est contraire à la loi. Le juge considère qu'une telle loi renferme des « lacunes et discriminations, non conformes aux normes internationales relatives à la qualification, à la sélection et à la formation des personnes devant remplir des fonctions de magistrat ». De telles lacunes lui paraissent suscep-

¹¹ Sur ces principes voir la décision n° 11/93 du 23 juin 1993 de l'affaire n° 2/C/93 sur la loi organique sur la Cour de cassation

¹² CC, décision n° 3/C/95 du 9 juillet 1995.

tibles d'engendrer des iniquités et des situations arbitraires contraires au principe de l'indépendance des juges garanti par la Constitution et au principe d'égalité également reconnu par la Constitution, par référence à la Déclaration des droits de l'homme et du citoyen de 1789 et à la Déclaration universelle des droits de l'homme de 1948.

Par ailleurs, si le préambule est ainsi largement évoqué comme fondement de la jurisprudence constitutionnelle, l'ensemble des dispositions de la Constitution sont loin d'être en reste. Ainsi, dans sa jurisprudence n° 3/C/95 du 9 juillet 1995, le juge rappelait que les restrictions aux libertés fondamentales par le législateur ne sont possibles que dans la seule invocation « d'autres principes de valeur constitutionnelle tels que la préservation de l'ordre public ou la sauvegarde de l'intérêt général ».

En outre, l'intérêt que le juge constitutionnel a porté au contrôle par voie d'exception en tant qu'outil indispensable à la protection des droits et libertés définis dans la Constitution a permis un certain progrès dans la consolidation de l'État de droit. Le juge constitutionnel, à travers les décisions rendues, notamment celle n° 11/93 du 23 juin 1993, s'emploie à faire respecter les principes constitutionnels et les libertés fondamentales garanties aux citoyens. Dans ce cas d'espèce, il s'agit d'une affaire où, par un arrêt n° 1/C.C/C.R./93 du 19 février 1993, la Cour de cassation visait à surseoir à statuer, aux fins de rabat d'un arrêt rendu par la 2ème section de la Cour suprême statuant en matière sociale, dans le litige opposant la compagnie multinationale Air Afrique à cinq de ses ex-agents et à saisir le Conseil constitutionnel de l'exception d'inconstitutionnalité. Pour conclure au défaut de conformité de la loi à la Constitution, le juge constitutionnel considère que « la mise en œuvre de la procédure de rabat d'arrêt de l'article 33, alinéa 2, par la Cour de cassation entraînerait une inégalité non justifiée entre les justiciables, en ouvrant la nouvelle voie de recours à certains d'entre eux et pas à d'autres, selon qu'ils cherchent à remettre en cause une sentence non entièrement exécutée ou une sentence déjà exécutée, en violation du principe de l'égalité devant la loi et devant la justice, consacré par l'article 6 de la Déclaration de 1789, l'article 7 de la Déclaration de 1948, l'article 3 de la Charte africaine des droits de l'homme et des peuples et les articles premier et 7 de la Constitution ». Le juge sanctionna dans cette décision la triple violation des principes en étroite relation avec la protection des droits fondamentaux garantis par la Constitution notamment par l'atteinte à l'autorité de la chose jugée, une violation du principe de l'indépendance du pouvoir judiciaire à l'égard des pouvoirs législatif et exécutif, la rupture du principe d'égalité des citoyens (Mbodj 1994 : 81). En fait, en exigeant le respect de l'égalité et de la justice, le juge revient ici sur deux principes qui relèvent à la fois des droits de l'homme et des garanties procédurales et qui sont désormais une partie substantielle des droits fondamentaux. Dans d'autres décisions, à l'instar de

celles n° 3/C/96 et n° 4/C/96 du 3 juin 1996, après avoir ordonné la jonction de deux exceptions soulevées devant le Conseil d'État et visant à faire déclarer inconstitutionnelle la loi n° 76.67 du 2 juillet 1976 relative à l'expropriation pour cause d'utilité publique et aux autres opérations foncières d'utilité publique, le juge déclare, sur la base d'une motivation assez élaborée, la constitutionnalité de la loi en ce sens qu'elle est conforme aux exigences de « respect et garantie intangible ... du droit de propriété » définies par la Constitution.

Le juge constitutionnel sénégalais essaye de rendre ainsi effectif par ces différents procédés le respect de la norme fondamentale surtout en ce qui concerne la protection des libertés fondamentales qu'elle garantit. Par ailleurs, le juge a su, par le contentieux électoral qui constitue une partie importante de son activité, se positionner de façon assez remarquable dans la construction de l'État de droit.

Le privilège manifeste du contrôle de la régularité des élections dans la jurisprudence constitutionnelle

En Afrique, la naissance de la justice constitutionnelle autonome semble plus ou moins coïncider avec la transition démocratique. Cette coïncidence ne relève pas d'un pur hasard et mieux, elle révèle nombre de desseins implicites confiés aux juridictions constitutionnelles. Le nouveau juge constitutionnel devait en réalité réguler le jeu politique notamment par l'arbitrage des contentieux électoraux. Du fait du contexte historique même de son apparition, le juge constitutionnel africain en général¹³ et le juge sénégalais en particulier, devaient garantir, en vue du parachèvement du processus démocratique déclenché, des élections libres et transparentes. Ainsi Babacar Kanté souligne-t-il : « c'est après l'adoption d'un code électoral dit de consensus que le Conseil constitutionnel a été créé pour en garantir l'application effective, et que le président de la commission d'élaboration de ce code en a été désigné comme le premier président » (Kanté 2005 : 157). Le qui-vive du Conseil constitutionnel pendant chaque échéance électorale n'est dès lors point paradoxal. Par ailleurs, celles de 1993, ont, par les turbulences¹⁴ occasionnées, fortement affecté son autorité et son prestige.

¹³ Dans nombre de pays africains, les juridictions constitutionnelles naissent en concomitance à l'ouverture du processus de transition démocratique, notamment dans des pays comme le Bénin, qui est le premier à s'être doté d'une juridiction constitutionnelle en Afrique de l'Ouest par sa Constitution du 11 décembre 1990

¹⁴ L'assassinat de Babacar Sèye, vice-président du Conseil constitutionnel à la veille des résultats de la présidentielle reste un des points marquants de ces turbulences.

Le juge constitutionnel sénégalais, malgré les apparences,¹⁵ a fait, dès son installation, preuve de beaucoup de hardiesse en vue de faire prévaloir les impératifs de l'État de droit à travers un respect des règles électorales. Ainsi, dans sa décision n° 5/95 du 2 mars 1993, le Conseil estime-t-il qu'après avoir été valablement saisi et malgré le silence des textes,¹⁶ il a l'obligation de se prononcer sur la question portée devant lui. Il considère que « ni le silence de la loi, ni l'insuffisance de ses dispositions n'autorisent le conseil compétent en l'espèce de s'abstenir de régler le différend porté devant lui ; qu'il se doit de se prononcer par une décision en recourant, au besoin, aux principes généraux du droit, à la pratique, à l'équité et à toute autre règle compatible avec la sauvegarde de l'État de droit et avec l'intérêt commun ». Le juge explique que « la règle selon laquelle la proclamation provisoire doit intervenir avant la proclamation définitive à effectuer par le conseil ne peut être intangible, qu'elle peut être écartée devant le principe fondamental de la nécessité absolue de la continuité du fonctionnement des institutions ». Il en conclut ensuite que, n'ayant compétence qu'en matière de déclaration définitive des résultats, ce serait porter atteinte à la sauvegarde des droits les plus élémentaires des candidats que de procéder à une déclaration définitive sans qu'au préalable ne soit intervenue une déclaration provisoire telle que prévue par le code électoral. En fait, le Conseil, dans le cadre de ses compétences en matière électorale, a deux fonctions bien déterminées par la Constitution et par le code électoral. Sur ce point, il faut d'abord distinguer les deux attributions que sont les déclarations de candidatures et la proclamation des résultats ; ensuite distinguer la proclamation provisoire de la proclamation définitive des résultats qui ne sont pas toutes les deux de la compétence du Conseil.¹⁷ Le juge constitutionnel est seulement concerné, d'une part, par la solution des contestations que peuvent élever les candidats sur la régularité des opérations électorales (l'article 29 al. 2 de la Constitution) et, d'autre part, par la proclamation des résultats définitifs. Dans cette décision, le juge s'est prononcé avant tout sur une situation non prévue par la législation en vigueur en essayant de bien situer le problème qui se pose avant de s'expliquer

¹⁵ Noir Ismaila M. Fall qui évoque la réputation d'une certaine frilosité de la juridiction constitutionnelle au sein de l'opinion. Voir I.M. Fall, 2007, *Evolution constitutionnelle du Sénégal*, Dakar, CREDILA CREPOS, p. 75.

¹⁶ Le juge édifie sur l'interprétation qui sied à un scénario non prévu par les textes et qui est créé par la lettre ainsi que l'ensemble des procès-verbaux sur les élections qui lui ont été présentés par le Premier président de la Cour d'appel et le président de la commission nationale de recensement des votes pour une proclamation définitive bien avant la proclamation des résultats provisoires étant donné que les travaux de la commission nationale subissaient des blocages.

¹⁷ Voir décision CC n° 5 /95 du 2 mars 1993.

sur les autres éléments qui éclairent l'économie des dispositions constitutionnelles, législatives et réglementaires énoncées dans son raisonnement.

Ainsi, en ce qui concerne la régularité des élections, une décision sur les affaires n° 12 à 29 /E/98 du 8 juin 1998 suite à une jonction de recours relevait la diversité des questions sur lesquelles le juge constitutionnel devait se prononcer. Dans ce recours, des questions relatives à la fiabilité du fichier électoral, la non-transmission ou la transmission irrégulière des procès-verbaux des bureaux de vote, la distribution illégale des cartes d'électeur, la délivrance de cartes consulaires à des non-Sénégalais, la délocalisation et la composition des bureaux de vote, la nomination irrégulière et tardive de membres de bureaux de vote, l'heure de clôture des votes, l'identification de l'électeur, l'insuffisance et l'absence des bulletins de vote, les irrégularités et les troubles dans les bureaux de vote (violences, bourrages des urnes), les votes multiples, les faux certificats de conformité et leur usage massif, le trafic d'influence, le format des bulletins de vote sont autant de problèmes portés devant le juge sénégalais.

La diversité des motifs de saisine du Conseil constitutionnel en matière électorale justifie d'une certaine façon le privilège dont bénéficie le contentieux électoral qui occupe désormais une partie importante de l'activité du juge constitutionnel sénégalais. En dix ans de fonctionnement, entre 1993 et 2002, on fait remarquer que sur les quatre-vingt-quatre décisions et avis rendus par le juge constitutionnel, trente-cinq concernent la matière électorale (Kanté 2005 : 157). En outre, ce privilège reste aussi lié au fait que l'opposition qui saisit le Conseil ne semble, généralement, mettre en avant que les questions liées à un gain électoral immédiat ou futur. Ce même argument pourrait justifier la relativité du développement du contentieux des droits fondamentaux devenus les parents pauvres dans les saisines du Conseil constitutionnel.

Toujours est-il, qu'au regard de la pratique, on peut estimer qu'il s'agit de compétences que le juge semble le mieux assumer, ou tout au moins, que le contentieux électoral est devenu son terrain de prédilection. Dans ce domaine, le juge essaye d'élaborer des techniques et méthodes juridiques sophistiquées pour faire respecter la réglementation électorale. A titre d'exemple, l'analyse de certaines de ces décisions permet de relever une technique un peu semblable à celle utilisée en matière de défense de droits de l'homme surtout dans le cadre des fautes au plan économique et mais aussi dans l'interprétation des normes morales en droit des affaires. Il s'agit de la technique du «*naming and shaming*» qui consiste à émettre des avertissements implicites en dénonçant nommément et publiquement ceux qui auraient enfreint les textes. En atteste la décision du 8 juin 1998 sur les affaires n° 12 à 29 /E/98 où le juge constitutionnel, pour se prononcer sur un grief fondé sur des troubles dans les bureaux de vote, cite nommément le maire de la ville de Rufisque Mbaye Jacques Diop qu'on accuse d'avoir « fait irruption dans le centre de vote de Gouye Mouride, flanqué de « nervis » qui ont bourré les urnes après avoir expulsé les membres du bureau et

le délégué de l'ONEL ; (...) qu'il y a (...) atteinte à la sincérité et à la transparence du scrutin de nature à entraîner l'annulation des résultats du vote dans les bureaux visés ».

Au demeurant, aussi notable que soit le contentieux électoral, il ne faudrait point exagérer le rôle du juge constitutionnel sénégalais. Ce dernier évoluant dans un contexte de crispation autoritaire du régime politique pouvant mettre à genoux les institutions et prenant en otage la démocratie, n'est pas exempt de critique. Son action reste fortement mise à l'épreuve dans ce domaine et dans bien d'autres où il fait face à des contrariétés non négligeables.

Le juge constitutionnel :

Un acteur imparfait dans la construction de l'État de droit

Le juge est un acteur principal dans la construction de l'État de droit mais arrive-t-il à réaliser cette symbiose nécessaire entre État de droit et démocratie ? Le juge constitutionnel africain, de façon générale, sénégalais, en particulier, adopte souvent des positions qui rendent sceptiques. Il s'agit de son incompétence devant le contrôle de normes constitutionnelles et de ses silences qui peuvent, derrière l'option du fondamentalisme dans l'interprétation constitutionnelle, s'analyser comme des reculs à l'aune des enjeux démocratiques de son œuvre. Il en ressort l'urgence d'une redéfinition de son rôle pour la consolidation de l'État de droit.

Une interprétation fondamentaliste des textes par le juge constitutionnel

« Les Constitutions ne sont pas des tentes dressées pour le sommeil »¹⁸ disait-on, mais en Afrique les Constitutions troublent le sommeil de pas mal d'observateurs et citoyens. La révision de la Constitution est nécessaire parce qu'elle permet l'adaptation du droit aux réalités. Elle doit permettre de réduire l'écart déjà immense dans les pays africains entre le Droit et les pratiques. En ce sens, Babacar Kanté relève fort opportunément que « la stabilité d'un système est une affaire de point d'équilibre. Il s'agit d'un équilibre entre les grands principes constitutionnels, entre les institutions mais aussi entre les institutions et les citoyens ». Ce point d'ancrage est évolutif et mutant en fonction des réalités, « des circonstances, des mœurs de la société civile ou politique et des rapports de force ». Ainsi, « les différentes révisions constitutionnelles, malgré leur incohérence, ont parfois rempli une fonction de stabilisation du régime politique sénégalais » (Kanté 1989 : 157).

¹⁸ Formule bien connue de Royer Collard dans son Discours du 3 mai 1820 reprise dans M. de Barante, 1861, La vie politique de M. Royer Collard, t. II, Paris : Librairie académique Didier et cie, p. 28.

Toutefois, force est de constater que leur fréquence est facteur de banalisation des Constitutions qui perdent leur prestige supérieur pour être reléguées, symboliquement du moins, au même statut que les lois ordinaires (Conac 1980). Cette situation trouve un adossement juridique dans l'organisation même de nos régimes constitutionnels qui ne prévoient pas de mécanismes juridictionnels de contrôle de la révision constitutionnelle. En effet, si le juge constitutionnel a d'énormes pouvoirs en matière de contrôle des lois, il importe, tout de même, de reconnaître son incompétence face aux lois référendaires et aux actes constitutifs. Le fondement de cette incompétence du juge vient du fait que ces lois sont de façon directe ou indirecte l'expression même de la souveraineté. La compétence d'attribution dont il est investi lui permet de contrôler les pouvoirs publics mais nullement le peuple.

Ainsi, avec « la rigueur de l'appréciation de la compétence » qu'on lui reconnaît, le juge constitutionnel sénégalais s'est prononcé sans ambiguïté sur ces deux points. D'abord, dans son avis n° 5/2000, le juge estime qu'il « ne peut examiner ni l'aspect politique ni l'aspect de la constitutionnalité des dispositions du projet de constitution ».¹⁹ Cette position est constante chez le Conseil constitutionnel sénégalais, qui dans de nombreuses décisions, la confirme. En effet, l'argument selon lequel : « La compétence du Conseil constitutionnel est strictement délimitée par la Constitution et la loi organique sur le Conseil constitutionnel ; que le Conseil ne saurait être appelé à se prononcer dans d'autres cas que ceux limitativement prévus par ces textes ; que le Conseil constitutionnel ne tient ni des articles 74 et 103 de la Constitution ni d'aucune disposition de la loi organique le pouvoir de statuer sur une révision constitutionnelle »²⁰ est souvent brandi comme justification de ce refus. Ainsi, dans sa décision 6/C/2000, face à un recours introduit par seize parlementaires pour inconstitutionnalité d'une procédure référendaire, le juge constitutionnel précise que « la législation sénégalaise ne contient aucune disposition constitutionnelle ou légale conférant au Conseil constitutionnel compétence pour statuer sur les recours dirigés contre les décisions prises en matière de référendum par le président de la République ; qu'au surplus, il n'existe pas en l'espèce de conflit de compétence entre le pouvoir exécutif et le pouvoir législatif, comme le soutiennent les requérants ; que dès lors, le recours dont est saisi le Conseil constitutionnel échappe à sa compétence ».

¹⁹ On retrouve quelques années plus tard une position similaire chez le juge constitutionnel français notamment dans sa décision n°1/C2003 du 26 mars 2003.

²⁰ Décision n° 3/C/2005 du 18 janvier 2006.

Au vu de ces considérations, on est tenté de dire que s'il est déjà d'ancienne jurisprudence que « tout juge est juge de sa compétence », ²¹ le juge sénégalais semble l'avoir trop bien compris. En fait, il a fait du cantonnement dans la « chaîne du droit » une obligation. Un engagement que le président de la République s'est par ailleurs plu à lui rappeler en ces termes « si le Conseil constitutionnel a pour mission de veiller au respect de la Constitution par l'exécutif et le législatif, il va de soi qu'il est tenu lui-même aux mêmes obligations de respect de la Constitution et de la loi ». ²²

A partir de ce moment, ses réticences peuvent trouver deux justifications essentielles. D'abord, on est en face d'un juge constitutionnel qui ne bénéficie que de compétences d'attribution, ce qui peut être analysé comme une limitation du fait de la Constitution et de la loi organique qui déclinent ses attributions. Sur ce point, la position du juge peut se comprendre au plan strictement juridique en ce sens que la question de la répartition des compétences est une question d'ordre public qui ne saurait souffrir d'aucune interprétation. Ce qui fait dire à Ismaïla Madior Fall que « dans l'exercice de son office de contrôle de constitutionnalité, le Conseil constitutionnel se fonde sur une interprétation restrictive de sa mission qu'il circonscrit, à juste titre, dans le cadre d'une compétence d'attribution bien définie par la Constitution et la loi organique sur le Conseil constitutionnel » (Fall 2005 : 75). Ensuite, une autre justification peut se trouver dans l'interprétation limitée et à la limite littérale de la compétence du juge constitutionnel ce qui constitue une auto-paralysie de la part du juge lui-même. En effet, la distinction que la théorie juridique opère entre le sens « littéral » et les autres sens d'un texte, notamment ceux qui prennent en considération « le but » du texte, est très prononcée dans le cadre de l'interprétation constitutionnelle (Pfersmann 2005). Que le juge constitutionnel ait fait option pour la conception littérale ne fait plus l'ombre d'un doute.

Ainsi, dans sa décision n° 3/C/2005 du 18 janvier 2006 qui a beaucoup défrayé la chronique, le juge constitutionnel sénégalais semble bien ne pas perdre de vue « le respect du droit et de ses compétences » en refusant toute confusion entre les mobiles politiques des recours ²³ et les arguments juridiquement vala-

²¹ Voir en France l'article 92 du nouveau code de procédure civile et article 90 du code de procédure pénale, de même que l'article 38 R. du code des tribunaux administratifs.

²² Lettre n° 333 du 28 mars 2001 adressée au président du Conseil constitutionnel par le président de la République pour demander des explications et commentaires sur sa décision du 26 mars 2001 interdisant l'apposition de l'effigie de ce dernier sur les bulletins de vote.

²³ Dans cette affaire, tout porte à croire que l'on était encore dans ces cas symptomatiques où comme l'estime M. Zaki, certaines motivations des requérants sont « d'abord d'ordre politique, on saisit le juge à la suite d'un désaccord de fond sur un

bles. En effet, pour procéder à la prorogation du mandat des députés, deux lois dites constitutionnelles furent votées par l'Assemblée nationale selon la procédure requise et que le juge constitutionnel ne pouvait, en toute logique, connaître. Il s'agit de la loi n° 2006-11 du 20 janvier 2006 prorogeant le mandat des députés dont l'expiration était normalement prévue pour le 30 juin 2006²⁴ et la loi n° 2007-21 du 19 février 2007 modifiant la première. Pour les détracteurs de ces lois, toutes les deux n'étaient constitutionnelles qu'au regard de leur procédure d'adoption. Du coup, l'opposition ne manqua pas de les qualifier de « fausses lois constitutionnelles ». Et pour le professeur El Hadj Mbodj : « Sur la double prolongation du mandat des députés, force est de constater que ces lois n'ont nullement modifié l'ordonnement constitutionnel en vigueur, c'est à dire la disposition des droits et des institutions. Qui plus est, on ne trouve pas une seule trace de ces lois constitutionnelles dans le corps même de la Constitution. Si ces lois ont été formellement adoptées selon la procédure de révision constitutionnelle, il n'en demeure pas moins qu'elles sont restées complètement isolées du corpus constitutionnel, qu'elles étaient censées intégrer ».²⁵ Serions-nous en face de l'émergence d'une nouvelle catégorie juridique de loi ? Existerait-il une loi qui puisse ne point avoir les attributs d'une loi constitutionnelle sans pour autant être « inconstitutionnelle », une loi qui parce que viciée par une certaine « fausseté » constitue une nouvelle catégorie : Une « fausse loi constitutionnelle » ? Le débat reste entier au plan du droit, du moins dans le contexte sénégalais. Toutefois, quoiqu'il soit vrai que les enjeux politiques, qui sous-tendent ce débat, aient beaucoup fait douter de la position du juge constitutionnel sénégalais, analysé sous l'angle purement juridique on est tenté de soutenir que ce dernier n'était pas pour autant en porte à faux avec les exigences juridiques. En effet, comme le disait François Luchaire à propos d'une décision du juge constitutionnel français liée au droit d'asile, « que la Constitution ait été révisée, à propos du droit d'asile pour des motifs d'ordre politique, personne n'en doute ; mais ce n'est pas – pour le juriste – une raison pour crier au scandale » (Luchaire 1994 : 5).

Reste que ces positions du Conseil démontrent distinctement que s'il y a une limite au pouvoir du juge constitutionnel, il s'agit bel et bien du pouvoir constituant. Dans une certaine mesure, on pourrait même approuver la constance dans l'interprétation et dans la logique du juge constitutionnel sénégalais. En fait, les

texte, le recours au juge est utilisé non pas tant pour imposer le respect de la constitution que pour tenter d'éliminer un texte sur le vote duquel on a été battu ».

²⁴ L'article 60 de la constitution de janvier 2001 fixe une durée de 5 ans pour le mandat des députés et les députés dont le mandat devait être prorogé étaient élus à l'issue des élections du 29 avril 2001.

²⁵ Voir la préface à l'ouvrage de I. Fall, 2007, Textes constitutionnels du Sénégal du 24 janvier 1959 au 15 mai 2007, Dakar, CREDILA, p. 11.

déclarations d'incompétence concernent, le plus clair du temps, les lois constitutionnelles. Jusqu'en 2009, les quinze cas de décisions ou avis concluant sur une incompétence du juge constitutionnel portaient sur les révisions constitutionnelles. Les autres cas se rapportaient à des décrets de répartition notamment celui de 2006 concernant les sièges de députés à élire au scrutin majoritaire départemental²⁶ que le juge estimait relever de la compétence du Conseil d'État. Ce qui conduit à dire qu'il n'y a pas en réalité, comme le considèrent beaucoup d'observations auxquelles le juge doit, en partie, sa mauvaise presse, une multiplication des cas d'incompétence qui relèvent généralement d'un seul domaine : Les révisions constitutionnelles. Aussi valable que puisse paraître l'argument de la constance jurisprudentielle, on pourrait toujours objecter que « même si le Conseil ne peut se déjuger, il semble plus conforme à une bonne régulation du contentieux et à une politique jurisprudentielle dynamique, qu'il ne se sente pas lié par ses différentes interprétations du texte constitutionnel » (Zaki 2003 : 227). On peut même aller plus loin que le raisonnement de Zaki car il est clairement discutable de considérer que le Conseil constitutionnel ne saurait se déjuger puisque les revirements de jurisprudence sont, dans bien des cas, possibles et même, au regard de certaines circonstances, souhaitables.

Par ailleurs, si au plan juridique, l'incompétence face aux révisions constitutionnelles peut se comprendre, elle n'est pas sans conséquence sur l'évolution constitutionnelle et sur la vie politique. En ce sens, il y a lieu de distinguer d'une manière assez minutieuse, l'opportunité politique des révisions, leur fréquence et leur caractère constitutionnel.

En réalité, « l'existence d'une garantie constitutionnelle juridictionnelle de la Constitution emporte une autre conséquence. En imposant au législateur le respect de la Constitution, le Conseil constitutionnel contraint le constituant à intervenir plus fréquemment pour retoucher le texte même de la Constitution » (Melin-Soucramanien 2007). C'est ainsi qu'au Sénégal, on a vite fait de relever que la continuité politique contrastait avec l'instabilité constitutionnelle (Kanté 1989). En effet, la Constitution a été plusieurs fois remaniée, notamment dans ses dispositions relatives à la durée et au nombre de mandats présidentiels, aux rapports entre le président de la République et le Premier ministre ou entre l'exécutif et le Parlement, aux réformes judiciaires, aux collectivités locales etc. Entre la période allant du 20 juin 1967 au 24 mars 1984, on a noté une dizaine de révisions avec parfois des changements entiers de régime, avec la révision du 26 février 1970 et celle du 1er mai 1983 (Diarra 1984 : 752). La Constitution de 1963 a connu plus d'une vingtaine de révisions en trente-sept ans. Après l'alternance de 2000, les dépôts de projet de loi les plus houleux par le gouvernement

²⁶ Décret n° 2006-1350 du 8 décembre 2006 portant répartition des sièges de députés à élire au scrutin majoritaire départemental.

qui mise simplement sur ce que la presse appelle le vote de « la majorité mécanique libérale ». Tel fut le cas de la loi sur le couplage des élections législatives et présidentielle, la loi 31-2001 portant modification de l'article 33 du texte constitutionnel dont le contenu visait le vote des corps militaires et paramilitaires, le prolongement des mandats des députés et la suppression du « quart bloquant » par la modification de l'article 33 de la Constitution, en 2006. Plus récemment, cinq lois constitutionnelles ont été votées entre le 15 novembre 2006 et le 25 mai 2007 et trois étaient en cours de discussion au Parlement en décembre 2007 (Thiam 2007).

On peut noter en toute rigueur que ces révisions constitutionnelles ne sont pas exemptes de critiques – la quasi totalité étant jugée par une large partie de l'opinion et de l'opposition comme entachées d'inconstitutionnalité – et ce d'autant qu'elles échappent à tout contrôle de la part du juge constitutionnel. Cette possibilité de monter d'un cran au-dessus du juge par la procédure des révisions constitutionnelles augmente la fréquence de celles-ci. A bien des égards, il s'agit plus de contournements de procédures qui rendent la Constitution et les institutions sujettes à la manipulation politique. En effet, bien que les textes prévoient un partage du pouvoir de révision constitutionnelle entre les parlementaires et le chef de l'État, c'est ce dernier qui s'arroge un « monopole de fait » de l'initiative de révision. Ainsi, les majorités mécaniques au Parlement aidant, la révision constitutionnelle a souvent été l'instrument privilégié pour la personnalisation du pouvoir au profit du président de la République. L'adoption par le Parlement, le 29 juillet 2008, de la loi constitutionnelle portant révision de la Constitution visant une énième modification du mandat présidentiel qui, après avoir été ramené à cinq ans après l'alternance, se voit prolonger à sa durée initiale de sept ans en est une illustration parfaite.²⁷ Cette tendance a été aussi visible avec l'adoption de la loi constitutionnelle n° 01-2009 du 2 juin 2009 instituant le poste de vice-président de la République ; un poste que l'opposition qualifia de « profanation voire d'une dénaturation des institutions constitutionnelles ».²⁸

Ainsi, les déviations possibles du pouvoir constituant dérivé font que l'incompétence du juge constitutionnel est vivement critiquée surtout quand ce dernier, selon son interprétation stricte de la loi, se refuse à s'immiscer dans le contrôle du pouvoir de révision. Ce refus est souvent vu comme un casernement dans des formalismes qui empêche le juge de se placer en défenseur de l'équilibre institutionnel et garantie d'un État de droit respectueux des droits et liber-

²⁷ Et le fait que cette révision ne s'applique pas au mandat présidentiel en cours qui ne durera pas 7 ans mais 5 ans ne dédouane point le caractère ubuesque de cette révision.

²⁸ Voir décision n° 2-C-2009 du 18 juin 2009 du Conseil constitutionnel.

tés en tant que « forme la plus achevée de la liaison vertueuse entre droit et démocratie » inspiré par un « constitutionnalisme sanctionné » (Baguenard 1999).

Le vrai problème se trouve être que, même en dehors des révisions constitutionnelles, le juge sénégalais, en tant que garantie juridictionnelle du « constitutionnalisme sanctionné », fait douter, de par ses positions, de l'importance qu'il prête à la consolidation de l'État de droit démocratique par le refus de toute impunité des violations des droits et libertés. Une telle limite s'est annoncée dès la veille de son installation. En effet, en 1993, alors qu'on le voyait comme une institution bien placée pour le respect de la législation électorale notamment le respect des temps d'antenne durant les campagnes, le juge a été saisi à l'occasion de la présidentielle du 21 février 1993, d'un recours fondé notamment sur le moyen tiré des irrégularités commises pendant la campagne électorale et consistant en une propagande déguisée à la radio et à la télévision par la diffusion d'images d'une manifestation d'une autorité religieuse favorable au candidat au pouvoir. Dans sa décision n° 6-93 du 13 mars 1993, il considère, au sujet de cette manifestation qualifiée par les requérants de « pression morale sur les électeurs », qu'« il n'est pas évident qu'elle eut une influence déterminante sur le scrutin ayant pu porter atteinte à la liberté de vote des électeurs qui ont regardé cette émission ; qu'il n'en reste pas moins que la diffusion de cette manifestation par la télévision, alors que la campagne allait être clôturée est regrettable ». Par une conception limitative de sa compétence, le juge interprétant l'article 29 de la Constitution estime qu'il n'est compétent que « si les irrégularités commises lors de l'établissement des listes électorales constituaient des manœuvres susceptibles de porter atteinte, par leur nature et leur gravité, à la sincérité des opérations électorales ». Dans ce cas précis, il y avait lieu de se demander s'il n'y avait pas eu assimilation entre « irrecevabilité dans le fond » à une incompétence (Kanté 2005 : 160). Si tel était le cas, le juge constitutionnel aurait-il voulu refuser de se prononcer sur un fait qu'il qualifiait de « regrettable » en se protégeant derrière la soupape de l'incompétence ? D'un point de vue strictement juridique, il est tout à fait possible de concevoir la position du juge constitutionnel au regard de la distinction juridique entre les fautes substantielles et celles non substantielles déjà largement en cours dans les juridictions administratives. Néanmoins, les vœux de voir le juge constitutionnel jouer le rôle de l'ultime arbitre en matière de constitutionnalité justifie la critique adressée à cette décision. Ainsi un auteur écrivait-il que le fait que le Conseil constitutionnel ait manifesté, ici, une « réticence à sanctionner la propagande déguisée est une illustration de l'ambiguïté du rôle du juge électoral qui peut constater une irrégularité sans en tirer une conséquence juridique » (Fall 2002 : 129).

Ces interprétations fondamentalistes du juge ont tendance à amoindrir même les techniques méritoires du contrôle de constitutionnalité telle l'exception d'in-

constitutionnalité. A titre d'exemple, on peut retenir les arguments évoqués par le juge constitutionnel sénégalais dans sa décision n° 16/95 du 13 février 1995 où il estime que « la Cour de cassation doit se prononcer avant toute saisine du Conseil constitutionnel sur sa compétence et sur la recevabilité du pourvoi ou déchéance, tout examen de « la solution du litige » lui étant « *subordonné* ». Le résultat en est qu'en cas de « refus opposé par la juridiction, la partie intéressée ne peut pas utilement saisir le Conseil constitutionnel » (Bolle 2008). Du fait d'une telle interprétation, « c'est le comportement concret des juridictions ordinaires qui conditionnent l'effectivité de l'exception d'inconstitutionnalité ». Cette situation minore la procédure de l'exception d'inconstitutionnalité pourtant pendant longtemps considérée comme une spécificité de la justice constitutionnelle africaine qui devait même inspirer la jurisprudence de l'Hexagone²⁹ pour faire face à la lacune longtemps laissée par l'impossibilité de contrôler la constitutionnalité des lois promulguées bénéficiant de ce fait d'une « présomption irréfragable de constitutionnalité » après leur publication au Journal officiel.

En définitive, le formalisme des interprétations situe le juge dans une position le plaçant sous le feu des critiques les plus acerbes d'autant plus qu'il est le plus souvent comparé à son homologue béninois jugé plus intrépide. Un des exemples saisissants est l'attitude très audacieuse – un peu trop zélée à notre sens – de son homologue béninois qui est allé jusqu'à se prononcer sur une loi constitutionnelle. En effet, pour s'offrir une année supplémentaire au Parlement, les députés béninois, le 23 juin 2006, ont voulu, par un vote écrasant et amplement nécessaire pour une révision constitutionnelle, s'accorder une prorogation de leur mandat. Le juge constitutionnel refuse toute révision de la Constitution qui, par ailleurs, est restée intangible depuis le 11 décembre 1990. Le juge considéra que le mandat des députés, une situation constitutionnellement établie, est le résultat d'un consensus national dégagé par la Conférence des Forces Vives de la Nation de février 1990 et consacré par la Constitution en son préambule qui réaffirme l'opposition fondamentale du peuple béninois à la confiscation du pouvoir. Il ajoute que la prévision d'une procédure de révision de la Constitution ne saurait primer sur la détermination du peuple béninois à créer un État de droit et de démocratie pluraliste, la sauvegarde de la sécurité juridique et de la cohésion nationale. Il considère que toute révision doit tenir compte de ces idéaux, notamment le consensus national, principe à valeur constitutionnelle et « qu'en conséquence, les articles 1 et 2 de la Loi constitu-

²⁹ La procédure de la question prioritaire de constitutionnalité n'a été intégrée que récemment en France avec la modification de l'article 61-1 de la Constitution par la loi constitutionnelle 2008-724 du 23 juillet 2008 portant modernisation des institutions de la Vème République (J.O. du 24 juillet 2008).

tionnelle n° 2006-13 adoptée par l'Assemblée nationale le 23 juin 2006, sans respecter le principe à valeur constitutionnelle ainsi rappelé, sont contraires à la Constitution ». Par ce dernier considérant de la décision DCC 06-074, le juge se donne le droit de censurer une loi constitutionnelle dont l'adoption « a respecté les procédures qui s'appliquent à la révision de la Constitution ». Le juge béninois opte pour ce que la doctrine qualifie de « supra-constitutionnalité interne »³⁰ définie comme l'existence d'une « supériorité de certaines règles ou principes, qualifiés de « normes », sur le contenu de la Constitution, normes pouvant figurer expressément dans le texte ou existant explicitement » (Arné 1993 : 475). Un scénario quasi inédit se dessine ainsi dans le paysage constitutionnel de l'Afrique francophone. Inédit en ce sens qu'il opère une rupture avec la tradition de refus de toute idée de supra-constitutionnalité largement répandue dans l'espace francophone. En effet, même dans l'histoire constitutionnelle française, on ne relève point de décision du Conseil constitutionnel qui ait reconnu expressément l'existence de « principes supra-constitutionnels internes » à moins de voir un tel principe à travers l'article 89 de la Constitution qui pose que la forme républicaine du gouvernement ne peut faire l'objet de révision. Toujours est-il qu'une telle position pourrait susciter un intérêt certain pour la construction démocratique sur le continent s'il permet au juge constitutionnel de faire face à l'infantilisation de la Constitution par les pouvoirs publics.

Ce souci d'un activisme judiciaire capable de consolider l'État de droit démocratique place le juge constitutionnel sénégalais face à un défi constant de recherche d'une redéfinition de son rôle.

Une redéfinition nécessaire du rôle du juge constitutionnel

François Delperée s'interrogeait en des propos on ne peut plus provocateurs : « Un spectacle réussi, a-t-on coutume de dire, repose sur un bon sujet et sur de bons acteurs. Et s'il en allait de même pour l'œuvre de la justice constitutionnelle ? » (Delperée 2003 : 5). On est tenté de répondre par l'affirmative en ce qui concerne, en tout cas, la participation de celle – ci à la consolidation de l'État de droit.

En conséquence, la recherche constante de la consolidation de l'État de droit doit se réaliser à trois niveaux : L'un est avant tout un problème d'ordre conceptuel et tient de l'idée même que l'on se fait de l'État de droit ; l'autre, plutôt juridique, concerne les attributions du juge en ce sens que le juge ne fait que dire le droit et ne peut en aucun cas le créer ; enfin le dernier niveau paraît plus

³⁰ Elle s'oppose à la supra-constitutionnalité externe qui consiste en l'existence de normes internationales ou supranationales à l'observation desquelles sont soumises les normes constitutionnelles.

subjectif parce que d'ordre « intime » en ce qu'il relève de la déontologie même du juge. D'abord, il est opportun de se demander si au-delà même des seules compétences d'attribution dont bénéficie le juge, une explication fondamentale de la frilosité du juge n'est pas à rechercher dans la Constitution sénégalaise elle-même. Le préambule de ladite Constitution décline « l'option pour le respect et la consolidation d'un État de droit dans lequel l'État et les citoyens sont soumis aux mêmes normes juridiques sous le contrôle d'une justice crédible et indépendante ». Cette tentative de chercher une définition à l'État de droit semble davantage sacrifier à l'approche formaliste de l'État de droit plutôt qu'à celle substantielle qui semble mieux à même de porter les germes d'une démocratie constitutionnelle qui aille au-delà des procédures. Ensuite, en ce qui concerne la relecture des attributions du Conseil constitutionnel, beaucoup d'exemples peuvent être tirés des pays francophones eux-mêmes, notamment le Bénin. En effet, trois aspects fondamentaux particularisent le cas béninois : L'absence de quorum pour la saisine parlementaire, la possibilité pour la Cour de se prononcer directement sur la violation des droits de la personne et l'auto-saisine de la Cour constitutionnelle (Degni-Segui 1998 cité par Diarra 2001). Ainsi, la Cour constitutionnelle béninoise semble, pour une meilleure efficacité de son contrôle, combiner quelques différents éléments des trois variantes du modèle kelsenien de justice constitutionnelle,³¹ rompant ainsi avec le mimétisme traditionnel en allant au-delà des modèles classiques, ce qui peut s'analyser comme une posture assez audacieuse à l'aune du contexte balbutiant des démocraties africaines. Ceci découle des énoncés constitutionnels non moins audacieux. En effet, l'article 122 de la Constitution béninoise pose expressément la saisine par voie d'action ou sous la forme d'exception préjudicielle de constitutionnalité. Aussi le système béninois s'est-il attelé rigoureusement, notamment à travers le règlement intérieur de ladite Cour, à la facilitation de la procédure de saisine qui est écrite, gratuite et secrète. Et dans la pratique, cette saisine est de loin préférable à la saisine par voie d'exception en ce sens que les citoyens la trouvent plus rapide et ont davantage confiance en l'indépendance et en l'autorité du juge constitutionnel plutôt qu'en la justice ordinaire trop souvent entachée d'incurie (Bourgi 2000 : 739). Et mieux encore, l'article 121 al. 2 de la Constitution béninoise permet à la Cour constitutionnelle de se

³¹ Les trois variantes sont déclinées par Dutheillet de Lamothe en ces termes : « soit la Cour constitutionnelle est totalement indépendante des autres juridictions (...) ; soit le système prévoit la possibilité pour le juge ordinaire de renvoyer, par une question préjudicielle, devant la Cour constitutionnelle l'examen de la constitutionnalité d'une loi dont il doit faire application (...) ; soit le système ouvre la possibilité aux citoyens eux-mêmes, après épuisement des voies de recours ordinaires, de se prévaloir devant la Cour constitutionnelle de la violation par l'administration, ou même par une juridiction, de leurs droits et libertés fondamentales (...) ».

prononcer « d'office sur la constitutionnalité des lois et de tout texte réglementaire censé porter atteinte aux droits fondamentaux de la personne humaine et aux libertés publiques ». De même, le juge constitutionnel béninois s'adonne à la pratique dite des réserves d'interprétation largement pratiquées. Quelle que soit la pratique effective de ces attributions, ces dispositions, combinées à d'autres, offrent au juge constitutionnel l'opportunité de faire « sauter les verrous juridiques qui permettaient à des gouvernements autoritaires d'exercer légalement leur pouvoir » (Du Bois de Gaudusson 1999 : 257).

Notre insistance sur l'explication du modèle béninois a pour but de mettre en relief l'idée selon laquelle le droit sénégalais pourrait revoir les attributions du juge notamment en matière de protection des droits de l'homme, et donner aussi au citoyen la possibilité de susciter, à lui seul ou en groupe, le contrôle de constitutionnalité de manière directe et offensive en vue d'une meilleure consolidation de l'État de droit. Il s'agissait aussi de relever, malgré le défaut d'élaboration affinée des motivations des décisions mais aussi le soupçon de l'existence de mobiles politiques plus avérés que des motifs juridiques, qu'à bien des égards les positions du juge constitutionnel béninois relèvent d'un grand courage dans le contexte africain.

Mais toujours est-il qu'il faut garder les réserves qui s'imposent du fait même de la divergence de contexte des deux juridictions entre les modèles béninois et sénégalais. Il ne faut pas perdre de vue que les institutions sont filles de l'histoire politique de chaque pays. Alors que le modèle béninois naît des cendres d'un régime non démocratique après un rassemblement des forces vives de la nation à travers des conférences nationales, le modèle sénégalais est un système qui s'est construit par touches successives depuis la veille des indépendances. A partir de ce moment, l'un et l'autre évoluent naturellement dans des contextes différents et s'ils n'ont pas de buts différents, ils peuvent, du moins, avoir des priorités divergentes. L'un estimait nécessaire d'enrichir son système institutionnel d'une Cour constitutionnelle, l'autre se limita, en lieu et place d'une telle Cour, à une mise en place d'un Conseil constitutionnel. En outre, il n'est pas rare que la Cour constitutionnelle béninoise soit accusée d'en faire plus que ne l'autorisent ses attributions (Aïvo 2006). Pour ses détracteurs, elle est victime de l'indulgence de l'opinion publique pour le « juge séditieux ». Or, le « gouvernement des juges » – fut-il celui des juges constitutionnels s'adonnant à des interprétations parfaitement subjectives des textes flous et lacunaires – reste aussi incompatible avec l'État de droit. Vouloir situer toutes les juridictions constitutionnelles sur le même pied dans une ambiance où le rôle du juge s'analyse uniquement à l'aune de ses actes de bravade à l'égard des pouvoirs publics, ferait tomber la juridiction dans cette « fumisterie institutionnelle » où l'on a eu jadis à classer le comité constitutionnel français (Poirmeur 1999 : 312).

Par ailleurs, toujours dans le domaine des attributions, il est clair, au regard des objectifs de consolidation démocratique et de protection des libertés souvent consignés dans les accords internationaux, que la compétence du juge constitutionnel en matière du contrôle de conventionalité des lois aurait pu être d'un apport certain dans la construction de l'État de droit par l'offre d'un contrôle supplémentaire des droits fondamentaux surtout dans nos États encore fragiles. Cependant, cette supposée carence ne doit pas être systématiquement considérée comme un travers angoissant si l'on sait que les autres juridictions, même celles de rang inférieur, peuvent engager la responsabilité de l'État sur la base de ces conventions internationales. De ce point de vue, un recours constitutionnel systématique n'est pas forcément d'une nécessité particulière. Aussi, sur ce plan, revoir les compétences de la juridiction constitutionnelle dans le sens d'un recours direct des citoyens nécessitera-t-il, au préalable, une meilleure articulation des compétences entre le juge constitutionnel et les autres juges qui ont aussi des compétences étendues, une redéfinition de l'autorité de la chose jugée et une harmonisation des jurisprudences.

Et enfin, concernant la question de l'attitude du juge lui-même, nous dirons avec Paul Martens que « le juge, ce n'est pas seulement un professionnel capable de manier intellectuellement les règles de procédures et les concepts juridiques, c'est aussi celui qui fait en sorte que personne ne puisse se trouver démuni face à l'arbitraire du pouvoir » (Martens 2003). Au lieu de « s'abriter dans l'étanchéité des ordres juridiques », le juge devrait se prononcer chaque fois qu'un droit fondamental était en cause et que l'État de droit était menacé sans s'encombrer « des questions sophistiquées de recevabilité et de compétence ». Il s'agit de ne pas tolérer l'existence dans les États de zones de régression démocratique.

Dans cette perspective, l'idée n'est pas de mettre à mal le droit en entrant dans des considérations hautement subjectives mais plutôt de requérir un effort de la part du juge d'être plus stratège. Pour le cas français déjà, Jacques Robert évoquait l'idée d'une « nécessaire stratégie » (Robert et Rousseau 1998 : 1756), non pas une stratégie de pouvoir mais une « stratégie politique ». Pour cet ancien juge constitutionnel, bien que le Conseil ne soit pas une juridiction politique, la stratégie politique doit consister en une recherche de plus de crédibilité du côté de l'opinion publique. Pour le juge français, cela consiste à ne pas aller dans le sens des censures fréquentes et systématiques des lois sauf en cas de violation caractérisée de la Constitution. Il pense qu'« il faut que l'opinion se dise : Ils ont arrêté cette loi parce que, effectivement, il y avait une *violation caractérisée de la Constitution* et ne le faire que dans des cas exemplaires et pas trop souvent » (*ibid.* 1998).

Ce qui importe, ici, pour le juge constitutionnel, est moins le refus de censurer que l'idée qu'il y a une nécessité de stratégie politique et de quête de

crédibilité populaire. Ainsi, si la classe politique sénégalaise estime que le juge constitutionnel doit être plus hardi, il devrait être à même de renforcer sa vigilance en vue d'obtenir une meilleure légitimité en tant qu'institution non élue. C'est la conscience de la présence d'un juge constitutionnel figé sur une interprétation littérale que favorise la tradition positiviste en cours dans la formation dont il est issu qui avait conduit l'opposition au Sénégal à déposer une proposition de loi en août 1999 devant l'Assemblée nationale pour qu'il y ait une réorientation de la composition du Conseil constitutionnel. Cette loi proposait que parmi les cinq juges, au moins deux soient issus de milieux autres que judiciaires ou des facultés des sciences juridiques. Elle visait l'intégration d'autres types de juges³² dont les expériences professionnelles permettraient d'avoir une vision moins fondamentaliste et plus éclairée par les expériences vécues.

Le juge est confronté le plus souvent à des difficultés d'interprétation du texte parfois flou ou silencieux. Pour pallier cette tare, à l'image du juge français qui ne va pas certes au delà du texte mais qui, en cas de silence, use de ses pouvoirs d'interprétation pour créer des principes constitutionnels qui viennent renforcer le texte et diminuer ses lacunes, le juge constitutionnel sénégalais doit pouvoir faire œuvre normative et non pas rester contraint par son statut de juge de la constitution. Il lui faut comprendre que l'idée selon laquelle *cujus est condere legem ejus interpretari*³³ est révolue. Cette exhortation est d'autant plus justifiée que le juge sénégalais lui-même considère dans sa décision n° 18/95, affaire n° 3/C/95 du 19 juillet 1995, « Que la seule préoccupation du Conseil constitutionnel demeure le fonctionnement harmonieux et complémentaire des juridictions qui commande *aux juges de corriger les imperfections de la loi, de combler ses lacunes par des constructions jurisprudentielles réfléchies, patientes et parfois audacieuses* » (c'est nous qui soulignons). Si le juge constitutionnel peut avoir de telles ambitions pour les autres juridictions, on ne peut raisonnablement en attendre moins de lui.

Cette optique découle de l'observation selon laquelle « tout n'est jamais radicalement inconstitutionnel, tout n'est jamais même radicalement constitutionnel ou rarement ». Avec cette conviction, le juge – rompant avec le fétichisme des textes qui veut trouver à toute interprétation un substratum écrit – pourrait aller jusqu'à créer « *ex-nihilo* de nouveaux principes constitutionnels s'ils apparaissaient imposés par l'évolution des mœurs ou des technologies du monde moderne » (Robert et Rousseau 1998 : 1760). Il est clair que même en

³² Des politologues, des journalistes de desk politique, d'anciens hommes d'État, des ambassadeurs, des officiers généraux ou supérieurs, etc.

³³ Expression latine signifiant « C'est à celui qui a édicté la loi qu'il appartient de l'interpréter », Voir G. Cornu (sous la direction de), 2007, Vocabulaire juridique, 8e éd., Paris : PUF, p. 978.

France, d'où le Sénégal a hérité le modèle, le juge constitutionnel, pour faire valoir « l'objectif constitutionnel », « invente une jurisprudence et s'attribue des compétences qui ne sont certainement pas ce que prévoit la Constitution » (Arné 1996 : 232). Néanmoins et à l'évidence, cette stratégie politique doit être pratiquée avec modération car si le juge constitutionnel en Afrique est un pédagogue avant d'être un censeur, en tant « qu'arbitre qui doit apprendre les règles du jeu aux joueurs : Comme l'arbitre sportif qui surveille le jeu sans y participer, il doit discipliner les gouvernants sans se substituer à eux ».

Mais, insidieusement, aborder la position subjective du juge en Afrique, revient inévitablement même à questionner sa position objective par rapport aux autres pouvoirs, notamment au pouvoir exécutif. Au delà, l'objectif qui vise à faire participer le juge constitutionnel au jeu démocratique et à la consolidation de l'État de droit, ne peut s'inscrire que dans un mouvement d'ensemble n'occultant aucun aspect du problème. Sous ce rapport, se pose souvent la question de mettre le juge dans une situation objective lui permettant d'être efficace. D'abord, en ce qui concerne son statut, s'il faut reconnaître un certain mérite dans la position statutaire du juge constitutionnel sénégalais contrairement à d'autres pays africains comme le Burkina Faso où le président de la République peut démettre ce dernier à partir d'un simple décret, la question de son indépendance n'est pas pour autant totalement réglée. Ensuite, la maîtrise des règles de procédure par les requérants est nécessaire pour tout succès des recours face à un juge plus enclin au formalisme qu'à l'empirisme. Une vulgarisation du droit en ce sens ne serait point inopportune. En outre et à titre d'exemple, notons que quand la fameuse loi de 2006 décida de regrouper les élections présidentielle et législatives, autant l'opposition, les juristes, que l'opinion, s'employaient à décrier la prolongation des mandats des députés – mais beaucoup d'entre eux avaient oublié que cette situation conduisait le juge constitutionnel à se prononcer sur l'ensemble des résultats des deux élections dans un délai de cinq jours en lieu et place de cinq jours pour chacune des élections. On se souciait peu de savoir s'il s'agit là d'une situation objective permettant au juge d'être à même de mener à bien sa tâche.

Pourtant, ces questions particulières, à la limite banales, méritent aussi attention si tant est que la consolidation de l'État de droit est une finalité commune à tous les Sénégalais.

Conclusion

Le juge constitutionnel sénégalais aura-t-il permis la consolidation d'un « État de droit achevé » ? Même si l'affirmative ne saurait s'imposer comme réponse, il est clair que le juge constitutionnel, malgré ses moyens limités, est parvenu par le biais de ses attributions à apporter sa contribution à l'édification de l'État

de droit démocratique. Pourtant, il lui reste encore du chemin à faire dans ce processus aux exigences mouvantes. En effet, le juge sénégalais n'est pas exempt de reproches et parmi les critiques qui lui sont adressées on compte son excès de fondamentalisme. La rigueur de son appréciation des règles de forme fait qu'il est dessaisi de nombre de causes qui, si examinées au fond, recèlent bien des germes d'inconstitutionnalité. Ces champs d'inconstitutionnalité qu'il laisse au nom du respect du formalisme juridique, aussi méritoire que puisse paraître son option, constituent des zones de régression démocratique dangereuses pour la consolidation de l'État de droit. Étant donné qu'il est beaucoup plus aisé de poser les bases de l'État de droit que de les perpétuer et de les maintenir en bon état, dans la mesure où l'État de droit existe en tant que mouvement de rationalisation et de mise en ordre perpétuelle et évolutive, le juge sera appelé à se perfectionner pour atteindre son objectif.

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Sur les traces du droit vivant dans le labyrinthe du droit foncier et des pratiques locales au Mali

Moussa Djiré

Au cœur de ce texte se trouve la question de savoir si, compte tenu des dynamiques locales marquées par le pluralisme juridique, la décentralisation administrative peut constituer un facteur de sécurisation foncière. La réponse à cette question a nécessité d'étudier d'abord la configuration et les caractéristiques des dynamiques locales afin d'y identifier les manifestations concrètes du pluralisme juridique en général, de préciser ensuite l'expression de ce pluralisme à travers l'analyse des règles et pratiques de la gestion foncière et, enfin, de déterminer à partir d'études de cas, quel peut être le rôle de la commune en matière de sécurisation foncière. L'étude de la configuration sociopolitique et institutionnelle de la commune dévoile l'existence d'un pluralisme juridique marqué par la superposition ou plutôt la coexistence de plusieurs champs sociaux, de centres d'autorités, donc de producteurs de normes juridiques plus ou moins autonomes. Ces champs qui sont d'envergure communale ou infra communale, ne sont pas cependant en rupture ou en opposition constante et n'évoluent pas en vase clos. Selon les situations, ils occupent le même espace ou mobilisent les mêmes acteurs. Ce contexte qui constitue celui de la gestion foncière est fortement marqué par l'autonomie de fait des villages, un activisme des ONG, l'absence de l'État mais d'un État qui s'entête pourtant à vouloir tout régenter, la faiblesse et l'impuissance de la commune pourtant formellement pourvue de nombreuses prérogatives. Pour se consolider et constituer un facteur de sécurisation foncière, la décentralisation devra se renégocier, car les idées généreuses de démocratie et de développement dont elle est porteuse ne seront que des

vœux pieux tant que les villages ne les intégreront pas à leur vécu. Cette renégociation suppose une plus grande implication des institutions villageoises dans le processus de prise de décision et de leur exécution. Elle suppose également la reconnaissance du patrimoine foncier des villages et la consolidation du rôle de coordination et de médiation de l'institution communale.

Introduction

Ce texte reprend des extraits d'un rapport de recherche (Djiré 2001) dont certains éléments ont été publiés dans un ouvrage collectif que j'ai eu l'honneur de co-diriger avec Gerti Hesseling et Barbara Oomen (Djiré 2005). Il présente le processus de mutation intellectuelle d'un « juriste classique », une reconversion dans laquelle le contact avec Gerti Hesseling a joué un rôle essentiel. Il ne pouvait y avoir de ma part meilleur hommage à Gerti, que de revenir sur ce parcours « initiatique » auquel elle a fortement contribué.

En confrontant la devise du pays « *Un peuple-un but-une foi* » célébrant l'unité nationale à la possibilité d'un pluralisme juridique, il n'était point question pour moi de la remettre en cause, mais de l'utiliser pour relater cette expérience de recherche qui a consacré une rupture dans ma démarche de chercheur et mon appréciation des phénomènes juridiques.

Les considérations sur l'unité nationale ont favorisé l'expansion, surtout dans l'espace francophone, des théories du « droit pur » prônant le monisme juridique fondé sur une approche formaliste. Le Mali, du fait de l'influence du système classique français, n'a pas échappé à cette tendance. L'enseignement et les pratiques officielles du droit sont de façon générale empreints d'un grand dogmatisme enrobé dans un formalisme savant.

Je ne suis pas un juriste « pur et dur » au vrai sens du terme. Mais, ma conception du droit n'était pas très éloignée de la tendance dominante : C'était une approche profondément positiviste, mettant le droit étatique au centre de l'ordonnement juridique. Toutefois, l'acquisition de connaissances en anthropologie juridique et la conduite d'une recherche à partir de cette méthodologie ont entraîné des changements dans cette vision. Le présent texte retrace l'itinéraire de cette reconversion, ainsi que les résultats de la recherche qui a permis d'expérimenter les nouvelles méthodes.

L'apprentissage de nouveaux concepts et l'élaboration d'une problématique de recherche sur le foncier – décentralisation

Au tout début, était le programme de coopération juridique Mali-Pays-Bas, un projet élaboré en 2000 par des institutions de recherche des Pays-Bas et financé par le ministère néerlandais des Affaires étrangères. Ce projet avait pour but de

contribuer, entre autres, à l'émergence à la Faculté des Sciences Juridiques et Economiques de l'Université de Bamako, d'une culture de recherche socio-juridique. Boursier du programme, je passai trois mois de formation méthodologique au pays de Grotius.

Les concepts alors étudiés comme ceux de pluralisme juridique, ceux sous-jacents de champs sociaux semi-autonomes et d'arènes locales, ainsi que les notions de groupes stratégiques, les théories sur l'impact social de la loi et de l'approche processuelle, malgré les limites qu'ils recèlent, m'ont semblé très pertinents pour l'analyse des phénomènes juridiques.¹

A l'issue de la formation, je décidai de consacrer ma recherche à l'étude des conditions de formation, des spécificités ainsi que du fonctionnement des droits locaux.² Dans la mesure où le droit n'existe et ne s'exprime qu'à travers des relations sociales concrètes, je plaçai au cœur de ma problématique de recherche la question du foncier-décentralisation.

Au Mali, pays à vocation agropastorale, la question foncière est l'objet d'une grande préoccupation, de la part aussi bien des autorités administratives et politiques que des populations. En zone rurale, elle se caractérise par une grande insécurité que les réformes successives du code domaniale et foncier, notamment en 1986 et en 2000 et 2002, n'ont pas encore réussi à atténuer.

La réforme de *décentralisation* (mise en œuvre à partir de l'adoption de la loi n° 93-008/AN-RM du 11 février 1993 déterminant les conditions de la libre administration des Collectivités Territoriales, modifiée par la loi n° 96-056 du 16 octobre 1996) visant à accorder aux populations le droit de gérer leurs propres affaires, la mise en place des institutions décentralisées devrait en principe contribuer à réduire les situations conflictuelles découlant de l'écart entre le droit et les pratiques, et permettre une plus grande efficacité en matière de gestion foncière et, au-delà, contribuer au développement local. Mais, rien n'est moins aussi évident. Les communes sont les collectivités décentralisées de base. En milieu rural, elles sont essentiellement formées de villages ou de fractions qui continuent à être gérés par des institutions coutumières. La coexistence entre celles-ci avec, d'une part, des institutions communales élues et, d'autre part, celles de l'État, soulève des problèmes dont l'étude présente un intérêt scientifique certain. Par ailleurs, si peu de gens contestent l'opportunité

¹ Pour un bref aperçu de ces concepts cf. Arnaud 1993.

² Sans remettre en cause la notion de droit coutumier je lui préférerais désormais cette appellation, car déjà lors de la formation théorique, il était apparu clairement qu'il n'existe pas de droit coutumier à l'état pur et que ce qui est généralement présenté comme étant le droit coutumier, n'est en fait qu'un assemblage de normes de diverses origines, établies à la suite de pratiques plus ou moins répétées.

du choix de la décentralisation, les avis restent encore largement divergents quant à l'appréciation de ses orientations et de ses perspectives.³

Je me proposai donc de chercher la réponse à la question de savoir si, compte tenu des dynamiques locales marquées par le pluralisme juridique, la décentralisation administrative pouvait constituer un facteur de sécurisation foncière.

La réponse à cette question nécessitait d'étudier d'abord la configuration et les caractéristiques des dynamiques locales afin d'y identifier les manifestations concrètes du pluralisme juridique en général, de préciser ensuite l'expression de ce pluralisme à travers l'analyse des règles et pratiques de la gestion foncière, et enfin de déterminer à partir d'études de cas, quel peut être le rôle de la commune en matière de sécurisation foncière. L'objectif général de la recherche étant d'étudier « le droit vivant », afin d'y déceler des expériences susceptibles de renforcer la sécurisation foncière, et au-delà, le processus de décentralisation.

Pour les investigations de terrain, mon choix s'est porté sur la commune rurale de Sanankoroba. Cette localité, tout en présentant certaines caractéristiques propres aux zones péri-urbaines (du fait de sa proximité avec le district de Bamako), reste une zone profondément rurale, marquée par des conflits fonciers de divers ordres, et constitue à ce titre un observatoire privilégié pour la recherche envisagée.

Démarche méthodologique et déroulement de la recherche : Un pas de plus dans la remise en cause

Si la démarche méthodologique générale fut celle de l'anthropologie juridique, je décidai cependant d'adjoindre à l'approche processuelle fondée sur l'étude des conflits l'analyse des normes, aussi bien nationales que locales, car le droit peut être vécu également en dehors du conflit. L'obéissance aux règles juridiques constitue même parfois la forme la plus courante d'observation du droit. C'est pourquoi il est nécessaire d'analyser leur contenu, et la façon dont les parties les appréhendent, les intériorisent, et les négocient dans leurs activités et au cours des conflits. Les règles ne sont pas seulement un cadre, mais aussi un enjeu, et il est nécessaire d'étudier pourquoi elles sont ou ne sont pas appliquées (Rouland 1988 : 73).

Aussi, la recherche a-t-elle été abordée sous deux angles intimement liés. Le premier concerne l'identification et la description du paysage institutionnel, les « groupes stratégiques », et l'analyse des valeurs qui les animent, ainsi que les

³ Dans l'appréciation du processus de décentralisation, s'affrontent « les rêves de démocratie de base et le scepticisme libéral démocratique, la vision emphatique et la vision sceptique » (von Trotha 1999 : 1), mais les vraies questions demeurent posées quant à l'avenir du processus dans la phase opérationnelle (cf. Kassibo 1997).

logiques sur lesquelles ils se fondent. Concomitamment, j'essayais de confronter, autant que possible, les faits observés avec les normes du droit étatique, afin de vérifier le processus de réception de ce dernier dans le droit et les pratiques locales.

Le second angle concerne l'étude des rapports entre les principaux champs sociaux et les interactions en leur sein ; aussi bien des rapports de coopération que des litiges et les modes de leur résolution. Ces relations ont été abordées à travers des études de cas approfondies.

Pendant la phase de terrain, furent pratiquées différentes techniques d'enquête enseignées par la science anthropologique. C'est ainsi que l'observation participante, les entretiens formels et informels, individuels et de groupe, la prise de notes, la reconstitution des faits, le recours à des informateurs clefs, la consultation des archives tant de la mairie que des organisations non gouvernementales et associations villageoises de développement ont été mis à profit pour collecter et consigner le maximum d'informations.

Du fait de la démarche itérative que je privilégiais, la problématique connue, tout le long de la phase de terrain, de nombreuses rectifications. Mais celles-ci n'ont pas été opérées à la manière d'un *zapping thématique*, mais plutôt de réajustements graduels, nécessités par les informations recueillies.

Pour rendre les résultats de la recherche lisibles, j'articulerai mon texte autour de trois axes : Dans un premier temps, je présenterai la configuration et les caractéristiques des dynamiques locales ; ensuite, j'analyserai les règles et pratiques de la gestion foncière en mettant en exergue les éléments de sécurisation foncière ; enfin j'évoquerai la place de l'institution communale dans la sécurisation foncière.

Configuration et caractéristiques des dynamiques locales dans la commune rurale de Sanankoroba : Un pluralisme juridique évident

Par dynamiques locales, j'entends l'ensemble des interactions entre acteurs locaux. Il s'agit des configurations institutionnelles et socio-politiques observées aussi bien en position statique qu'en mouvement. Cette observation permet d'identifier plusieurs champs sociaux plus ou moins autonomes, tant au niveau communal que villageois. Pour être bien appréhendés, ces champs sociaux doivent être situés dans leur environnement physique. Aussi, commencerai-je par présenter la carte de visite des localités, avant d'aborder successivement l'arène villageoise et les acteurs d'envergure communale.

Présentation des localités

La commune rurale de Sanankoroba est située au sud de Bamako. Son territoire est constitué par de vastes plaines en bordure du Niger avec quelques plateaux

latéritiques à l'est et au sud. Officiellement estimée à 18 296 habitants⁴, elle a une population pluri-ethnique, avec cependant une prédominance des ethnies bambara et malinké. Composée de 26 villages, elle est une des trois communes héritières de l'arrondissement du même nom qui regroupait une soixantaine de villages. Administrativement, elle est rattachée au cercle de Kati et à la région de Koulikoro. L'agriculture constitue la principale activité économique. Celle-ci est appuyée par l'élevage, la pêche ainsi que les produits de la cueillette et le maraîchage.

Le village de Sanankoroba, le chef-lieu de la commune, est situé à trente cinq kilomètres de Bamako. Fondé vers le 18ème siècle par les Traoré, sa population est estimée à 5195 habitants. Les deux autres villages, Nienguen Coura et Nienguen Koro, sont situés à trente kilomètres à l'ouest de Sanankoroba, à moins d'un kilomètre l'un de l'autre, sur des hauteurs bordées par une vaste plaine.

C'est dans cet environnement globalement marqué par une grande pauvreté, que se positionnent et interagissent divers champs sociaux.

L'arène villageoise – un pluralisme juridique diffus et hiérarchisé

Le village est défini par l'article 60 du code des collectivités territoriales comme étant la communauté de base en milieu rural sédentaire. Il est administré par un chef de village investi par le conseil de sa communauté. Le chef de village est pratiquement considéré par la loi comme un appendice de la commune et de l'État. Mais la situation est en réalité beaucoup plus complexe. Chacun des villages étudiés possède une grande autonomie fondée sur une organisation sociale et politique cohérente qui structure un véritable « *ordre villageois* ».

A l'intérieur des villages, on distingue plusieurs structures qui forment autant de champs sociaux relativement autonomes: Les familles et les clans, le conseil des anciens, les groupes d'âge et les associations.

Les familles et les clans (lignages) constituent le premier échelon et en même temps le centre de gravité et le pivot des relations sociales.

Dans les trois villages, le conseil des anciens également appelé « Vestibule des anciens » ou tout simplement « le Vestibule »⁵ est la véritable instance de prise de décision au niveau villageois. Mais, il n'est nulle part évoqué par le

⁴ Chiffres du recensement de 1996 alors disponibles.

⁵ Le terme vestibule (*blon*) désigne en général la première salle qui sert de porte d'entrée dans les concessions bambara. Il est donc pourvu de deux portes : une donnant sur la rue et l'autre débouchant sur la cour de la concession. Ici, il désigne le lieu où se tiennent les réunions du conseil des anciens, qui est généralement le Vestibule de la concession du chef de village. Comme il est d'usage dans les villages, nous appellerons souvent Vestibule, le conseil des anciens.

code des collectivités qui fait plutôt référence aux conseillers de villages élus.⁶ Le conseil des anciens jouit d'une grande légitimité liée, d'une part, à sa composition et, d'autre part, aux modalités de prise de décision.⁷ En principe composé du chef de village et des patriarches des différents clans, il siège chaque fois que des problèmes d'intérêt villageois le nécessitent. Dans l'exercice de son pouvoir, le Vestibule s'appuie sur les groupes d'âge ou *sèrè*. Un groupe d'âge regroupe les hommes ou les garçons de la même génération circonscrits à la même date. A la tête de chaque groupe d'âge, se trouve un chef qui est obligatoirement ressortissant d'une famille autochtone. En faisant une transposition des institutions modernes sur l'organisation sociopolitique des villages, on peut affirmer que le Vestibule des anciens représente le pouvoir législatif et les groupes d'âge, le pouvoir exécutif, dans la mesure où ce sont ses membres qui interviennent dans le village, soit pour exécuter une décision du conseil des anciens soit de leur propre initiative (Amstalden 1998 : 58).

A côté de ces institutions qui peuvent être qualifiées de coutumières dans chaque village, existent de nouvelles organisations, des associations regroupant tantôt l'ensemble du village, tantôt les jeunes ou les femmes. Celles-ci ont été créées, d'une part, à la faveur du mouvement de démocratisation qui a suscité la création de multiples associations et, d'autre part, grâce à l'action des organisations non-gouvernementales qui ont encouragé la mise en place de structures d'appui à leurs projets.

De tout ce qui précède, on peut déduire l'existence dans les villages d'un certain pluralisme juridique dans la mesure où chacune des organisations sociales présentées forme un champ social organisant des relations sociales déterminées, structurées autour des principes et des règles propres. Mais, il convient de ne pas exagérer la portée de ce pluralisme qui est diffus et hiérarchisé, toutes les structures étant en principe soumises au conseil des anciens. Le village constitue une sorte de société globale dont les contours et les spécificités ne sont pleinement intelligibles qu'à la lumière de ses principes fondateurs ainsi que des interactions entre les principaux groupes sociaux. Ces principes de base ont pour nom : Parenté, gérontocratie, autochtonie et hiérarchisation des rapports de genre.

⁶ Ces derniers sont plutôt des intermédiaires entre le conseil des anciens qu'ils appuient et l'administration. Ils sont dirigés par un premier conseiller qui fait office de coordinateur.

⁷ Dans les trois villages, lorsqu'un problème est débattu par le Vestibule, la parole passe du plus jeune au plus ancien et se termine par le chef de village qui conclue par une synthèse qui est exposée comme étant la position du village. Cette démarche vise, d'une part, à préparer la décision des anciens qui sont généralement les seuls à se prononcer sur le fond de la question débattue, d'autre part, à éviter qu'un aîné ne soit contredit par un cadet, pratique contraire à la coutume.

Le principe de parenté sur lequel reposent les familles et les clans, détermine l'appartenance des individus à un sous-groupe de la société, le partage des mêmes ancêtres dont les « mânes » sont ensemble célébrés, ainsi que celui du même espace, exploité en commun ou non. Il est le fondement d'une grande solidarité. Le rejet hors de la famille ou du clan constitue donc pour un individu la pire des sanctions.

Le principe de gérontocratie et son complément – le principe de séniorité, fondent l'organisation et le fonctionnement du Vestibule et des groupes d'âge et constituent la base de tous les rapports sociaux, les cadets étant toujours soumis aux aînés. L'acceptation quasi générale de ces principes est liée au fait que l'acquisition et la transmission des connaissances s'effectuant de façon généralement empirique, « la séniorité est synonyme de pouvoir et de savoir » (Bérindogo 1997).

L'autochtonie est rarement évoquée comme principe d'organisation sociale. Mais une différenciation, que l'on ne peut observer qu'à l'issue d'un séjour relativement long, subsiste entre, d'un côté les familles autochtones issues de l'ancêtre fondateur et qui seules peuvent accéder à la chefferie et à la direction des groupes d'âge, et de l'autre les allochtones. Entre ces deux groupes existent des relations de tutorat plus ou moins apparentes.

Quant aux relations de genre, elles sont organisées selon le principe de la « non-mixité » qui est fondé selon Rondeau sur « la distinction entre les lieux et choses des femmes et ceux des hommes » et institue une ségrégation des premières au profit des seconds (Rondeau 1994 : 322). Cette « ségrégation » s'exprime à divers niveaux, notamment l'exclusion des femmes des instances traditionnelles de prise de décision, les conditions du mariage et la division sociale du travail à leur détriment.⁸ Cependant, si elles ne jouissent pas des mêmes droits que les hommes, les femmes possèdent, à travers des associations, des espaces d'autonomie qu'elles gèrent librement, à condition de ne pas constituer une menace pour l'ordre public villageois et les mœurs.

Le maintien et la consolidation de ces principes sont assurés par des moyens de coercition sociale fortement appuyés par les croyances à l'existence d'un ordre surnaturel dont les secrets sont détenus par les anciens. Cependant, malgré la rigidité apparente de ces principes, et contrairement à une idée répandue, l'ordre villageois n'est pas un ordre figé; il est fondé sur un droit extrêmement flexible et négocié, comme l'expliquent les deux cas qui suivent.

Le destin du supplice du kapokier

Lorsqu'un habitant de Nienguen Koro est pris en flagrant délit de vol ou lorsque la preuve du forfait est irréfutablement établie, l'intéressé est contraint par le Vestibule

⁸ Pour le détail de la situation des femmes, notamment à Sanankoroba, cf. Amstalden 1998.

à restituer l'objet ou l'animal volé et astreint à payer au village une amende. Jusqu'à une période récente, le délinquant était en outre soumis au « supplice du kapokier ». Cette punition consistait à attacher les deux mains de l'indélicat autour du tronc d'un kapokier planté pour la circonstance sur la place publique du village où il restait pendant une journée ou des heures selon les cas. En plus de la honte et de l'opprobre que cette sanction constituait pour le voleur et sa famille, la punition était physiquement douloureuse.

Avec le temps, le conseil des anciens cessa de recourir à la mesure qui, progressivement, tomba en désuétude. Excédé par la multiplication des vols dans le village, le Vestibule décide de ressusciter le supplice tant craint, et fait planter un grand kapokier sur la place publique.

Quelques temps après, une chèvre disparaît. Les enquêtes révèlent à la surprise générale, que l'animal a été vendu par un notable, membre du Vestibule et chef d'un des clans les plus puissants du village. L'affaire est débattue par l'organe suprême qui condamne le coupable à rembourser la valeur de la bête et à s'acquitter de l'amende. Les rivalités villageoises aidant, certains se prononcent également pour que l'indélicat patriarche soit, au nom de la justice et de la pédagogie de l'exemple, soumis au supplice. Leurs arguments sont sur le point de convaincre, lorsqu'un membre du clan de l'intéressé fait irruption dans la salle. Costaud de son physique et réputé être le plus gros bagarreur de la contrée, cet énergumène menace de réduire en cendres la famille de quiconque toucherait à son oncle. Puisque tout le monde est convaincu que cet indiscipliné personnage est capable de tenir promesse, le Vestibule adopte une décision empreinte d'une extrême sagesse : Celle de ne pas déshonorer un notable du village.

Le kapokier qui avait été planté sur la place publique ne reçut aucun supplicié, malgré quelques vols qui furent par la suite commis et les responsables confondus. L'arbre finit par se dessécher dans sa solitude, fut arraché et jeté derrière le village, en même temps que le supplice auquel il a donné son nom.

Ce cas montre que les villages connaissent peu de limites à leur compétence « législative » et « judiciaire », les sanctions pénales au Mali, notamment la contrainte par corps, relevant de la compétence de l'État et non des autorités coutumières. Il enseigne surtout que, malgré les éléments de permanence qui les caractérisent, les coutumes, tout comme les lois, ne sont pas figées. A l'instar de ces dernières, elles évoluent : Leur naissance, leur application et leur disparition dépendent toujours du rapport des forces en présence au sein de l'ensemble social concerné. Elles changent avec le temps et selon le rapport des forces. Le cas suivant confirme avec éloquence ces affirmations.

L'abrogation du veuvage

Il est de coutume au Mali, que lorsqu'une femme perd son époux, elle observe une période de réclusion. A Nienguen Koro, il y a de cela quelques années, la fin du veuvage était marquée par un rituel spécial pour la veuve qui venait de perdre son premier époux. Un groupe de vieilles femmes accompagnait l'intéressée en dehors du village pour la « purifier ». Ce jour là, personne ne sortait, car, conformément à une croyance fortement ancrée, rencontrer la procession de purification c'était exposer son conjoint ou soi-même à une mort certaine.

Avec le temps, une grande partie de la population finit par être excédée par ce rituel séculaire et comme c'est toujours la façon en pareil cas, commença à « parler dans la gourde ».⁹

A la suite d'un incident, quelques personnes influentes demandèrent l'abrogation de la mesure. Le chef de village convoqua une réunion au cours de laquelle, les anciens lui signifièrent de façon unanime qu'il est le seul et l'unique propriétaire de son village et qu'il a le plein droit d'interdire toute pratique qu'il juge contraires aux intérêts de la communauté. Ils se déclarent solidaires de toute décision qui sera prise à cette fin. Le lendemain, le chef de village convoque la responsable de l'association traditionnelle des femmes et son adjointe qu'il informe de la décision d'interdiction de la procession de « purification ». La décision est rapportée non pas comme la sienne propre, mais comme émanant de tout le Vestibule et de tout le village¹⁰ et les sanctions précisées : Dorénavant, si à la suite de ce rituel, quelqu'un mourait dans ce village, tous les membres du groupe de femmes seront considérés comme bannis de la communauté, personne ne leur adressera la parole. Les deux responsables des femmes ne peuvent que prendre acte de la décision qui sera par la suite portée à la connaissance de l'opinion par le chef de village.

Depuis la déclaration publique de l'interdiction du rituel, aucune vieille femme du village n'avisait personne d'une quelconque cérémonie de « purification » et aucun villageois n'aperçut sur les sentiers de la plaine une quelconque procession. Depuis lors, chacun, chaque jour qu'il lui plaît, vaque librement à ses affaires; pourtant, de nouvelles veuves, il y en a eu dans le village, et elles ont toutes passé leur temps réglementaire de réclusion de veuvage.

L'analyse du « rituel du veuvage » et du processus de son abrogation révèle des éléments importants sur le pluralisme juridique dans le village, l'étendue des pouvoirs du chef de village et du Vestibule, le processus d'extinction de certaines coutumes. La pratique de la procession qui accompagne la fin du veuvage et les menaces de mort qui s'y rattachent doivent être comprises comme faisant partie d'un phénomène sociétal plus large, c'est à dire celui des sociétés secrètes exclusivement féminines. Comme rapporté plus haut, les femmes, exclues des centres officiels de décision, en tant que groupe social, ont des espaces d'expression propres qu'elles créent et réglementent à leur guise, mais tout comme les autres champs sociaux du village, ceux-ci ne sont autonomes que dans une certaine limite. Les normes qui sous-tendent le fonctionnement des organisations villageoises peuvent être « abrogées » par le Vestibule. Le cas ci-dessus précise une sanction généralement redoutée par tous les villageois : Le

⁹ Cette expression désigne l'absence de liberté d'expression, l'autocensure due à la peur qui pousse les gens à ne pas dire haut et fort leur point de vue.

¹⁰ Il s'agit là d'une sage précaution qui vise, d'une part, à se prémunir d'une réaction éventuelle de ces dames (considérées en général comme de grandes sorcières) et, d'autre part, à « retourner au Vestibule son respect », car les anciens, en lui affirmant que lui, et lui seul, pouvait décider, lui ont reconnu son statut de chef et témoigné du respect qu'il doit « rembourser » en soulignant la collégialité de la décision.

rejet de la communauté. Enfin, il permet d'appréhender la finesse des rapports entre le chef de village et les anciens. Lors des débats sur les questions délicates, les membres du Vestibule suggèrent au chef de village une solution tout en lui laissant le choix de la décision finale. Mais, ce dernier s'efforce de faire en sorte que cette décision reflète les suggestions des membres du Vestibule, surtout de ses membres influents. Si le contraire se produisait, ceux-ci ne contesteront pas la décision, mais pourront refuser leur soutien au moment de son exécution. De toute évidence, le chef de village apparaît ou plutôt doit apparaître comme étant le garant de la réalisation de la volonté générale.

Les deux cas étudiés permettent d'affirmer que si le pluralisme juridique est bien une réalité dans les villages, il est flou et hiérarchisé. En situation normale, c'est à dire en l'absence de conflit, les normes des différents champs sociaux sont respectées et c'est dans une situation conflictuelle que se pose le problème du choix, donc de la priorité, de la hiérarchisation d'une norme par rapport à une autre, d'un champ social par rapport aux autres. Ce choix est fonction du rapport des forces entre les champs sociaux et les groupes stratégiques qui les animent. Le pluralisme juridique reflète la pluralité des centres du pouvoir, car c'est bien du pouvoir que relève la faculté d'élaborer des normes et de les imposer. Si l'espace villageois est un espace hiérarchisé, il n'en est pas de même de l'arène communale où cohabitent des organisations diverses, aussi bien quant à leur statut et leur puissance, qu'à leurs modes d'organisation et de fonctionnement, d'où un pluralisme juridique d'une autre dimension. Les principes fondateurs de l'ordre villageois, sans être fondamentalement remis en cause, sont en train de s'éroder progressivement, du fait de l'influence de ces champs sociaux.

Les champs sociaux d'envergure communale : Un pluralisme horizontal?

En plus des villages qui la composent, l'arène communale est occupée par d'autres acteurs dont l'action s'étend en principe sur tout le territoire communal. Il s'agit des associations et des organisations non gouvernementales, des services déconcentrés de l'État et de la commune.

Aussi paradoxal que cela paraisse, lorsqu'on séjourne dans la commune de Sanankoroba, le premier constat est la présence prépondérante des ONG maliennes et étrangères et d'associations à dimension communale. Elles sont relativement nombreuses et chacune d'elles axe ses interventions sur des principes et des stratégies d'intervention propres. Chacune a établi des règles qui organisent non seulement ses rapports avec les villageois, mais également les relations entre ces derniers pour ce qui concerne la gestion des projets. Elles ont entraîné la mise en place de véritables champs sociaux semi-autonomes régulés par des normes spécifiques et impulsé une réelle dynamique de développement local.

Nous illustrerons leur action avec les exemples du *Benkadi*, de *Suco*, du *Ben Ba* et de *Plan international*.

Les dynamiques locales à Sanankoroba ne peuvent être bien appréhendées sans le *Benkadi* (La bonne entente), une association villageoise dont l'expérience a, par la suite, touché tous les villages de l'ancien arrondissement. À l'origine, le jumelage-coopération entre Ste Elisabeth, un village du Québec, et Sanankoroba (Konaté, Simard, *et al.* 1999 : 23-24). Grâce à cette coopération furent élaborés de nombreux projets qui contribuèrent largement à l'essor économique du village. Les partenaires québécois de l'association l'ont mise en relation avec *SUCO*, un organisme non-gouvernemental canadien. Entre 1993 et 1996, les deux structures réalisent un projet expérimental à l'attention de quatre villages. Ce projet suit quatre grands axes : L'appui organisationnel, la formation, l'appui aux activités à caractère économique, l'appui à la communication. Progressivement, la démarche fut étendue aux autres villages de l'ancien arrondissement.

La dynamique engagée a abouti à la mise en place d'une association inter-villageoise et intercommunale : Le *Ben Ba* (La Grande Entente) qui est devenue un cadre de réflexion, d'échanges, de conception et de mise en œuvre de projets de développement dans une soixantaine de villages.

Plan International, conformément à ses documents de base, est une organisation humanitaire internationale de développement centrée sur l'enfant, sans affiliation confessionnelle, politique ou gouvernementale. Les équipes de Plan International travaillent directement avec les enfants, leurs familles et communautés pour identifier leurs besoins et développer les programmes qui y répondent.

Les ONG jouissent d'une grande audience dans la commune. Grâce à leur appui, un embryon de société civile est en train d'émerger dans l'espace villageois et communal. Mais ce processus n'est pas linéaire. L'introduction de nouvelles démarches, malgré la prise en compte des ordres locaux, ne s'effectue pas sans heurts, sans crises. Par ailleurs, elle s'accompagne de l'émergence de « courtiers en développement » aux profils, ambitions et stratégies divers. À l'instar des ONG, les services déconcentrés de l'État ne sont pas à proprement parler des acteurs nouveaux.¹¹ L'administration étatique existait depuis l'indépendance; mais avec la décentralisation elle a en principe pris un autre contenu. Conformément aux dispositions des articles 2 et 3 du décret n° 95 – 210 / P-RM du 30 mai 1995 déterminant les conditions de nomination et les attributions des représentants de l'État au niveau des collectivités territoriales, les sous-préfets sont les représentants et les dépositaires de l'autorité de l'État dans le ressort

¹¹ La présence des ONG dans le pays est cependant relativement récente. Elle a commencé dans les années 1970, à la suite de la grande sécheresse qui a frappé le pays.

territorial de la collectivité. Ils ont pour mission de veiller à l'exécution des lois et règlements du pouvoir central, d'assurer la coordination des services et organismes de l'État dans la commune et d'assister les autorités communales. Mais sans grands moyens et sans service à coordonner, ils exercent peu de prérogatives.

Les autorités communales, auxquelles devrait être transférée une grande partie des compétences exercées par l'ancien chef d'arrondissement, ne se trouvent pas pourtant dans une position très enviable.

Un proverbe du terroir affirme que « ... *lorsque la vache saute par-dessus le berger qui est en train de la traire, ce dernier devient un homme simplement accroupi* ». Cet adage qui désigne le ridicule de la posture d'un homme qui a des prérogatives mais ne peut les exercer, qualifie bien à propos la situation de coquille vide dévolue à bien des communes rurales maliennes. En effet, si les textes de décentralisation reconnaissent aux communes d'immenses prérogatives, la réalité du terrain met à nu leur caractère fictif.

Conformément à l'article 14 du code des collectivités territoriales, le conseil communal règle par ses délibérations les affaires de la commune, notamment celles relatives aux programmes de développement économique, social et culturel. Cet article fait de la commune le véritable responsable du développement local et surtout lui confère des pouvoirs en matière de gestion foncière. Mais, après plus d'une décennie d'existence,¹² la commune a des difficultés à retrouver sa voie. Les instances communales et les mécanismes se sont mis progressivement en place. Mais le conseil communal se composant de 17 conseillers ressortissants de 6 villages (avec 10 conseillers pour le seul village de Sanankoroba), on ne peut s'empêcher de s'interroger sur sa représentativité.

La décentralisation n'est pas encore tout à fait effective, mais il existe indéniablement une réelle volonté de la part de la commune de « *ratrapper sa vache* » et de s'approprier des prérogatives qui lui sont octroyées par la loi. Pour acquérir plus de légitimité auprès des citoyens, elle élabore et essaie de mettre en œuvre diverses actions de développement.

L'étude de la configuration sociopolitique et institutionnelle de la commune dévoile l'existence d'un véritable pluralisme marqué par la superposition ou plutôt la coexistence de plusieurs champs sociaux, de centres d'autorités, donc de producteurs de normes juridiques plus ou moins autonomes. Ces champs qui sont d'envergure communale ou infra communale, ne sont pas cependant en rupture ou en opposition constante, et n'évoluent pas en vase clos. Il arrive que dans certaines situations, ils occupent le même espace ou mobilisent les mêmes acteurs. Ce contexte, fortement marqué par l'autonomie de fait des villages, un

¹² Le conseil communal a été installé en septembre 1999. L'observation demeure valable, 12 ans après, en février 2011.

activisme des ONG, l'absence de l'État, la faiblesse et l'impuissance de la commune pourtant formellement pourvue de grandes prérogatives, dresse le cadre de la gestion foncière.

Les règles et pratiques de la gestion foncière : Deux orientations du même impératif

A Sanankoroba, comme dans les autres localités rurales, la terre constitue le principal moyen de production. La question de l'accès aux ressources foncières et de leur exploitation ainsi que de leur appropriation y revêt donc une grande importance. Le foncier étant l'expression contradictoire des pratiques sociales s'inscrivant dans l'espace en vue de l'affecter à des usages, de se l'approprier, et ainsi de dominer l'espace de certains acteurs sociaux (Le Roy, Karsenty & Bertrand 1996), au cœur des règles et pratiques qui y ont cours, se trouve l'impératif de sécurisation foncière.

Mais la notion de sécurisation foncière soulève toujours la question de savoir qui sécuriser, contre qui ou contre quoi, comment et pourquoi (Hesseling & Ba 1994 : 59). L'État et les villages apportent à cette question des réponses différentes, mais souvent complémentaires.

Les règles étatiques en matière de sécurisation foncière

Le dernier texte en date, l'ordonnance n°00-027/ P-RM du 22 mars 2000 portant code domanial et foncier (CDF), modifiée et ratifiée par la loi n° 02-008 du 12 février 2002, à l'instar des précédentes lois, est fondé sur l'approche domaniale qui institue la prééminence de l'Etat dans la gestion foncière. Par ailleurs, tout en reconnaissant et réglementant l'ensemble des droits réels immeubles énumérés à l'article 49, le CDF fait du titre foncier l'unique preuve de la propriété foncière. Il est, conformément aux dispositions de l'article 169 du code, définitif et inattaquable et constitue devant les juridictions maliennes le point de départ unique de tous les droits réels existants sur l'immeuble au moment de son immatriculation. Si, à travers ces dispositions, le nouveau code conforte la logique capitaliste de la propriété foncière, il y ouvre cependant une brèche en faveur du monde rural en renforçant les dispositions relatives aux droits coutumiers. En effet, l'article 43 du nouveau code, non seulement confirme les droits coutumiers exercés collectivement ou individuellement sur les terres non immatriculées, mais précise également que nul individu, nulle collectivité, ne peut être contraint de céder ses droits si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnisation.

De cette nouvelle disposition découlent trois conséquences majeures soulignées par le code. En premier lieu, les droits coutumiers peuvent à la suite d'une enquête publique et contradictoire faire l'objet d'un titre opposable aux

tiers. En second lieu, en vertu des dispositions de l'article 45, quand ils comportent une emprise évidente et permanente sur le sol, se traduisant par des constructions ou une mise en valeur régulière, sauf en cas d'interruptions justifiées par le mode de culture, ils peuvent être concédés au profit de tout tiers ou être transformés en droit de propriété au profit de leur titulaire. Enfin, conformément aux précisions données à l'article 47, la procédure d'expropriation pour cause d'utilité publique utilisée uniquement pour les titres fonciers est applicable en matière de purge des droits coutumiers. A ces dispositions s'ajoutent celles de l'article 48, qui affirment la reconnaissance des conventions coutumières sur les terres non immatriculées et droits fonciers.

L'intérêt des innovations opérées par le nouveau code réside surtout dans le fait que celles-ci réalisent une certaine adéquation entre le droit national et les droits coutumiers. Elles permettront surtout aux divers acteurs ruraux de se mettre, selon la belle formule de Gerti Hesseling, « à l'ombre de la loi » et de faire face aux abus du pouvoir de l'État (Hesseling 1992). Tout comme l'était la réforme foncière au Sénégal analysée par cet auteur, les nouvelles dispositions sont le fruit « d'un consensus entre les paysans et les pouvoirs publics ». Mais leur portée se trouve limitée, d'une part, par l'ignorance que les citoyens ont en général du droit officiel, aussi bien du fait de l'hermétisme du langage juridique, que de l'incapacité de la grande majorité de la population à lire et écrire. Par ailleurs, l'effectivité de la reconnaissance des droits coutumiers se trouve handicapée par l'absence du décret d'application devant définir les modalités concrètes de leur constatation et de leur enregistrement. Les paysans continuent à gérer leurs terres selon les règles coutumières, mais ils ne se sentent pas toujours en sécurité.

Les règles et pratiques foncières locales

Elément de « l'ordre villageois », les règles et pratiques foncières sont, à l'instar de ce dernier, fondées sur une grande cohésion interne. De façon générale, en fonction du mode d'attribution, on distingue dans les trois villages étudiés deux catégories de terres : Celles réparties lors de la création du village entre les premiers clans installés et celles données ou prêtées plus tard à des allochtones. À l'origine, la propriété foncière était lignagère. Mais, avec le temps et la croissance démographique, les familles à l'intérieur du même lignage se sont agrandies et des scissions sont intervenues. Ainsi, dans beaucoup de cas, on a été amené à répartir les terres entre les nouvelles unités familiales qui en sont actuellement les gestionnaires. Les familles pouvaient à leur tour céder une partie de leur domaine à des étrangers après avis favorable du conseil des anciens, mais qui pouvait être informé uniquement par respect.

En fonction de la vocation des terres, il existe des espaces publics et des espaces privés. Les terres publiques sont gérées par le chef de village et les terres privées par les lignages.

Des entretiens dans les trois villages, il ressort que, dans le passé, la terre n'avait pas une valeur marchande, mais sociale. La cession de terre était gratuite, le demandeur devant seulement offrir dix noix de colas en signe de respect. Aujourd'hui, cependant, à Sanankoroba, personne ne peut obtenir de la terre avec de la cola. Dans la conception traditionnelle, la frontière entre la cession gratuite et le prêt était assez mince. La plupart du temps, les cessions à des personnes étrangères au lignage étaient des prêts ; toutefois le prêt de longue durée pouvait entraîner la propriété, surtout dans les cas où le premier défrichage était réalisé par l'emprunteur ou lorsque ce dernier procédait à une exploitation continue. Ce flou est à l'origine de nombreux conflits fonciers.

A Nienguen Coura et Nienguen Koro, c'est toujours le mode traditionnel de cession de la terre qui est en vigueur. La terre prêtée pouvant être retirée, il est en principe formellement interdit de planter des arbres fruitiers sur des terres empruntées. Mais, dès lors que le propriétaire de la terre autorise un emprunteur à le faire, ceci équivaut à un transfert de propriété.¹³ De même, il est interdit de planter des arbres sur des espaces considérés comme publics, c'est à dire appartenant à tout le village ou à un groupe de villages.

Les femmes n'ont pas accès à la propriété foncière coutumière. Les terres qu'elles exploitent leur sont prêtées, soit par leur famille d'origine, soit par leur belle-famille.¹⁴ Mais l'action des ONG a entraîné quelques changements dans cette situation. Même si celles-ci n'interfèrent pas en général dans la question foncière, elles ont négocié, auprès des villages et des familles, des périmètres de maraîchage pour le compte des groupements de femmes qu'elles appuient. Dans les villages, existe un système de sécurité foncière fondé entre autres sur les conventions locales ou « *benkan* » (la parole convenue), la croyance aux interventions surnaturelles. La compétence des autorités villageoises en matière délictuelle ou de simple police peut même parfois être reconnue par des ressortissants d'autres villages, notamment en matière d'institution d'amende ou de taxe.

¹³ Aucun de mes interlocuteurs n'ayant pu me situer la source de cette coutume, j'émetts l'hypothèse qu'il s'agit certainement ici de l'influence de la jurisprudence étatique sur la coutume car les décisions judiciaires (depuis la période coloniale) relatives à la détermination de la propriété foncière se fondent souvent sur la présence d'un aménagement sur le terrain objet du litige, en l'occurrence, sur la présence d'arbres fruitiers.

¹⁴ Cette situation est expliquée par le fait que l'on considère qu'une femme non mariée finira par faire partie d'une autre famille ; la terre faisant partie du patrimoine familial, on ne prend donc pas le risque de la transférer à une autre famille.

Le vol de la mare

Au nord des deux Nienguen, il existe une grande mare dont Nienguen Koro assure la gestion. C'est ce village qui fixe la date de la pêche collective dans ce cours d'eau et en informe les autres villages. Avant cette date, nul n'a le droit de pêcher dans la mare; et toute personne prise en flagrant délit de braconnage ou, comme on le dit dans le village, de « vol de la mare » est traduite devant le Vestibule où elle doit reconnaître son forfait et s'acquitter de l'amende dont le montant varie selon les cas. Un de mes interlocuteurs de Goungoun Djou me rapporta qu'il a comparu à deux reprises devant le Vestibule. La première fois, pour défendre quatre de ses neveux qui avaient été aperçus par des habitants de Nienguen Koro en train de pêcher dans la mare et la seconde fois, pour répondre lui-même d'un forfait du même genre accompli par deux ouvriers qui travaillaient pour son compte.

La première fois, mon interlocuteur parvient à la suite de négociations à obtenir une diminution du montant de l'amende initialement fixée par le Vestibule.

La seconde fois, il se rend chez le chef de village de Nienguen Koro le soir de la convocation. Il implore le pardon de ce dernier et le prie d'être son interprète auprès des anciens. Ensuite, il lui remet une somme pour lui-même et une autre pour le Vestibule. Les sommes sont acceptées et mon interlocuteur ne fut plus convoqué.

Un autre cas de « vol de la mare » relaté par les anciens de Nienguen Koro, fut le fait de ressortissants de Krina, un village situé derrière le fleuve. Le chef de ce village envoya à Nienguen Koro un émissaire pour présenter ses excuses et payer l'amende réglementaire.

Les cas relatés soulignent la reconnaissance quasi unanime par les populations de la zone des pouvoirs de Nienguen Koro sur la mare de Bo. Cette reconnaissance se traduit non seulement par l'acceptation par les contrevenants de s'acquitter du montant de l'amende, mais également par tout le protocole qui entoure la pêche collective. Elle provient non pas de la crainte d'un pouvoir direct de coercition (que Nienguen Koro ne possède pas), mais plutôt de celle de châtiments occultes, c'est à dire surnaturels, qui pourraient être infligés aux récalcitrants. Cette crainte est soutenue par le fait que c'est Nienguen Koro qui assure les sacrifices rituels à la mare.

En effet, la compréhension des systèmes juridiques villageois est impossible sans l'intégration de la croyance en l'intervention du surnaturel (Voir à ce propos, les analyses de Rouland 1991: 275-281). Elle explique pourquoi, dans la plupart des cas, les dispositions villageoises en matière de gestions des ressources naturelles s'avèrent plus efficaces que les normes étatiques. Mais, au-delà des considérations purement mystiques, les rituels ont une fonction juridique latente. C'est à travers les sacrifices qu'il fait à la mare, que Nienguen Koro fait prévaloir sa propriété sur cette ressource. Interrogée sur le fait de savoir dans quelle mesure la religion musulmane, dont se réclame l'ensemble du village, pouvait s'accommoder avec des pratiques animistes, le premier conseiller du chef de village répondit : « Si Nienguen Koro cessait de faire les

sacrifices, qu'est ce qui le distinguerait des autres villages? Sur quoi se fonderait-il désormais pour se prévaloir de la propriété de la mare ? »

Il serait cependant naïf de penser que l'existence de normes juridiques relativement efficaces empêche l'éclatement de conflits ; l'espace villageois est le théâtre de conflits de tous genres. Mais sa spécificité par rapport à l'État, c'est d'y trouver des solutions durables fondées sur la négociation et la reconnaissance de la légitimité des institutions locales, comme en témoigne le cas qui suit.

Le litige Sébala contre Soumabalila

Depuis des décennies, le clan Soumabalila de Sanankoroba, composé principalement de familles Coulibaly, exploite un champ situé au nord-est du village. Il y a environ dix ans que le terrain est en jachère. Vers la fin du mois de février 2001, la famille du clan qui exploitait ce champ décide de le vendre. Mais le clan Sébala composé principalement de familles Traoré, considérant que ce terrain lui appartient, s'oppose et menace de le retirer. A cet effet, il dépose une plainte auprès du chef de village qui convoque le conseil des anciens.

Les deux clans en conflit sont représentés par leurs patriarches qui exposent leurs prétentions. Le demandeur, le clan Sébala, affirme que le champ objet du litige est sa propriété. Dans le passé, lorsque le problème s'est posé d'installer les Coulibaly, c'est Sébala qui a accepté de mettre ce terrain à leur disposition. Sébala ne saurait accepter le bradage des champs qui lui appartiennent. Le défendeur, le clan Soumabalila, soutient que le champ litigieux lui a toujours appartenu. Soumabalila n'est pas un clan étranger à Sanankoroba. Son patriarche défie quiconque d'indiquer le clan dans le Vestibule duquel les premiers Coulibaly auraient déposé leur sac (de voyage). Leur ancêtre, qui était un cousin de Kola Magnan, le fondateur du village, est venu s'installer à Sanankoroba en même temps que ce dernier. Après les débats, le conseil des anciens décide, au nom de la sauvegarde de la paix et de la cohésion sociale dans le village, de conserver le statut quo : Soumabalila va continuer comme par le passé à exploiter le terrain, mais ne pourra pas l'aliéner ; Sébala devra respecter ce droit d'usage.

Considérant que le village s'est rallié à sa position, Sébala accepte avec enthousiasme la décision. Quant à Soumabalila, il trouve la décision injuste mais l'accepte également, en s'en remettant cependant « aux mânes des ancêtres ».

Ce cas met en exergue deux aspects de l'ordre villageois: D'une part, la question de la propriété foncière, et d'autre part, celle de la force obligatoire des décisions du Vestibule. Il donne également quelques éclairages sur la technique de la conciliation coutumière.

En premier lieu, la décision du Vestibule confirme qu'en milieu rural, l'attribution de la terre et son exploitation ne font *pas* automatiquement *acquérir* la propriété. Mais l'exploitation continue pendant une longue période rend difficile la dépossession du détenteur. Le Vestibule a opté pour la thèse de Sébala, mais ne peut pousser jusqu'au bout la reconnaissance à ce dernier de toutes les implications du droit de propriété. De la décision, nous pouvons déduire que le droit de propriété sur la terre prêtée peut être opposé à l'emprunteur qui com-

mence par avoir un comportement de propriétaire et le priver du droit de disposition. Il ne peut cependant être invoqué pour le déposséder, surtout lorsque le prêt s'est étendu sur une très longue période.

En second lieu, le cas confirme la prééminence du Vestibule dans la gestion des affaires villageoises. Si Sébala a pleinement approuvé la décision du fait de l'entérinement de sa thèse par le Vestibule, Soumabalila lui s'y est rallié tout simplement parce qu'il s'agit d'une décision du Vestibule. Il trouve la décision injuste, mais l'accepte parce qu'il s'agit de la décision d'un organe suprême. N'ayant pas d'autre recours, il s'en remet aux mânes des ancêtres. Bien sûr, il peut demander l'arbitrage du maire, du sous-préfet ou même de la justice ; il peut donc en principe faire du « forum shopping », mais en principe seulement car, sauf circonstances exceptionnelles, il n'ira jamais devant ces « justices alternatives ». Pour lui, la seule instance légitime pour juger de son cas reste évidemment le Vestibule. On peut même se demander s'il ne s'agit pas ici de l'expression d'un monisme et non d'un pluralisme juridique, car dans le règlement des affaires villageoises, la loi du village prime sur tout. La personne qui « transporte » un problème villageois hors de ses limites est vouée aux gémonies et fait l'objet d'un rejet.

Enfin, le cas permet d'affirmer que le mécanisme de règlement des conflits fondé sur la conciliation du Vestibule ne vise pas exclusivement à la manifestation de la vérité, mais surtout à sauver l'entente et la cohésion sociales alors que les décisions des tribunaux tendent essentiellement à indiquer « qui a tort, qui a raison ». C'est pourquoi les actions de conciliation débouchent généralement sur des compromis plus ou moins viables, mais généralement acceptés par les parties alors que les décisions de justices sont le plus souvent remises en cause..

La décentralisation intervient dans une arène sociopolitique complexe, déjà structurée et animée par des groupes stratégiques aux intérêts multiples et souvent contradictoires, une arène qui fonctionne sur la base de règles et pratiques foncières relativement cohérentes. Elle est venue en quelque sorte accentuer le pluralisme juridique existant. Peut-elle, dans un tel contexte, constituer un facteur de sécurisation foncière?

Quel rôle pour la commune?

La commune, il convient de le rappeler, est la collectivité territoriale décentralisée de base. En milieu rural sédentaire, elle est composée de villages. Elle est dirigée par un conseil communal dont les membres sont désignés au scrutin proportionnel de liste. Le conseil élit en son sein un bureau présidé par le maire. Le conseil communal a la responsabilité de concevoir, planifier et mettre en

œuvre les actions de développement économique social et culturel. Il élit en son sein un bureau présidé par le Maire.

La réponse théorique à la question relative au rôle de la commune est fournie par diverses lois, en l'occurrence le code des collectivités, le code domanial et foncier et la loi 96-050 ANRM du 16 octobre 1996 portant principes de constitution et de gestion du domaine des collectivités territoriales qui reconnaissent aux collectivités territoriales un domaine public et un domaine privé. Mais, aucun domaine n'ayant encore été transféré aux collectivités, leur situation de « berger sans vache » se confirme de jour en jour.

Cependant, les recherches de terrain montrent que la commune pourrait jouer un rôle important, notamment dans le règlement des conflits et la coordination de la gestion foncière.

Le règlement du litige foncier entre Nienguen Koro et Nienguen Coura

Les deux protagonistes sont d'accord pour situer le début de la crise en 1998. Un jour, des topographes de Bamako se présentent à Nienguen Koro et demandent au chef de village de leur indiquer les champs de riz appartenant à l'ancien commandant de cercle de Kati, afin de procéder à leur bornage au profit de particuliers à qui ce dernier les aurait revendus.

Soupçonnant des personnalités de Nienguen Koro d'avoir vendu les terres en question au commandant de cercle, les habitants de Nienguen Coura refusent de se rendre dans la plaine. Des représentants de Nienguen Koro y accompagnent alors les topographes.

A leur grande surprise, les habitants de Nienguen Coura constatent le lendemain, que c'est dans la partie de la plaine qu'ils exploitent que les bornes ont été implantées. Le conseil des anciens, informé, se réunit et le chef de village ordonne aux jeunes d'aller arracher les bornes. Ensuite, il envoie des émissaires informer le chef de village de Nienguen Koro qu'il a récupéré sa part de la plaine, et lui demande de désigner des représentants pour venir procéder à la délimitation entre les champs des deux villages. Ce dernier refoule les émissaires et leur demande de transmettre à son homologue qu'il ne saurait y avoir de délimitation entre les deux villages, leurs ancêtres n'ayant jamais procédé à pareille opération.

Quelques temps après, Nienguen Coura relance sa proposition de délimitation, et cette fois-ci encore, essuie un refus de la part de Nienguen Koro. Excédé par les demandes multiples de délimitation, le conseil des anciens de ce village informe ses voisins du retrait de six mares qu'il leur aurait prêtées dans le passé. Ces derniers qui contestent toute propriété de Nienguen Koro sur lesdites mares saisissent alors les autorités de tutelle (maire et sous-préfet). Le maire convoque à Sanankoroba les chefs des deux villages qui se font représenter par leurs conseillers administratifs qui conviennent de garder le statu quo et acceptent la proposition du maire d'organiser une grande fête de réconciliation à Nienguen Koro. Mais, la question de la plaine n'ayant pas été évoquée lors des pourparlers à la mairie, les représentants de Nienguen Coura sont désavoués par le conseil des anciens.¹⁵

¹⁵ En outre, les anciens considèrent que célébrer la réconciliation à Nienguen Koro équivaut à reconnaître l'ancienneté, la suprématie de ce village.

Fort de ces renseignements, j'informe le maire de la situation et lui suggère une visite sur le terrain avant toute initiative. Peu après, ce dernier se rend dans les deux villages en compagnie de son premier adjoint et mène des négociations séparées avec leurs Vestibules.

Tout le long de l'évolution du conflit, les deux parties ont adopté des positions divergentes soutenues par des stratégies tantôt similaires, tantôt différentes. De façon invariable, Nienguen Coura exige la délimitation. Cette position que l'on peut penser, à priori, raisonnable, parce que conforme au droit moderne, sous-tend en fait une stratégie, celle visant à démontrer que l'autre village ne possède pas de terre. En effet, les habitants de Nienguen Coura affirment qu'il n'existe pas de limite entre leur village et Nienguen Koro, dans la mesure où c'est avec Touréla qu'ils ont une frontière (Touréla est situé derrière Nienguen Koro)¹⁶. Ils affirment que ce sont leurs ancêtres qui ont installé ceux de Nienguen Koro lorsque ceux-ci arrivèrent de la Guinée.

Nienguen Koro, évidemment, réfute ces arguments. Pour les anciens de ce village, c'est la démocratie et la décentralisation qui sont les principales sources du conflit, car soutiennent-ils, « quand on a commencé à parler de liberté et d'égalité, même ceux qui n'avaient rien ont voulu chercher leur part et ont commencé à réclamer ce qui ne leur appartient pas ». Ils invoquent de multiples arguments historiques et géographiques comme preuve de leur ancienneté, notamment leur position privilégiée dans l'exploitation des mares de la plaine.

Les positions des deux protagonistes paraissant inconciliables, tout semblait indiquer que la fin du conflit était encore très loin. Mais le maire et son adjoint ont réussi, en se fondant sur leur statut de « fils du pays » à les persuader d'accepter les termes d'un compromis qui fera l'objet d'un protocole d'accord signé le 21 mars 2001 à la mairie de Sanankoroba. Dans le document, les parties déclarent mettre fin au litige qui les a opposées et s'engagent à s'abstenir de tout acte susceptible de le réveiller. Dans cette optique, toute personne qui, par des actes ou des propos, tentera de le ressusciter devra être identifié et combattu par les deux villages qui s'engagent à gérer les problèmes, comme par le passé, sur la base de la concertation et de l'entraide. Par la suite, à Nienguen Koro, tout comme à Nienguen Coura, sont organisées des séances de restitutions et le protocole d'accord est entériné, avec la réserve qu'il soit également respecté par l'autre partie.

Le litige entre les deux Nienguen pose avec acuité la question de la sécurisation foncière dans le nouveau contexte de décentralisation et de libéralisation. Avant que l'on ne parle de délimitation et de bornage, il n'y avait aucun problème entre les deux villages; mais il a suffi que ces notions apparaissent pour perturber les bonnes relations entre eux. On sent chez chacun d'entre eux une volonté de se sécuriser, mais selon des méthodes opposées. Autant Nienguen Coura pense que c'est par la délimitation qu'il peut sécuriser ses terres, autant Nienguen Koro trouve que seul le statu quo peut permettre une véritable

¹⁶ Cette position vise à nier la propriété de leurs voisins, même sur leur propre village, et d'après plusieurs informations, Touréla qui appartient au même groupe ethnique que Nienguen Coura serait prêt à témoigner dans ce sens.

sécurisation.¹⁷ Enfin, on ne peut s'empêcher d'établir un lien, ne serait-ce qu'indirect, entre la décentralisation et ce conflit. En effet, Nienguen Coura fait partie des neuf villages du Solon qui avaient voulu, dans le cadre des regroupements des villages en commune en 1996, se constituer en commune. Mais les rivalités entre les villages frères à propos du choix du chef lieu de commune ont rendu impossible un consensus, ce qui amena les autorités à les rattacher à Sanankoroba et Dialakoroba. Depuis lors, les villages concernés sont en contact permanent et mènent des actions tous azimuts pour atteindre leur objectif. En prévision de son adhésion à la commune du Solon, Nienguen Coura, encouragé en cela par Touréla souhaite avoir « sa part de la plaine ». Par ailleurs, des conflits de personnes liés à différentes formes de rivalités et les ambitions individuelles que j'ai décelés de part et d'autre, ont contribué à envenimer la situation.

L'analyse du processus qui a conduit à la signature du protocole d'accord, ainsi que celle de son contenu, confirme la thèse du pluralisme juridique, en l'occurrence, l'exercice par les villages d'un pouvoir quasiment exclusif en matière foncière. Les autorités communales sont conscientes de leur incapacité à imposer une quelconque décision en matière foncière. Dans ce contexte, elles interviennent plutôt comme médiateurs et conciliateurs quand des litiges éclatent, plutôt que comme véritables gestionnaires des terres. Cette fonction de médiation est facilitée par le fait qu'elles sont reconnues légitimes par les autorités villageoises qui, par respect pour l'autorité, acceptent de faire certaines concessions. L'accord démontre à suffisance, que toute solution viable concernant la gestion foncière ne peut venir que des populations elles-mêmes.

Si d'une façon générale, l'apparition de la commune comme nouvelle structure socio-politique a eu l'avantage de porter l'élite locale à la direction de la gestion des affaires et de favoriser le règlement de certaines procédures administratives au niveau local, elle n'a pas totalement dissipé les appréhensions de la population par rapport aux réformes initiées par l'État.

Conclusion

La question de la sécurisation foncière au niveau communal est indissociablement liée à celle de la décentralisation en général, qui pose à son tour celle des rapports entre l'État et les collectivités et, au-delà, la problématique du pluralisme juridique dans un État unitaire. Cette relation nous ramène aux trois mots qui forment la devise du Mali ; *Un peuple-Un but-Une foi*. Cette devise et l'ordre juridique qu'elle sous-tend s'opposent-ils à la reconnaissance du plura-

¹⁷ En effet, Nienguen Koro apparaissant comme le gardien de la tradition dans la zone (gestion de la mare du Bo et interdiction de planter des arbres dans la plaine), toute délimitation diminuerait ses prérogatives.

lisme juridique? La réponse formelle est positive, surtout lorsqu'on s'inspire du point de vue normativiste considérant le droit comme un certain nombre de normes explicites et écrites, contenues dans des textes rassemblés le plus souvent en codes (Rouland 1988) ou comme un ensemble de règles obligatoires en vigueur dans un État, qui les établit et a la charge de les faire respecter. La vision d'un droit monolithique semble correspondre sans conteste à la vocation unificatrice de l'État. Mais le droit n'étant pas tant ce qu'en disent les textes que ce qu'en font les citoyens (Le Roy 1999 : p. 33), il convient de relativiser la réponse à la question posée. Le droit constitue l'emballage juridique d'un projet de société, l'instrument juridique de sa réalisation.

En effet, un des résultats majeurs de ma recherche fut la confirmation de la réalité du pluralisme juridique, d'un pluralisme juridique multiforme et à plusieurs strates. Étant donné les multiples courants qui traversent la théorie du pluralisme juridique, il est nécessaire de préciser que j'utilise le concept pour désigner, sans à priori idéologique, l'existence simultanée de plusieurs ordres juridiques auxquels les individus sont plus ou moins soumis. Ces ordres juridiques, selon les mots de Vanderlinden (1997) commentant un texte de Dominique Darbon, peuvent être et souvent seront en opposition. Chacun d'eux étant en principe totalitaire, « ce totalitarisme implique destruction des systèmes de droits concurrents, association de ces systèmes dans le cadre de systèmes dérogatoires, reconnaissance de ces systèmes dans le cadre d'un ordre hiérarchique des systèmes de droit » (Vanderlinden 1997: 30-31). L'opposition tant proclamée entre le droit moderne et les droits coutumiers doit être abordée avec précaution, car le droit local est un amalgame de normes de diverses sources, les citoyens s'orientant selon leurs intérêts et les circonstances.

Le droit, qu'il soit national ou local traduit toujours un projet de société fondé sur des modèles de relations sociales qu'il cherche à reproduire, à perpétuer. Dès lors, son efficacité dépend du degré d'acceptation sociale. Dans une société pluraliste, le droit est pluriel. Sans la prise en compte des spécificités locales, s'exprimant à travers des normes juridiques locales, la devise nationale ne constituera qu'un slogan, une fiction. Le caractère doublement exogène du droit et de l'organisation judiciaire officielle des pays africains tant souligné par de nombreux auteurs est une réalité qui affecte sérieusement son effectivité (Le Roy 1997). Face à ce modèle d'organisation « qui se veut et se pense comme unitariste », les citoyens ont, dans la pratique, trouvé à leurs préoccupations des réponses pragmatiques plurielles (Hesseling & Le Roy 1990). À l'évidence, tant que les performances des instances juridiques, administratives et judiciaires étatiques n'auront pas apporté l'assurance d'une plus grande efficacité des dispositifs et des formalismes officiels, le plus grand nombre des acteurs conti-

nuera à recourir à des formes plus ou moins métissées et coutumières d'encadrement des sociétés (*ibid.*).

Il n'est pas question de vivre sans État, mais de réussir l'adéquation entre le niveau national et le niveau local, réconcilier le citoyen avec l'État. Comme le notent si bien Olivier et Catherine Barrière, la problématique ne se situe pas sur le plan de l'opposition de la tradition à la modernité, mais plutôt sur le terrain de l'adaptation ou de la réforme. Même si le droit n'a rien d'inné, il ne s'impose à la conscience collective que dans la mesure où sa raison d'être s'identifie à la reproduction sociale. Il est donc plus opportun de « partir d'un acquis pour progresser vers un circonstancié que de raser un passé » (Barrière & Barrière 1995 : 170-171).

L'adoption de la décentralisation comme orientation majeure de l'État, constitue une reconnaissance de cette réalité. Mais le processus se déroule dans une situation extrêmement complexe dont la connaissance est nécessaire pour en scruter les perspectives. La réforme de décentralisation a entraîné une amorce de recomposition du paysage politique et institutionnel, accompagnée d'une remise en cause graduelle des légitimités existantes et de l'élaboration de stratégies par les divers groupes pour un meilleur repositionnement sur l'échiquier local. Des enjeux anciens réapparaissant comme déterminants dans ce nouveau contexte,¹⁸ il est nécessaire de bien les situer, afin d'en cerner tous les contours.

Si l'adéquation est nécessaire entre l'ordre national et l'ordre local en général, il est tout aussi nécessaire de l'opérer également entre la commune et les villages. La recherche a montré que l'acceptation de l'ordre local, notamment villageois, est principalement liée au mode de prise de décision et de règlement des différends fondé principalement sur la négociation. Aussi serait-il souhaitable que les dispositions législatives et réglementaires soient le plus flexibles possibles, car « l'État de droit » ne saurait se réaliser s'il n'est pas fondé sur un droit compris et accepté de tous les acteurs. La réussite d'une réforme, quelles que soient les bonnes intentions qui la guident, ne peut être assurée que lorsqu'elle est comprise et acceptée par les acteurs sociaux.

Ainsi, pour se consolider et constituer un facteur de sécurisation foncière, la décentralisation devra se renégocier, car les idées généreuses de démocratie et de développement dont elle est porteuse ne seront que des vœux pieux tant que les villages ne les intégreront pas à leur vécu. Cette renégociation suppose une plus grande implication des institutions villageoises dans le processus de prise de décision et de leur exécution. Elle suppose également la reconnaissance du patrimoine foncier des villages qui doit se traduire par la transformation du droit

¹⁸ Voir à ce propos l'éditorial de Giorgio Blundo et de Roch Mungbo (Blundo, G. & R. Mungbo, 1998).

de gestion foncière reconnu à la commune en devoir de coordination et de médiation.

La décentralisation administrative à Sanankoroba, comme ailleurs au Mali, malgré les limites soulignées, peut constituer un facteur de sécurisation foncière si les autorités communales continuent sur la lancée déjà amorcée qui consiste, selon les termes de Le Roy, à privilégier l'ordre négocié à l'ordre imposé, ce qui substituera un ordre accepté à l'ordre contesté (Le Roy 1999).

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THE CHALLENGES OF LAW AND CONFLICT /
LES DÉFIS DE DROIT FACE AU CONFLITS

Effectuating normative change in customary legal systems: An end to ‘widow chasing’ in Northern Namibia?

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Leaders of six Owambo traditional communities in Namibia met at a ‘Customary Law Workshop’ of Owambo Traditional Leaders in Ongwediva in northern Namibia in May 1993 to make recommendations to the traditional councils about harmonizing customary laws. One of the topics under discussion was the position of widows. Two issues were at stake. The first concerned the practice whereby a husband’s matrilineal family chased his widow back to her own matrilineal family after his death and the second was that women who remained on the land they had occupied with their husbands were required to pay the traditional leaders for the land in question. The traditional leaders at the workshop unanimously decided that widows should no longer be chased off their land or out of their homes and that they should not be asked to pay again for the land either. The new norms for protecting widows became well known and were enforced in Uukwambi, and the number of allegations of land grabbing has dropped significantly over the last 15 years to almost none today. This demonstrates a behavioural change regarding widows’ inheritance rights. The process of recording norms protecting widows’ rights in the written customary laws of Uukwambi has led to significant changes in

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local inheritance practices. This success is remarkable when contrasted with failed attempts in other African countries to change customary inheritance practices through statutory intervention. The self-recording process in the Uukwambi Traditional Authority presents a positive example of how normative change in African customary justice systems can be achieved.

Introduction

‘Widow chasing’ is a feature of gender inequality in customary legal systems that has received a great deal of criticism in various African countries. Many governments have tried to eradicate the practice by enacting statutory intestate succession laws to replace customary law. However these attempts have seen limited success as the new statutory laws are largely ignored in traditional localities where inheritance continues to be practised according to customary norms.

This chapter discusses a process of ‘self-recording’ customary law among the Owambo Traditional Authorities of northern Namibia and its impact on local inheritance practices in Uukwambi. The following questions are central. What factors prompted the Owambo Traditional Authorities to change their customary norms and to engage in a process of self-recording? Was there a widely felt need in Owambo society for this process and/or did the government demand the implementation of changes? How was the resolution agreed on at the workshop translated into local legislation in the Uukwambi Traditional Authority? What processes of dissemination and legal awareness creation were used? What was the impact of the changed norm on local practice in the area? How widely is this norm currently known and accepted? And finally, to what extent is it now being observed by the people and enforced by the traditional leaders? By answering these questions, this chapter hopes to provide insight into the consequences and effectiveness of an alternative method of creating change in customary legal systems.

The arguments presented in this chapter draw on field research conducted in Uukwambi Traditional Authority between September 2009 and February 2010. Data were collected principally through qualitative data collection methods: Semi-structured interviews with women, women’s leaders, traditional leaders, farmers, governmental authorities, academics and NGO staff; focus-group discussions with women and NGO staff; and participant observation of traditional court meetings. Structured interviews on the basis of a survey were also conducted in 216 rural households to explore issues associated with legal awareness, perceptions of customary proceedings and the role of traditional leaders in settling disputes.

Adjusting customary law in Owambo

Leaders of six Owambo² traditional communities assembled for a Customary Law Workshop in May 1993.³ According to the minutes of the meeting, the purpose was 'to start a process of consultation between the Owambo Traditional Authorities in order to harmonize certain aspects of their traditional law, to adjust it to the new social and legal environment and to improve the legal status of women in line with the requirements of the Constitution of Namibia'.⁴ Each of the Owambo Traditional Authorities was supposed to include the agreed norms in a written document containing its own recorded customary law.⁵ According to Hinz (2009: 85), the self-recordings address two kinds of groups. The first consists of all outsiders who have to deal with the customary law and the second is made up of community members 'who have to be reminded that a given part of customary law had to be changed to meet constitutional requirements or standardized in view of needs that flow from the growing interaction of members of different communities'. Not surprisingly, local customary practices were far from uniform even within traditional authorities. Limited knowledge among village leaders of the norms as defined by the highest level of traditional leadership, the discretionary powers of traditional leaders to include circumstantial issues such as the behaviour of the parties in the traditional court, and abuses of power by traditional leaders were all leading to wide variations in customary practices. Due to their written character, self-recordings have had the potential to bring change in this regard, reduce the flexibility and negotiability of norms and enhance the certainty and equity of traditional dispute settlement. They also provide villagers with a simple way of accessing knowledge about customary laws.

² Owambo is the collective name for twelve tribal groups that live in northern Namibia and southern Angola. Seven of these linguistically and culturally related societies live in present-day Namibia: the Ondonga, Oukwanyama, Ongandjera, Uukwambi, Ombalantu, Uukwaluudhi and Uukolonkadhi (Hahn 1966; Tötemeijer 1978). The Owambo people constitute the largest population group in Namibia. Their home area was called Owamboland during the colonial period but is today divided into the Omusati, Oshana, Oshana and Oshikoto regions. Almost half of the entire population lives here on less than 7% of Namibian territory (2001 Population and Housing Census).

³ Similar workshops were held in 1994 and 1995 by the Kavango and Nama Traditional Authorities (Hinz & Joas 1995: 207-237).

⁴ Minutes of the Customary Law Workshop of Owambo Traditional Leaders, cited in Hinz & Joas (1995: 193-206). The Traditional Authority of Uukwaluudhi was not represented but their king later gave his full consent to all the decisions made at the workshop.

⁵ The Council of Traditional Leaders recently resolved that all traditional communities in Namibia should embark on such a self-recording process (Hinz 2009: 85).

This chapter considers the extent to which the 'home-grown' recording process in northern Namibia has created a locally legitimate written statement of customary law and can be seen as a method for enabling effective normative change in a customary legal system. The following section analyzes the process, the timing and the main agents of change behind this transformation of customary law. It gives special consideration to the changes advocated regarding gender equality and discusses the resulting written laws in one of the Owambo Traditional Authorities, namely Uukwambi Traditional Authority. The subsequent section looks at the effects of the recording of the main customary laws on the nature and functioning of the Uukwambi legal system. And the final section highlights the attempts to change the position of widows in inheritance cases and raises the issues of the awareness and implementation of the new norms.

Timing

Efforts to harmonize Owambo customary laws have built on earlier self-recordings by the participating traditional authorities, such as Ondonga (1989), Uukwaludhi (1984) and Ongandjera (1982) (Hinz & Joas 1995; for Ondonga: Hinz 1997: 72). A first official draft of the laws in other Owambo Traditional Authorities was made in the run-up to the harmonization workshop (Hinz & Joas 1995). Interviews in Uukwambi Traditional Authority revealed, however, that senior traditional leaders had had lists of rules and principles in their possession for a number of decades but that these documents were not unified or widely known or distributed.⁶

The timing of the unification was intricately linked to events at the national political level. With independence finally arriving in 1990, the 1990s were characterized by a strong identification with the new Namibia and a sense of urgency to make concomitant changes to transform the remnants of the divisive apartheid government into a more inclusive, modern form of government. The Owambo Traditional Authorities were struggling to remain relevant in the new constellation of an independent Namibia. In the run-up to independence neither the report of the United Nations Institute for Namibia (UN 1986), which was crafted as a blueprint for an independent Namibia, nor the Namibian Constitution⁷ even mentioned traditional leaders (Hinz 1997: 68-69). This can be inter-

⁶ Interviews 40: senior headman, 3 December 2009; 44: female traditional councillor, 4 December 2009; and 57: female traditional councillor, 27 January 2010. Chief Iipumbu reported that his earliest copy of written laws dated from 1956. I have not seen this copy myself (Interview 55: chief and former secretary, 19 January 2010).

⁷ Their recognition can only be deduced from Articles 66(1) and 102(5) of the Namibian Constitution. The first stipulates the validity of the customary law and common law in force on the date of independence, subject to the condition that they do not

preted as an indication that 'the political minds behind the Constitution did not envisage much of a role for traditional authorities' (*Ibid.*: 69). A year after adopting the first Constitution, President Sam Nujoma established a 'Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders and Authorities'. The Kozonguizi Commission, as it was known, was given, among others, the task of looking into the people's degree of acceptance of traditional leaders (Commission of Inquiry 1991).⁸ The Commission concluded that, despite regional differences and individuals' dissatisfaction, traditional leadership was a necessary and viable institution and recommended retaining it 'within the context of the provisions of the Constitution of the Republic of Namibia and having regard to the integrity and oneness of the Namibian Nation as a priority' (Commission of Inquiry 1991: 73; Düsing 2002: 188; Hinz 1997: 69-70). This brought in a new dawn for traditional leaders who were seeking to redeem the popular support they had lost because of their close alignment with the South African colonial regime (Becker 2006: 33).⁹

These push-and-pull forces combined to form a strong internal drive for the recording, harmonization and transformation of customary norms by traditional authorities in order to adapt them to the legal and social environment of the new Namibia. In addition, government plans, albeit still vague, to engage in a codi-

conflict with the Constitution or any other statute law. The latter article calls for the establishment of a Council of Traditional Leaders to advise on communal land management and other matters referred to it by the President. In addition, Article 19 of the Constitution, which guarantees the right to culture and tradition, is understood to include the right to live according to one's customary law.

⁸ Cf. Hinz (1997: 69-70) and Keulder (1998: 65-66).

⁹ South Africa's indirect rule, characterized by the extensive use of indigenous political institutions, had 'transformed the indigenous polities into local administrative organs dependent on the colonial state' (*Ibid.*: 33.) From the 1960s onwards, Ovamboland became the centre of Namibia's independence struggle and the scene of serious fighting between SWAPO (South West African People's Organisation) and the South African army, in which thousands of lives were lost. From the 1970s until independence, SWAPO and the churches were seen as the main sources of authority by the population and not the chiefs or the Owambo (homeland) authorities (*Ibid.*: 33; Keulder 1998: 84, note 16; Töttemeyer 1978: 104-105; Soiri 1996: 50). The chiefs' already diminished popularity and legitimacy waned further due to their involvement in reconnaissance work, their reporting of strangers to the colonial authorities and their drafting of people into the South West African Territorial Forces that was formed in 1977 in response to SWAPO's military successes. The results were serious, as Keulder (1998: 49, 52) describes: 'Chiefs and headmen were often identified as soft targets to be eliminated (by both sides) in order to strike back at the enemy. Many chiefs and headmen accordingly lost their lives.'

fication of customary law¹⁰ generated a certain degree of urgency in the whole undertaking in an attempt to stave off undue government interference.

Gender equality

One of the domains where change was advocated was in gender relations. Women had played a prominent role in the period before independence both as freedom fighters and in the running of rural localities while the men were away fighting in the war of independence or working on white-owned farms or in businesses. The notion of 'women's rights' emerged in Namibian politics when women freedom fighters not only expressed their opposition to colonial occupation but also to contrived custom and tradition (Becker 2006: 47). The collaboration of traditional leaders in the indirect rule of the apartheid government was a determining factor in this articulation. Adopted in February 1990, the Constitution of the Republic of Namibia reflected the demand for gender parity to guarantee equality and freedom from discrimination on a number of grounds, including sex discrimination (Section 10 [2]).¹¹

The aims of the 1993 Customary Law Workshop specifically included improving the legal status of women in line with the requirements of the Constitution. The minutes of the workshop disclose that the chairman of the Kozonguizi Commission referred to above and the then ombudsman of Namibia, Adv Kozonguizi, and Ms Shivute, a representative of the President's Office in the Department of Women's Affairs, were present at the workshop and explicitly brought up the issue of gender equality.

In the past the conditions of women were not as good as they should be, but today the government in trying [to] uplift the women's situation in Namibia.¹²

We, the women, have come to hear and see what is being done, so that if there is anything that may suppress the women be done away with. Traditional laws and general laws should be equalized. Traditional laws must be adjusted properly. We do not say should be abolished. Widows must also be protected.¹³

¹⁰ Chapter 27 of the 1986 report by the United Nations Institute for Namibia (p. 963) as well as Section 6 of the Law Reform and Development Act, Act 29 of 1991 mention codification.

¹¹ Article 10 of the Namibian Constitution provides that all persons shall be equal before the law, and that no one may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. With this article, the Namibian Constitution follows Article 1 of the Universal Declaration of Human Rights as well as Article 2 of the African Charter on Human and People's Rights.

¹² Advocate F.J. Kozonguizi, quoted in the Minutes, Para. 5. See also Footnote 4 above.

¹³ Ms Nashilongo Shivute, quoted in the Minutes, Para. 5. See also Footnote 4 above.

Ms Shivute's reference to widows refers to the customary inheritance norm whereby when a man dies, his estate is inherited by his matrilineal family, leaving his widow dependent on her husband's family unless she chooses to return to her own matrilineal family. Despite the customary obligation for the husband's family to support needy widows and children, this often resulted in the past in the widow and her children being chased out of their home. A related customary norm was that when women remained on the land they had occupied with their husbands, they were required to make a payment to their traditional leaders for the land in question. The traditional leaders at the workshop unanimously decided that widows should no longer be removed from their land or their homes and that they should not be asked to pay for the land.¹⁴ Another high-profile proponent of such a change was President Sam Nujomo. During the workshop, Adv Kozonguizi conveyed the President's strong feelings on the subject to the traditional leaders assembled.¹⁵

This normative change reflected a widely felt need amongst society to enhance the position of widows, both at a local and national level. Field research carried out in 1992-1993 in Uukwambi showed that when asked whether they agreed or not with the statement 'The husband's family should inherit all the property when the husband dies', 95.7% of respondents disagreed (Namibia Development Trust 1993: 63). The statement 'Women should be allowed to inherit land without having to pay' yielded a positive response in 96.7% of cases. The field research data thus clearly show that respondents believed that women, and not their husband's family, should inherit the husband's land, and that widows should not be charged for this land by the headman.¹⁶ In 1993, more than 100 women demonstrated against such discriminatory inheritance laws at the highest court of Oukwanyama Traditional Authority.¹⁷

Gordon (2008) shows the deep historical roots of 'widow dispossession', which was a subject of contention in Owambo society for more than a century, and details earlier attempts by traditional authorities, colonial administrators and missionaries to improve the inheritance situation of widows.¹⁸ These were largely unsuccessful, which led him to question the 'much-vaunted power of "Traditional Authorities" who have shown themselves to be aware, sometimes keenly,

¹⁴ Minutes, Para. 10. See also Footnote 4 above. It was also unanimously decided that women be allowed full participation in community courts (Para. 12 of the Minutes).

¹⁵ Interview 43: female traditional councillor, 14 December 2009.

¹⁶ *Ibid.*: 63.

¹⁷ *The Namibian*, 11 & 13 August 2003, quoted in Becker (2006: 48).

¹⁸ According to the former secretary of Chief Iipumbu, Maria Angungu, some districts in Uukwambi were already taking steps towards protecting widows before the new norm was stipulated in the written 'Laws of Uukwambi (1950-1995)' (Interview, 4 December 2009).

of inheritance issues and yet their own “traditional laws” appear to be frequently ignored or side-stepped’ (Gordon 2008: 9). This raises the question as to whether the Owambo Traditional Authorities’ latest efforts to enhance the position of widows will be more effective or whether the new traditional laws will again be ignored.

Uukwambi written laws

The 1993 Customary Law Workshop was not a law-making body and the meeting’s decisions were only recommendations for the councils of the various traditional communities. It was left to them to translate these into law for their respective communities.¹⁹ The resulting ‘self-recording documents’ were not comprehensive codifications but contain reference to a number of substantive and procedural norms that were felt to be of particular importance. Hinz calls them ‘self-statements’ of customary law because the traditional authorities themselves created these legal documents that contain aspects of their community’s customary law in their own words (Hinz 1997).

The written ‘Laws of Uukwambi (1950-1995)’ are divided into two sections. The first consists of 11 pages that describe the legal system of Uukwambi. It starts with a number of procedural rules stipulating the procedure for law-making, the hierarchy of traditional courts, the obligation of obedience to traditional courts, and the right to nominate witnesses. The remainder of the first section deals with substantive law of both a criminal and a civil character²⁰ mentioning a number of felonies and crimes (including murder, illegal abortion, abandoning a baby, rape, adultery, impregnating an unmarried woman, assault and intimidation) and stating the penalties required. It then turns to issues involving property and natural resources, such as land distribution, traditional inheritance, stolen property, cattle (transporting, slaughtering, lost cattle), and the protection of water, trees, wild animals, crops and grass for grazing. The section ends with a number of rules regarding what could perhaps be loosely termed ‘moral behaviour’, including the sale of alcohol, the prosecution of witch doctors, the traditional upbringing of children and obligations regarding the care of old people. The second part of the document contains 13 articles. The first 12 of these merely state the penalty for various felonies while the last one consists of sub-sections (a to r) that repeat some of the issues mentioned earlier in the document. For example, ‘a. Nobody must transport cattle without a permit’.

The unanimous decision regarding widows’ inheritance taken by the traditional leaders present at the Owambo workshop resulted in the following pro-

¹⁹ Minutes, Para. 8. See also Footnote 4 above.

²⁰ Customary law does not make a clear distinction between criminal and civil law.

vision in the written 'Laws of Uukwambi (1950-1995)': 'Traditional law give[s] provision that, if one spouse dies the living spouse shall be the owner of the house' (Section 9.2). Section 9.4 adds: 'Any widow [who] feel[s] treated unfairly during the inheritance process has the right to open up a case against those with the headmen/women or senior headmen/women or to the women and child abuse center'.

Uukwambi Traditional Authority is in the process of updating its written laws. According to the 'Laws of Uukwambi (1950-1995)', the traditional laws are to be reviewed every five years but, to date, they have only changed the fines to adjust them to the rising price of cattle. In the current process, they are explicitly checking whether their provisions contravene the Constitution. The draft²¹ version of 'The Laws of Uukwambi Traditional Authority (1950-2008)' reiterates the rights of the widow²² and explicitly acknowledges that no payment is required: 'In the amendment of the traditional law of 1993, it was agreed that widows will no longer be chased out of their land and/or asked to pay for the land/field after their husbands' death as it was before.'²³

Effects on the Uukwambi customary legal system

Having discussed the process of recording in Owambo and the document that resulted from it in Uukwambi Traditional Authority, the chapter now analyzes the local effects of the recording of Uukwambi customary law on the nature and functioning of the Uukwambi legal system. To what extent are villagers familiar with the existence and content of the written laws? Do they regard the recording as having influenced the administration of justice and, if so, in what way? How do traditional leaders view the effects of the new document? And to what extent does it change the relationship between the people and their traditional leaders?

Knowledge of the written laws

When the 162 respondents in the survey were asked whether the Uukwambi Traditional Authority had written customary laws, only 66 people (40.7%) were aware of the fact, with 17 persons (10.5%) answering in the negative, and 79 (48.8%) claiming that they did not know. When aggregated by age and gender, it is clear that knowledge regarding written customary law is most prevalent among people between the ages of 40 and 70 (Table 15.1) and more

²¹ This draft was still being discussed by the Traditional Council when the author left the field in February 2010.

²² Clause 9.2: 'The law states that (the/a) house belongs to the husband and wife and if the husband dies, then the house will belong to the wife'.

²³ Clause 9.1.

so among men than women (Table 15.2). When disaggregated by level of education, the data displayed no substantial differences.

Table 15.1 'Does Uukwambi traditional authority have written customary laws?' by age group (%; N=162)

	20-29 years	30-39 years	40-49 years	50-59 years	60-69 years	>70 years
Yes	17	29.2	51.6	61.9	63.3	47.1
No	14.9	16.7	3.2	0	9.1	17.6
Don't know	68.1	54.2	45.2	38.1	27.3	35.3

Table 15.2 'Does Uukwambi traditional authority have written customary laws?' by gender (%; N=162)

	Men	Women
Yes	56.7	29.3
No	7.5	13.0
Don't know	35.8	57.6

When respondents were asked how well acquainted they were with the content of the (written or unwritten) laws of Uukwambi, a similar pattern emerged. Age and gender accounted for substantial variations, with men aged 40 to 70 scoring above average. Education did not have any noticeable effect.

When discussing knowledge of customary laws, it should be noted that traditional court meetings do not engage the majority of the adult population in the villages. In Uukwambi, about two-thirds of respondents (71.7% of female and 62.7% of male respondents) had never attended a traditional court meeting in their village. 31.6% of respondents had participated in court meetings but only 8.2% reported having attended 'many times' or 'almost always'. In this case too, men aged 40 to 70 were overrepresented.

Positive change

Of the 66 respondents that acknowledged knowing of the existence of written customary laws, a large majority claimed to feel positive or very positive about the written laws (95.5%). Almost all of these respondents also agreed or strongly agreed that the headman/woman decided cases on the basis of the written laws (98.4%), that they found it easier to accept a decision when it was based on written law (98.7%) and that written laws have made traditional court decisions fairer (98.4%).

These positive views are largely corroborated by participant observation at traditional court sessions as well as in interviews with men and women who regularly attend such meetings. When the subject of the written customary laws of Uukwambi was broached, most interviewees agreed that the written laws are in fact being used in court. They explained that after the recording, the Uukwambi Traditional Authority gave all headmen/women copies of the laws and members of the traditional court take these to court sessions.²⁴ After the cases have been called, the chairman or secretary usually starts by reading the appropriate parts of the law to the public. And later in the proceedings, the written laws are often referred to in discussions, both by members of the court and by the villagers present.

Not all the interviewees were convinced of the importance of the recording of Uukwambi laws and a small minority questioned the effect this has. Some referred to the fact that not all the traditional leaders told villagers about the new laws. Others doubted whether a written document could make inroads in a largely illiterate rural society. Again others pointed out that the written laws might have increased legal awareness but that this had not enhanced respect for decisions and their enforcement.

Most villagers, however, said that the written laws had brought positive changes, especially through the recording of fixed fines. They stated that the recording of laws had enhanced the certainty and predictability of customary law for subjects, had brought forward the harmonization of decisions of different Uukwambi courts, and had increased impartiality in decision-making.

An additional effect of the recording of customary laws and the inclusion of fixed fines is found in the significantly enhanced legal knowledge of local villagers, at least among those who attend traditional court meetings. People are much less dependent on local information as the rules are the same everywhere in Uukwambi and, with regard to most fines, in other Owambo Traditional Authorities too. The combination of fixed fines and increased legal awareness among the people has fostered more accountability among court members and limits their discretion. The recorded laws act as a check on corrupt practices by traditional leaders in the settling of disputes. The following statements refer to the discretion of traditional leaders when ruling on cases and especially penalties.

Because the law is there and it is clear and they are all guided by this document, there is no difference [between one village leader and another]. For a long time it

²⁴ Many people who have a copy of the written laws of Uukwambi also own copies of the Traditional Authorities Act 2001 (in Oshiwambo) and the Oshiwambo version of 'A Guide to the Communal Land Reform Act LRA 2002' published by the Legal Assistance Centre.

was different because there was no document to guide them. Any headman could decide this is how I want my people to behave.²⁵

Previously, any traditional leader could decide how much you had to pay. This was influenced by how you behaved. When they thought someone was not respectful he would be fined four cows instead of two.²⁶

When the traditional courts fine someone a sum that is not in line with what the law states, villagers now question their traditional leaders about it. Such cases can – and are being – taken to the court of the senior headman/woman for him/her to rectify the situation in accordance with the law.²⁷

Traditional leaders' perceptions

The supremacy of written laws seems generally to be accepted by traditional leaders. As one headman put it, 'We cannot make a decision out of thin air. We have to refer to the law.'²⁸ Even those few traditional leaders who do not often refer to the written laws in their decision-making acknowledge the general validity and applicability of the law and claimed in interviews to be well aware of the law's content and that they make their judgements accordingly.

Most traditional leaders expressed marked appreciation of the changes the recorded laws had brought to the Uukwambi legal system. They stated that the laws have helped them to make the right decisions and that the written laws have enhanced the legitimacy and acceptability of their decisions by the parties involved and the general public. They feel that people respect the law more now that elements of discrimination have been removed from the process. Two headmen explain:

The written laws made my job easier. It is no more me who is saying this or that, but it is the law saying so. Everyone in the gathering will support a legal fine. So there will be no more revenge.²⁹

Now that we have written laws, every decision we make is no more from our head. We take it from the laws and show the people: This is what you did so this is what you get. Before, when someone was fined, the people said: 'The headman made me pay'. Now that they know it comes from the law, they really cooperate with us. We were told when we hold court meetings we must tell people that this is a

²⁵ Interview 32: female traditional councillor, 16 November 2009.

²⁶ Interview 51: headman, 5 January 2010.

²⁷ This happened in the village of Omaandi where the senior headwoman, at the request of villagers, gave a letter to the headman ordering him to adjust the fine in accordance with the law (Interview 49: women's group discussion, 29 December 2009).

²⁸ Interview 48: headman, 21 December 2009.

²⁹ Interview 50: headman, 29 December 2009.

copy of the laws and it said this. In every case we say: 'Because you did this, this is what you face'.³⁰

Enhancing the position of widows

We have seen that the written laws of Uukwambi included new provisions to protect women's land on the death of their husbands. This section discusses the effectiveness of these norms and considers the extent to which traditional leaders and ordinary people are aware of the new norms. Are the norms being enforced by traditional leaders? And has this led to effective behavioural change?

Legal awareness and behavioural change

Interviews held indicated that the changed norms have become quite well known and enforced in Uukwambi. Many people were familiar with the norms, and it was generally stated that the number of cases of land grabbing had decreased significantly over the last few years in the traditional courts³¹ and also on the Communal Land Boards.³² The wider awareness was corroborated by our survey data that showed that 81.5% and 81.1% of the 162 respondents in Uukwambi were aware of respectively the norms prohibiting land grabbing and prohibiting payment to the headman/woman. Of the 132 respondents who were aware of the norm prohibiting land grabbing, 91.7% claimed they did not know of any case of land grabbing in their village in the last three years, compared to 8.3% who had heard of such a case. These figures are particularly striking when compared with research carried out in 1992/1993 in Uukwambi. In this research, when asked about property and inheritance in a customary marriage, 51.2% of the 600 female respondents replied that they were convinced that on the death of their husbands, all of his belongings would go to his family (Namibia Development Trust 1993: 62).³³

³⁰ Interview 52: headman, 8 January 2010.

³¹ The court of one of the senior headmen in the Uukwambi traditional authority received only one case regarding land grabbing in 2009.

³² The Communal Land Boards (CLBs) were established in 2003 in line with the Communal Land Reform Act and tasked with resolving disputes on land matters, among others. One of the members of the Omusati CLB recounted how they had received many land-grabbing cases in their first three-year term [2003-2006] but that the number had dropped significantly in the second three-year term and that now, in their third term, they had not received any at all (Interview 35: CLB member Omusati Region, 18 November 2009). A member of the Oshana CLB confirmed this trend: they had also not received any cases regarding land grabbing in their third term (Interview 48: headman/CLB member, 21 December 2009).

³³ The study revealed that even when men have written wills, their wishes are not necessarily taken into consideration after their death (*Ibid.*: 72).

Widows having to pay headmen to retain their land and land grabbing were first outlawed in the written laws of Uukwambi and other Owambo Traditional Authorities, but later also by statutory law in the Communal Land Reform Act 2002.³⁴ In interviews, both customary law and statutory law were referred to as being sources of the new norm and both institutions – traditional authority and government – are now seen as enforcing agencies. It is difficult to deduce which regulatory system has contributed more to this new awareness. On the one hand, data from the Communal Land Boards show many land-grabbing cases were still being referred to them in the 2003-2006 period but these have gradually declined, with almost none being reported today. This coincides with the introduction of the Communal Land Reform Act 2002 rather than with the abolition of the customary norm by the Owambo Traditional Authorities in 1993. On the other hand, quantitative data demonstrate that 21.2% of the people who are aware of the norm contribute its basis to being in statutory law, with 5.3% specifically referring to the Communal Land Reform Act, compared to 64.4% who mention customary law as the source, and 14.4% who did not know. People quoting the norm for widows regularly added that when both parents die and a child inherits their property, this child is also not exempt from having to pay the headman to retain his/her parents' land. The fact that this practice contravenes the Communal Land Reform Act but not the written laws of Uukwambi³⁵ indicates that knowledge of the content of the Communal Land Reform Act is at best incomplete,³⁶ and that awareness of statutory norms is greater when they reflect customary norms.

Statutory inroads into customary inheritance practices

The awareness and acceptance of traditional leaders and ordinary villagers of the changed norms and the resulting near eradication of land grabbing³⁷ is especially remarkable when compared to attempts by other African countries to eradicate such practices and change customary inheritance practices by promulgating new statutory laws. For example, the national outcry over the plight of widows in Ghana under customary law led to the enactment of the Intestate Succession Law, 1985 (Provisional National Defense Council (PNDC) Law 111) which ensures that the spouse and/or any children are entitled to the self-

³⁴ Section 26 of the Act provides that, upon the death of a holder of a customary land right, the right will be reallocated to the surviving spouse. Section 42 adds that no compensation may be demanded or provided for this reallocation.

³⁵ Section 9 of the written laws of Uukwambi mentions only the surviving spouse.

³⁶ Limited public awareness of the Communal Land Reform Act 2002 is reported by Ambunda & de Klerk (2008: 80).

³⁷ Although decreasing, the removal of non-fixed property, especially livestock, is still a problem in Owambo. See Werner (2008: 28-29).

acquired house of the deceased and the household chattels of the intestate. The chattels include jewellery, clothes, furniture, kitchen and laundry equipment, simple hunting and agricultural equipment, books, motor vehicles and household livestock.³⁸ The remainder of the estate, if it exceeds a certain minimum amount, is then divided among the surviving spouse, children, parents and extended family, with the widow and children together entitled to seven-eighths of the residue of the estate, and in cases where there are no children, the surviving spouse is entitled to three-quarters.³⁹ A 1998 empirical study in four areas of Ghana revealed high levels of awareness of the existence of this law, although not necessarily the exact details, but limited application of its provisions at the local level (Dankwah 1998). Where the author found an 'increasing recognition of the necessity to let children partake of the enjoyment of their deceased fathers' intestate estate', the widow was still generally marginalized despite a slight improvement over the original customary position (*Ibid.*: 243).

Comparable stories can be told for other African countries. For instance, Malawi,⁴⁰ Zimbabwe,⁴¹ Zambia⁴² and Rwanda⁴³ all have statutes that protect the property of widows after the death of their husbands. Application at the local level is, however, considered to be minimal due to problems such as vague wording in the statutes and the fact that they are based on assumptions that are

³⁸ Intestate Succession Law, 1985 (PNDC Law 111), Sections 3, 4 & 18.

³⁹ See for a discussion of the Intestate Succession Law, 1985 (PNDC Law 111) of Ghana: Woodman (1985); Awusabo-Asare (1990); Yeboa (1992); Mensa-Bonsu (1994); Dzidzornu (1995) and Dankwa (1998).

⁴⁰ In Malawi, the Wills and Inheritance Act 25 of 1967 mandates the following division of the estate: In patrilineal societies, 50% to the wife, children and dependents and 50% to the customary family; in matrilineal societies 40% to the wife, children and dependents and 60% to the customary family. See White *et al.* (2002: 36). The new Bill No. 8 of 2010, Deceased Estates (Wills, Inheritance and Protection) is currently being debated by Parliament and no longer includes customary heirs as beneficiaries of the intestate estate (*The Nation*, 19 November 2010).

⁴¹ Zimbabwe's Administration of Estates Amendment Act No. 6 of 1997 determines the distribution of the estate in cases of dispute: a third goes to the surviving wife/-wives and two-thirds to any surviving child/children (Pfumorodze 2010: 47-48).

⁴² Zambia's 1989 Intestate Succession Act entitles the widow to 20% of the deceased's estate, his children are entitled to share 50% in equal parts, his parents 20%, and other relatives receive 10%. The Act only applies to land held under statutory law. Most land (80%) in Zambia is held under customary tenure and this land and any homesteads built on it are excluded from the Act (CLEP n.d.)

⁴³ Government of Rwanda, Law No 22/99 of 12/11/1999 to Supplement Book One of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Successions. This law stipulates 'community property' as default marriage property regime and thus 'firmly established gender equality in land inheritance and in property ownership within the majority of marriages' (Daley *et al.* 2010: 132-134).

largely urban-based and therefore insufficiently adapted to rural structures of kinship, marriage and co-habitation.⁴⁴ However, the main issue hampering the effectiveness of the statutes is the limited awareness most people have of their statutory rights, the problems of widows in accessing police and state justice structures, and the only partial extent to which traditional justice structures are aware of and are willing to apply statutory norms.⁴⁵

These cases contrast starkly with the successful attempt to abolish widow chasing in Uukwambi Traditional Authority. In this area, it was not a new statute promulgated by the government but self-regulation of customary law by the Owambo Traditional Authorities that formed the basis of the normative change. In other words, instead of imposing state law that prohibited certain customary practices, Owambo Traditional Authorities decided to change their own customary laws. This approach was able to overcome a number of the weaknesses of the statutory interventions mentioned above. Generally, awareness of customary norms is much higher than of statutory norms and awareness of the changed customary norms in Uukwambi is particularly high, among both ordinary citizens and traditional leaders. In addition, the latter do not resist any application of the new norms and widows therefore do not need to access state justice structures to protect their own property.

Conclusion

This chapter has discussed the origins and wording of the ‘self-recording’ of customary law in Uukwambi Traditional Authority, Namibia, and analyzed its impact on the nature and functioning of the Uukwambi justice system, particularly with regard to widows’ inheritance rights. This analysis has allowed an assessment of whether the self-recording process in northern Namibia has created a locally legitimate written statement of customary law and thus a process that enables effective normative change in customary legal systems.

Uukwambi’s written laws appear to be enjoying a large measure of local legitimacy, at least among those who participate in traditional court sessions. These people almost unanimously agree that traditional court cases are decided on the basis of the written laws of Uukwambi, and a large majority claim that they find decisions based on written laws easier to accept and fairer. In particular the recording of fixed fines is seen as a significant contribution to the certainty, predictability and impartiality of traditional court cases, and this has led to reduced discretionary rulings and fewer possibilities for abuse by tradi-

⁴⁴ See Mensa-Bonsu (1994: 108) and Pfumrodze (2010: 48-54).

⁴⁵ See for Malawi: Ligomeka (2003) and White *et al.* (2002: 38, 101, 105); for Zambia: Maumbu (1993); for Zimbabwe: Pfumrodze (2010: 54-55) and for Rwanda: Daley *et al.* (2010: 137-140).

tional leaders. The combination of fixed fines and increased legal knowledge among people as a result of a more cohesive application of customary norms has further limited the traditional leaders' room for manoeuvre and has fostered a sphere of accountability. Traditional leaders themselves also generally accept the supremacy of the written laws and have welcomed them as a positive change to the Uukwambi justice system, one that has enhanced the legitimacy and acceptability of their decisions. One can thus conclude that the local legitimacy of Uukwambi's customary justice system among traditional leaders and ordinary villagers alike has been strengthened rather than weakened by the process of self-recording.

The new norms protecting widows are now reasonably well known and are being enforced in Uukwambi. The number of cases of allegations of land grabbing has dropped significantly over the last 15 years and they are now rarely encountered. These figures bear witness to a significant behavioural change regarding the inheritance rights of widows. It would seem safe to conclude that the recording of norms protecting widows' rights in the written customary laws of Uukwambi has led to real changes in local inheritance practices. This success is even more remarkable when contrasted with similar attempts that have failed to change customary inheritance practices through statutory intervention in other African countries. The self-recording process in Uukwambi Traditional Authority thus sets a positive example of how normative change in customary justice systems can be effectuated.

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Decentralization and the articulation of local and regional politics in Central Chad¹

Han van Dijk

Under pressure from donors, the Chadian government embarked on a difficult project of administrative decentralization since 2000 in an attempt to bring its administration closer to the population and promote the democratization of local and regional politics. This chapter discusses some of the dynamics involved in this process and shows how administrative decentralization has served to reinforce the central administration's grip on local and regional politics and has led to the erosion of the power base of some of the 'neo-traditional' authorities and the rise of other centres of power. This has interacted with on-going processes of change in land tenure and religious transformations and is contributing to growing tensions between ethnic groups. These have become more pronounced with the breakdown of state authority following political unrest in the east of Chad since the start of the Darfur conflict.

¹ A preliminary version of this paper was presented at 'The Chad Basin: Recon-figurations' workshop at the Max Planck Institute, Halle, Germany, 29-30 September 2003. The author would like to thank the participants at this workshop for their comments. Fieldwork was conducted in 2002-2003 and on various field trips between 2004 and 2006 in collaboration with Mirjam de Bruijn and Nakar Djindil Syntyche, who I would like to thank for their contributions to the ideas that are developed in this chapter. My thanks also go to Jan Abbink for his constructive comments.

Introduction

A wave of democratization has swept over Africa since the Cold War ended in 1989. Initially expectations were high as democratic governments were elected in a number of countries but it appeared that this entailed the gradual restoration of power to old elites and that nothing much would change in politics as democracy was not engrained in society, and civil society was weak and unable to mobilize a countervailing power against the government. In many countries, the turnout at elections was so low that the newly elected governments could hardly be called representative (Lange 1997; Bratton *et al.* 2002).

To bring government and power to the people and improve the quality of governance, decentralization became the buzzword among donors for a while. It was expected that taking administration to the lower levels would increase participation in politics among ordinary people and improve the functioning of democracy and local government. In some countries, this has been quite successful in the sense that substantial progress has been made in creating local democratic institutions (for Mali, see Hesseling & van Dijk 2005). It is also clear that important risks are attached to the policy of decentralization (Ribot 2002; Leclerc-Olive 2001).

Under pressure from donors, the Central African state of Chad has also embarked on a policy of decentralization since about 2000.² Given Chad's history of political unrest and its lack of democratic tradition, this would appear to have been an extremely difficult operation. The purpose of this chapter is to consider some of the background to this operation over the last decade, how it was executed and what the commentaries of external observers were, and the outcome of the decentralization project at the local/regional level to date.

Decentralization and the work of Gerti Hesseling

Decentralization had an important place in Gerti Hesseling's work and was an interest that started when she worked for the *Club du Sahel* on various assignments. One of the policy reports in this field, a volume on the results of the Praia conference in 1994 (Hesseling & Ba 1994), is one of the most-cited works on decentralization in West Africa. Though decentralization was then a fashionable topic among donors following the wave of democratization that reached West Africa after the fall of Communism, Gerti Hesseling maintained a critical distance from the idea. At the time, donors thought that decentralization would

² With the new *Loi organique* of February 2000. Decentralization had already been announced in the country's 1996 Constitution. Chad was subdivided into 14 new regions in 2002.

be a panacea that would solve the problem of political instability and conflict and would remedy the shortcomings of corrupt government bureaucracies.

We were both much more sceptical. In fact, this scepticism led us to join forces at a small conference organized with the Africa Department of the Netherlands Ministry of Foreign Affairs in 1998. Our presentation resulted in two papers on this topic (Hesseling & van Dijk 2005; van Dijk & Hesseling 2006) in which we combined her conceptual approach with a number of studies and my own observations from the Malian context. The ideas developed in this chapter also influenced my thinking when doing research in Chad at a later date. While Mirjam de Bruijn and I were doing research there, Gerti found the time to visit and accompanied us on a trip to the central parts of Chad where we were doing field research. This confirmed for her that the approach taken in our joint work was essentially correct. This chapter was written on the basis of our research in Chad and it is only logical here to see it as a tribute to Gerti and her work.

Administrative decentralization

Administrative decentralization is generally defined as the transfer of duties, powers, resources and decision-making powers from central government to bodies outside the central core. Decentralization still seems to be fashionable, especially in the developing world but, as is so often the case with fashions, the word is not always used carefully. It is frequently used as an umbrella term comprising four types of decentralization (Otto 1999): (i) devolution: decentralization from the central government to an independent lower government; (ii) deconcentration: transfer from the central government to institutions of the same central government located in the provinces and districts; (iii) functional decentralization: the transfer of specific tasks, duties and/or resources from the central government to certain national institutions such as governmental services and independent government bodies; and (iv) privatization: the transfer of government duties to institutions outside the government.

However, such formal definitions provide only limited insight into the process of administrative decentralization. After all, the decentralization of the organization of healthcare is something altogether different from creating the political and economic conditions that enable the population to assume control of their own development and to deal adequately with the consequences of ethnic and economic diversity. And setting up a new layer of government is something entirely different from transferring control over all kinds of vital resources to the population.

Another problem is that governments and policy-making bodies in general have an instrumental and positivistic view of law and government. They believe that a thorough investigation of the defects of current systems of governance in

bringing about desired change can help to identify legal gaps and bureaucratic reforms that will help to bring government closer to the norms of good governance. Underlying this idea is the assumption that laws and regulations change people's conduct, bringing it in line with the law, and that bureaucracies are neutral tools in the Weberian sense, executing government policies and enforcing the law indiscriminately. However nothing is further from the truth: human conduct is determined in a larger complex of social and political relationships, one of which is the law (Griffiths 1996: 477; Hesselning 1996: 121). To turn decentralization into a success, local communities need to be properly operating entities that are geared up to equality and cooperation. Is it realistic to assume that the generally illiterate rural population can participate in all kinds of newly created political structures whose political and legal dimensions they do not understand? Are all categories of the rural population capable of participating in political processes as equal partners? Do they have equal access to political positions? Are they equally capable of benefiting from the possibilities created by a new governmental structure? Are these decentralized structures responsive and democratic institutions that execute what has been decided democratically? In many instances, this is an unjustified assumption. Without a correct diagnosis at the outset, decentralization of state power may lead to no more than a concentration of power at a lower level (Hesselning 1996; *Forests, Trees and People* 1998).

As the political unrest in large parts of Africa shows, it is not inconceivable that ethnic or ethno-regional differences will be accentuated by politicians who regard the decentralization of state powers as a welcome opportunity to claim a privileged position for their own ethnic group. An additional difficulty here is that local government officials and politicians are often only accountable to central government and not to the local population that they are supposed to represent (Silverman 1992). The result is that the local population can no longer rely on the intermediate level for protection and turns to its own groups or forms of social organization, which often operate along ethnic lines.

A further problem may be that politicians who take the lead in decentralization processes only do so because they see an advantage to it or are compelled to do so because of political conditions. In Mali, for example, former President Alpha Oumar Konaré was forced to embark on decentralization because his predecessors promised a large degree of autonomy to the Tuareg in the north. The only strategy to avoid a new conflict with the Tuareg and dampen southern resentment was to promise the whole country more regional and local autonomy. This also enabled him to channel the ambitions of local and regional politicians so they did not become a menace for the central government (Seely 2001).

Administrative decentralization in Africa has nevertheless gained momentum since the end of the Cold War and the wave of democratization that followed. Donors pressed African governments to embark on ambitious programmes of administrative decentralization on the assumption that a narrowing of the gap between the population and the administration would enhance the quality of governance, the transparency of administrative processes and the accountability of the administration. However, after a review of the literature on administrative decentralization, Manor (1999) concluded that it has primarily served to reinforce patrimonial forms of hegemony and decentralize this model to lower administrative levels.

Decentralization in Chad

Decentralization and political reform in Chad have, therefore, to be viewed against the backdrop of the country's history and its particular conditions. Like most African states, Chad inherited a centralized system of governance from the French. Nevertheless, in the 1960 Constitution, decentralized political structures to be ruled by elected officials were already foreseen (Lohse 2002). Urban and rural municipalities were defined as territorial units by Ordonnance No. 4/INT, dated 13 February 1960.³ The plan was to create these local municipalities when the succession of the local *chef de cantons* had to be arranged, following death or in other instances. However, this policy was sabotaged by the families of these rulers with the silent consent of the administrative authorities, who saw no advantage to local-level democracy. As a result, no municipality has been created outside the capital N'Djaména since independence, although this was also partly due the fact that Chad was ill prepared for self-governance when it became independent. Despite the fact that self-rule had been introduced after World War II (Lanne 1998), it could hardly be expected that Chad was ready to become a mature Western-style democracy overnight. Parts of the country had only been under colonial rule since 1930 and the colony was under military rule for much longer than other parts of colonial French Africa.

The administrative system at the local level consisted of sultans and *chef de cantons* who had been put in place by the colonial government. The stature and legitimacy of these local and regional representatives differed widely. On the one hand there were sultans who were the direct descendants of the rulers of the pre-colonial empires of Ouadday/Biltine, Kanem and Baguirmim, while on the other hand there were areas in the south as well as in the extreme far north where no centralized government was known to exist until the advent of colo-

³ Ordonnance No. 4/INT du 13 février 1960 portant sur l'organisation administrative générale du territoire de la République.

nialism. Here, the French appointed 'traditional' rulers. Not knowing local power relations, they appointed anybody as *chef de canton* including their cooks, drivers or housekeepers, probably often because of their knowledge of French (Lohse 2002). Any kind of government – local, traditional, neo-traditional or modern – would have had a hard time gaining the confidence of the population and being regarded as the legitimate expression of the population's political will.

Compared to other former French colonies, Chad was even more handicapped when embarking on independence as there was virtually no infrastructure, communication networks were not in place, and there were few, if any, educated people and those that were better educated mainly originated from the south of Chad. In large areas of the country it was not possible to ensure even the most rudimentary form of administration and the north remained under French administration until 1965. Southern civil servants lacked credibility in the eyes of people from the northern and central parts of the country. Moreover, these civil servants thought their time had come to oppress the northern populations after centuries of slave raiding by Northerners in the south. The regime of President François (later re-baptized Ngarta) Tombalbaye derailed in its attempt to hang on to power. In 1962, soon after independence, he established a one-party regime and, one by one, his political adversaries were accused of plotting against him and were arrested, exiled or killed. In this process, the north became increasingly marginalized politically as southerners came to occupy all the positions of power.

In response to oppression and excessive taxation, the first peasant rebellions broke out in central and eastern Chad in September 1965, beginning in Bitchotchi in the district of Mangalmé. Moubi peasants killed members of a government delegation who had come to demand unpaid taxes, after which repressive measures were taken by the Chadian army (Abbo 1997). The first incidents in the Tibesti Desert took place in the same month (Lemoine 1997). The two decades that followed were characterized by guerrilla warfare and permanent political turmoil as armed opposition groups, under the banner of the FROLINAT, took control of most of the countryside. They were supported by Libya and Sudan, which still had influence in Chadian politics up to the mid-2000s. As the former colonizer, France continued to play a crucial role with its diplomatic and military support for various regimes in N'Djaména (Buijtenhuijs 1978, 1987).

In the early 1980s, the country was in a state of anarchy and even after the rise to power of Idriss Déby in 1990 in a *coup d'état*, there was no institutional

monopoly on violence by the state in large parts of the country.⁴ The security forces and government administrators were not under the control of the central government and pillaged the countryside amid regular reports of human-rights violations.

There was little scope for political and democratic reform or for the expression of civil liberties and civic-political education during this period. Despite their lack of legitimacy, the French-appointed neo-traditional authorities (*chef de canton* and *chef de village*) became more important following independence and were the basis of state power in most of the country. The financial benefits accruing from these positions increased and, in the absence of any countervailing power and a functioning legal system and in the presence of an administration based on exploitation, they became administrators, judges and prosecutors at the same time. Their way of ruling did not resemble the model of a modern, Western-style administration but pre-colonial modes of governance. The difference with the pre-colonial era was, however, that they could not be held accountable by the population under their command since the state and the security forces, which had a monopoly on violence just after independence, backed them up. On the positive side, these neo-traditional authorities were indispensable in manipulating the official state administration and counteracting all the often absurd demands put on the population, such as excessive 'development' taxes or land taxation.

Though the situation calmed down to a certain extent when the Déby regime embarked on the road to democratization and political reform, it did so in extremely difficult conditions. The population was traumatized by 25 years of insecurity, dictatorship and famine caused by a combination of drought and military insurgence, and was exhausted by the double exploitation from the side of the government and the rebel forces. The Déby regime cannot be seen as an example of transparent, democratic governance, nor did it do much to reconcile the various groups that were opposed to each other during the years of civil unrest.

The economic and political situation in the 1980/1990s was alarming, with the country largely in ruins. On every indicator of social and economic development, Chad figured among the worst cases in the world. In 1990, there was no trace of democratic tradition at the level of the administration, nor had there been much scope for local people to participate in politics at the local level since there was always the threat of violence from either the administration or

⁴ Despite the apparent stability of Idriss Déby's regime, it has had to contend with more than twenty armed rebellions since 1990, some of which almost succeeded in toppling his regime (e.g. the MDJT *Mouvement pour la Démocratie et la Justice au Tchad*, and various armed groups that staged attacks on N'Djaména in 2006 and 2008).

its opponents. After the Hissein Habré regime (1982-1990), under which approximately 40,000 people were killed and 250,000 more were imprisoned, 'civil society' was shattered and weak. Pressurized by protests following the general wave of democratization in the early 1990s and under pressure from donors, President Idriss Déby gave way to administrative reforms in 1993. As in many other West African countries, a national conference was held (15 January-7 April 1993) to create the basis for new democratic institutions and redraft the constitution (Buijtenhuijs 1993). From then on, it took more than three years to organize presidential (June/July 1996) and parliamentary (January/February 1997) elections. Idriss Déby was elected president and his party, the *Mouvement Patriotique pour le Salut* (MPS), won a majority in Parliament. Voting was heavily influenced by the country's north-south divide, with Déby obtaining the majority of the votes in the north, whereas the opposition was stronger in the south (Buijtenhuijs 1998).

This process of democratic reform was, however, only democratic in appearance and most of the underlying political problems were not addressed. In fact, the elections created what could be called an 'official state', while most of the critical decisions were taken by an 'informal state' consisting of an inner circle of military and clansmen of President Déby. Analysts claimed that Déby only organized the elections because he was afraid of treason in his inner circle and wanted to gain more control over his own Bidyat clan (within the Zaghawa) by winning a popular mandate (Buijtenhuijs 1998: 70). Others argued that the elections were nothing more than a smoke screen to hide the determination of the 'clan' which was in power and to maintain control over the state by any means possible (*Ibid.*: 100).

The army remained the most important power at this time, consuming a large majority of the government's budget. Attempts to reform the army and demobilize former rebels and army personnel failed. In fact, there were two armies: the Republican Guard of around 7,000 troops that had all the heavy armoury available and who were considered 'untouchable', and the regular army that did not have any real power (Buijtenhuijs 1998: 97).

Insecurity was still rampant. Armed rebels were present in all areas of the country and it was only thanks to the fact that no foreign powers were supporting these rebels that Déby's government did not face any major challenges (*Ibid.*: 102). However, large parts of the country were not under the control of the state. The civil authorities did not have any means to improve security because they had no vehicles or authority as they were operating from dilapidated buildings. In this situation, demobilized army personnel turned to banditry and these so-called *coupeurs de route* formed an important threat to trade and transport. Undisciplined military did the same by erecting informal roadblocks on

the major transport axes and extorting money from traders and travellers.⁵ In addition, army elements used the presence of the rebels as a pretext for terrorizing the rural population, violating women and torturing people suspected of having links with the rebels (Buijtenhuijs 1998: 107). Local traditional rulers had to operate under the control of the military forces in their area and, in the absence of other countervailing powers, became the only power holders (Buijtenhuijs 1998: 107-108), and thus an intrinsic part of a system of oppression and violence.

The process of political reform was given a new direction when oil was discovered. The World Bank imposed strict conditions on the Chadian government regarding the repayment of its loans to support investments in oil exploration. The contract developed between 1993 and 1999 was approved by the World Bank on 6 June 2000 (Pegg 2006: 7) and plans for administrative reform were then made more concrete when a process of administrative decentralization was set in motion in 2000. The official purpose of the whole decentralization process was to establish municipalities, departments and regions as self-elected, territorial units. Decision-making authority was to be relegated to the lower units in the domains of healthcare, education, hydraulic infrastructure, physical infrastructure and markets. Decentralized territorial units were defined in the *Loi organique no. 002/PR/2000 portant statuts des collectivités territoriales décentralisées* of 16 February 2000, and the *Loi organique no. 07/PR2002 portant statuts des communautés rurales* of 5 June 2002. And, as already mentioned, the official purpose of decentralization was to remedy some of the defects of the administrative system and bring the administration 'closer to the population' so that politics and the administration of justice would become more 'democratic' and 'transparent' (Lohse 2002).

This operation was much too costly to be financed by the Chadian government alone. The 2000 contract with the World Bank concerning the spending of revenues from oil exploitation did not permit the government to finance the regional administration from these sources. As a result, the operation to create a transparent and accountable regional and local administration could only be executed with the support of donor countries (notably Germany), which would have to make a long-term commitment to this process if it was to have any chance of being successful.

⁵ On the N'Djaména-Abèché axis, there were an estimated 50 roadblocks in 1996 that demanded every car pay about FCFA 40,000-50,000 (FCFA 656 = EUR 1) in bribes to complete its journey (Buijtenhuijs 1998: 109).

Political practices at the local level

The Guéra is a mountainous area in Central Chad where numerous small ethnic groups, which are collectively called the *Hadjeraï* (Arabic: mountain dwellers), have settled over the course of history. Each mountain complex has its own ethnic group and sub-groups, and in pre-colonial times the plains between the mountains were uninhabited and the domain of slave-raiding troops from Ouaddai and Baguirmi. The area is semi-arid with a Sahelian climate, a short rainy season from June to October and annual precipitation of 500-600 mm.

Before the arrival of the French, political organization above the specific local/ethnic groups was limited, with most groups not having any political centralization. Only the Kenga near Bitkine and the Daadjo who were the last to settle to the north and northeast of present-day Mongo, the capital of the Guéra, knew some form of centralized polities. The administrative structure of *chef de canton* and *chef de village*, whose main tasks were to collect taxes and act as an intermediary between the French administration and the local population, had to compete with the customary leadership based on the Margay cult, a local spirit religion. Traditionally, the real authority within the villages was exercised by the Margay priests who were responsible for rituals centred on the fertility of the land and relations with the spirits of the mountains. Each mountain had its own spirit, called Margay in the literature,⁶ and the priest was the intermediary between the people and the spirit, was responsible for the maintenance of the social order and, in a lot of cases, also for the distribution of land (Fuchs 1970; Vincent 1975).

The Guéra played a special role in the civil war that dominated Chadian politics and daily life for most of the post-colonial years. One of the triggers took place in Mangalmé in the northeastern part of the Guéra in 1965 when people became fed up with the high taxes they had to pay under the regime of Ngarta Tombalbaye, Chad's first president (1960-1975) following independence. The tax on land was particularly resented in the Guéra and was seen as a way of dispossessing the *Hadjeraï* of their ancestors' land. Moreover, these taxes were often levied several times by exploitative administrators and *chefs de canton* and *chefs de village*. Following the tax riot in 1965, the FROLINAT, which became the main opposition force to the official government, infiltrated the Guéra (Abbo 1997; Buijtenhuijs 1978).

Discontent mounted and led to increased civil unrest and, ultimately, to revolts and armed rebellions in the eastern, central and later on northern parts of the country. In historical publications these rebellions are often depicted as national movements but nothing is, in fact, further from the truth. The struggles at the national level had their equivalents at the regional and even local levels.

⁶ Though every *Hadjeraï* group has its own label for their mountain spirit.

In several of the *cantons* in the Guéra, conflicts surfaced, centred on the control of the neo-traditional position of power of the *chef de canton*. In Niergui *Canton*, the *chef de canton* was killed in fighting with rebels who were led by his relatives. The incumbent *chef de canton* remained with the rebel forces and acquired the rank of captain in Hissein Habré's army. The *chef de canton* in Baro, after fiercely resisting the rebel forces with his *goummiers*, sided with the rebels, disappearing for three years and returning victorious to reoccupy his post as *chef de canton* under the new government led by Hissein Habré. In certain villages, civil unrest led to their splitting up, the break-up of families and a general atmosphere of fear and resistance towards any authority (Fuchs 1970; de Bruijn & van Dijk 2007; Abbo 1997).⁷

The Margay priests lost most of their influence during this period. Politically, they were no longer relevant and their religious power was waning as Islam progressively gained a foothold in villages under the influence of the various rebel armies and the governments dominated by Muslim northerners that came to power during the 1980s and 1990s. Religion became an important factor in the politics in Chad, an example being the Islamic conversion campaign that coincided with the rebels' efforts to conquer the area. The northern Muslim rebels despised the Margay cult and forced people to abandon it, and Catholic and Protestant clerics were maltreated and their buildings occupied or destroyed. The role of Islamic scholars in this movement is not clear. During this period, many people were killed both by the rebels and by government forces, and villagers were forced to again pay taxes to the rebels as well as the government. This state of oppression and terror led to many deciding to leave the area and settle in the south, while others went to N'Djaména. At the same time, nomadic pastoralists from the east and the north moved into the area as a result of drought and violence elsewhere. This mobility was a consequence of social dislocation but also of poverty, fear and anxiety, and conflicts that emerged between and within ethnic groups (cf. Bennafla 2000).

The first phase of the rebellion, which lasted until 1975, had a profound impact on the Guéra and its people. Little of what happened after that is known, and is certainly not documented. Apart from sporadic mention of the Guéra and its capital Mongo in publications on skirmishes during the civil war (Buijtenhuijs 1978, 1987; Lanne 1984), there is no real information related to events or conditions in the area. From the information we collected in 2002-2003, it would seem that there were high levels of violence and the vagaries of the climate in the form of the recurrent droughts and famines during the 1970s and 1980s must have taken their toll as well. In addition, the outflow of especially young men (to the war) will have had a significant impact on food production in

⁷ For a study of a region south of the Guéra, see Pairault (1994).

the area. The impact that the daily levels of violence had on relations between Arabs ('people from the North', 'Goranes') and the Hadjerai is not clear. They settled in the region as drought refugees, as herdsmen for townspeople and as agro-pastoralists, clearing land and establishing villages with the intention of staying in the area. This period was also marked by more tensions between different Hadjerai villages (personal communication, Père Franco 2003).

These developments may also have been a reaction to the changing ecological conditions in the area. Analogous to other Sahelian areas, the 1970s and 1980s in the Guéra were marked by severe drought. Only in the 1990s did rainfall patterns recover (cf. Beauvillain 1995). Figures for Mongo show a serious decrease in rainfall at the end of the 1960s, in the early 1970s and again in the 1980s. Plagues of locusts and pests (e.g. the Oriental yellow scale) were another destructive element that had to be confronted.

Local politics and administrative decentralization in the Guéra

The changes at the local level caused by the civil war and conversion to Islam have been tremendous. In most villages, the political organization changed from a system of dual control by the Margay priest and the *chef de village* to a single source of power embodied by the *chef de village*. The impact of war and drought significantly influenced the organization of land and land use and many people who were resettled during the war, for reasons of security or to bring them under the control of the army, were killed or fled their villages, which resulted in total disruption of traditional land-use patterns. In combination with the demise of the Margay priesthood, this led to uncertainty about land tenure. In one case, a village, whose inhabitants had remained more or less in one place, started to occupy the land of a neighbouring village that had been virtually deserted since the war. In another case, a new land-use system emerged over 25 years under the control of a number of rich (male) villagers. In a third case, entire villages were resettled in an area between the former villages under the control of the *chef de canton* and the *chef de village*, whereas land near the previous village sites remained under the control of the Margay priest (who had become irrelevant from a political point of view).

The power of the *chef de canton* is huge in the Guéra today. He is always the first administrative layer at which political, administrative and legal problems are dealt with. Even in civilian cases, such as divorce or adultery, he is often regarded as the administrator, judge and prosecutor, and works in situations where rules and norms are derived from several normative and legal frameworks. Given the demise of the Margay cult, the sudden prominence of Islam, the disruptions in economic life and the displacement of so many people following 30 years of calamities, people are often confused about rules and norms.

This is compounded by the physical insecurity that most people have experienced. Though the situation is much improved, the threat of physical violence, torture and intimidation still looms large over attempts by the population to deal with conflicts and administrative and legal problems.

The decentralization process in the Guéra was initiated against this backdrop of war, trauma and socio-economic disruption in 2002 and was still in progress during our fieldwork period in 2002-2003. The *préfecture* of the Guéra was originally subdivided into four sub-units, Mangalmé, Mongo, Bitkine and Melfi, and these were in turn subdivided into *cantons* headed by a 'traditional' *chef de canton*, in an administrative structure inherited from the colonial era. The course decentralization took in the Guéra resulted it becoming a region that was divided in two sub-units: the *préfecture* of Melfi and the *préfecture* of Mongo. These have since been subdivided into smaller *sous-préfectures*, which coincided, not incidentally according to local intellectuals, with the former *cantons*. At present, a number of *cantons* have been transformed into *sous-préfectures*, while other *cantons* are still waiting to be turned into *sous-préfectures*. No municipalities have yet been created in the Guéra.

It is wrong to assume that the term 'decentralization' suggests that this process is geared towards democratization. All the new officials are appointed by the central government, no elections are held and there are no bodies to represent the population within the new administrative units. It is also extremely difficult to get any reliable information on what is decentralized, why and in what form, which decision-making powers have been transferred, how the relationship with neo-traditional political positions, such as the *chef de canton* and *chef de village*, is organized, how the competences are distributed over the various layers of the administration and so on.

If the division of decision-making powers and procedures are not clear to the administration, they will be even less clear to the population that is in a state of uncertainty about what to expect from its administration. In addition to the *chef de canton*, local people are also faced with the presence of a *sous-préfet*. In their perception, the authorities, regardless of whether they are state-appointed, neo-traditional or elected, are 'people who want money'. In the case of administrative affairs and conflicts between villagers and villages and between nomads and sedentary farmers, when the intervention of the administration is needed or imposed because people have been fighting and killing each other, money is being tapped from the local village economy.

Another element to be taken into account is that *cantons* are mostly based on ethnic divisions. It is not clear in the Guéra whether people living within the same *canton* considered themselves as belonging to one ethnic group at the beginning of the colonial period. Nevertheless, one of the consequences of the cantonal organization has certainly been that ethnic or ethno-regional senti-

ments have been formed around affiliation to a specific *canton*.⁸ The conflicts and the redrawing of the *canton* boundaries during the colonial period created a certain momentum for the formation of ethnic identities. This process has evolved to the extent that the chiefly families in the *cantons* are in the process of inventing oral traditions concerning the origins of their ethnic group and justifying the present political position held by the chiefly family. These ethnic sentiments are again reinforced by the formation of a *sous-préfecture*, which the population regards as official recognition of ethnic identity.⁹ Fierce battles are erupting, for example, about the exact location of a dispensary in a village on the border between two *sous-préfectures*, where two groups co-habit: both want the dispensary in their part of the village.

Village politics

Efforts at democratization and administrative decentralization have changed the politics at local level. In two of the villages where field research was done, there were struggles over the control of village politics. In one case, villagers were organizing themselves to remove an oppressive *chef de village* by means of elections. To have permission from the *chef de canton* to run for a seat, each candidate and his followers had to pay FCFA 500,000.¹⁰ After the elections, if a new chief was elected, the previous one went to the *sous-préfet* to complain about the procedure, paying him an undisclosed sum to annul the elections. When the new chief was called to the office of the *sous-préfet*, he would have already collected money from his supporters to satisfy the financial demands of the *sous-préfet*. In the end, he remained in power but the result of these democratic elections was that about FCFA 1,500,000 was drained from the village economy (of 100 families) in a village where most families had experienced a bad harvest and were surviving on the proceeds from mat weaving.

In the second village, things were not as bad because the general level of wealth was somewhat higher. However, here there were four candidates, each paying a specified amount of money to the *chef de canton*. When one of them

⁸ We were shown documents from the colonial era by cantonal chiefs on the history of the *canton* and the administrative decisions behind creating the boundaries of *cantons* to 'prove' to us that they really are a separate group from the others.

⁹ In the south of Chad, such subdivisions have gone even further. Chadian newspapers have argued that this is done to create political divisions in the south so that a strong opposition to the government dominated by northerners cannot be formed. Commentators also argue that most of the administrators appointed are of northern origin and they accuse the government of using administrative decentralization to gain control over the south (see also Buijtenhuijs 1998).

¹⁰ FCFA 500,000 is more than EUR 750, which is a huge amount of money in a village where people normally only have very small amounts of cash.

was selected, a large number of livestock had to be sold by his family and followers to perform ceremonies for the *sous-préfet* and to have the new chief officially acknowledged.

If a *canton* gains official recognition as a *sous-préfecture*, this does not necessarily mean that there is self-rule at this level. In one case of a *canton* in the Guéra, the *sous-préfet* was of local origin but after the poor 2002 rainy season, he decided to close part of the valley west of the capital of the *sous-préfecture* to Arab camel herdsmen. The valley belonged to a game reserve and its exploitation was thus subject to limitations. He wanted to preserve the tree resources in the valley for the local sedentary population and knew that the tree fruits and leaves would be important for the survival of the population after the bad harvest. And, in addition, a plague of locusts had destroyed most of the tree fodder. The Arab herdsmen protested but the *sous-préfet* stuck to his decision. The Arabs took their case to the *préfet* and even to the president when he was on his way from the battlefields with the MDJT of Togoimi in the east to N'Djaména and was visiting Oum-Hadjer in Batha Province. Some weeks later, the *sous-préfet* received a letter from the Office of the President ordering him to cancel his decision and admit the Arab herdsmen into the valley.

In general, the rural population was in favour of a decentralized administration at the level of *sous-préfecture* in the sense that they saw this as recognition of their existence and their ethnic identity. However, no framework was put in place to ensure the functioning of these decentralized layers of administration. As the examples show, even when decentralized administrators wanted to be downwardly accountable, they were ultimately subjected to the administrative hierarchy of the state that favoured specific ethnic groups, a process that had been set in motion in the 1990s (Buijtenhuijs 1998). Moreover, as the examples show, the new administrative positions and the processes of so-called democratization enabled local authorities and administrators to develop new forms of rent-seeking behaviour. In the end, the new administrators also have to be paid.

The return of instability

The period during which this fieldwork was conducted (2002-2003) was relatively calm. At the time, there were no rebel groups present in the area and the army was no longer carrying out atrocities as it had in the 1980s and 1990s. Several further visits were made to the region between 2004 and 2006 but the political situation gradually deteriorated following growing instability in the Darfur region in Sudan and in eastern Chad. After President Déby refused to support his Zaghawa clansmen in Darfur, opposition from his own inner circle led to armed rebellions, with major attacks on the capital N'Djaména in 2006 and 2008 when the regime was almost toppled (Massey & May 2007; van Dijk

2006, 2007a, 2007b, 2008). In addition, unrest in the Central African Republic spilled over into eastern and southern Chad, which allowed rebel groups fighting the Chadian government to make incursions onto Chadian territory. This also affected our research area. Though the rebels were pushed back from the capital, the remnants, in the form of dispersed armed groups, are today once again present in the countryside. Between 2004 and 2008, the Chadian government increasingly lost control over the countryside but accurate data are almost non-existent except for in the east of Chad. Observers have noted the total absence of any system of justice, which has led to an increase in local conflicts and violence against civilians, armed banditry and incursions by so-called *Janjawid* militias in the east of the country, and increasing tensions between ethnic groups. As a result, almost half a million refugees and internally displaced people are now being hosted in camps in the east and southeast of Chad. To ensure the security of these camps, the European Union deployed 3,000 troops to the area between March 2008 and March 2009, which was followed by a UN mission of up to 5,300 troops. These stabilization forces were, however, too small to guarantee more than just the security of the refugees camps and insecurity has remained rampant in the rest of the east of Chad (van Dijk 2009).

Our own observations in 2006 in the Guéra confirm the deteriorating security situation. Following the various rebel attacks, there was an increase in the number of disbanded rebels and armed groups in the countryside. The government army was busy repelling rebels on the Sudanese frontier and lost control of large parts of the countryside, which in turn led to an increase in local conflicts and power holders gaining more influence. Paradoxically, this process can be labelled decentralization but, in the absence of the security forces, this has opened the door for violence against the population and the abuse of power by local power holders.

While doing interviews in three villages in June 2006,¹¹ we found that in all the villages there were increasing reports of cattle theft. One village had even evacuated their cattle to the capital of the *sous-préfecture* which was supposedly better protected. In the second village, men showed us the wounds they had suffered while pursuing what they called ‘Arabs on horseback’ who had stolen their cattle. And in the third village, neighbouring Arabs had occupied part of the village territory and when the villagers went to the administration, they, instead of the intruders on their territory, were fined by their own *chef de canton*, which cost them their entire stock of cereals for the dry season.

¹¹ Nakar Djindil did a survey as part of her PhD research in a number of villages on agriculture, health and malnutrition. The data here come from a number of focus-group discussions we held in these villages.

These examples show that villagers do not feel that they and their property are being protected by the state and its security forces. Instead, they are having to resort to their own solutions such as chasing cattle thieves to get their animals back or moving their animals to a place where the cattle thieves do not dare to go. If the authorities become involved in the conflicts, the villagers often have to pay dearly.

Conclusion

Data show that before political unrest broke out in 2004, we could not truly speak of decentralization in the sense that power had been transferred to the lower administrative levels. It was more that power was deconcentrated. In the end, regional and local administrators have remained subject to decisions from the centre. Local democracy and elections, which are now allowed at village level, are quite expensive and are serving to fill the pockets of power holders. This prohibits local people from fully participating in democratic elections. It is only the wealthy who can pay the authorities higher up the political hierarchy and thus further their interests.

Despite political advances towards democratization, the administration at national and regional levels, the army, police and gendarmerie, *préfets* and *sous-préfets*, and the *chef de canton* are frightening entities for ordinary Chadian citizens. When cases are brought before the *chef de canton*, as the most direct representative of the state, he administers justice, imposes fines and collects money to increase his own income, as if he was a pre-colonial sovereign. In more serious cases, the government administration is called to help but here again there are few checks and balances. Of course, the population has strategies for getting things done by bribery or via political networks and relatives who are closer to the centre of power. However, the disadvantage of such methods is that they are expensive and time-consuming, and thus undermine the local economy.

The policy of bringing ethnic groups together in administrative units is also risky. Ethnic sentiments are being recognized in this way as the official basis for political organization. This will weaken political opposition to the government as it will certainly lead to more political contradictions in the south and centre of the country and disputes over territory.

For the moment, administrative decentralization only exists on paper. At the local level, there is no chance that democratic institutions will develop and current efforts to deconcentrate the administration to the level of *canton* will give rise to a new centre of state power at this level, which will compete with neo-traditional authorities such as the *chef de canton*. Despite all the failings of governance through these neo-traditional authorities, their legitimacy is higher

than newly appointed professional administrators from outside who are regarded as 'intruders' and 'invaders from the north'. Under the present conditions of a malfunctioning bureaucracy, higher numbers of officials will only lead to more exploitation of the population as more and more officials want their share in rents that can be obtained from filling bureaucratic positions. Given the current economic situation, this will lead to more poverty and discontent.

The steady deterioration in the security situation since 2003 shows that there are no checks and balances in place. However, they are needed for decentralization to be effective. If the monopoly on violence is not maintained by a central authority, violent conflict between different population groups is bound to occur as there is no effective central leadership in the administration, or in politics more generally. Nor are there any successful local mediation mechanisms. People are being confronted with rent-seeking practices among officials, even at the lower levels of the administration or they are the victims of extortion by groups who control the means of violence. In this situation, decentralization only aggravates the problems of the local population as it means that larger numbers of greedy officials have to be satisfied.

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Conflict mobility and the search for peace in Africa

Mirjam de Bruijn & Egosha E. Osaghae

Gerti Hesseling discussed the importance of the role of the state in conflict resolution and peace building from a legal perspective in her inaugural address in 2006. This chapter reflects on the discussions Mirjam de Bruijn had with her while preparing a course at Utrecht University on the relationship between state/constitutional law and the mobility of conflict. It also considers some of the initial research findings of the Consortium for Development Partnership (CDP) that was set up in 2004 during Gerti's time as director at the ASC to research issues related to conflict and peace building in Africa. The solution suggested by Gerti to overcome the apparent contradictions between state and peace building was that the state in Africa should be more flexible in adopting new elements. It had, in her view, to become a so-called 'living state'. We argue that whatever state there is, it will always face challenges in containing conflicts as these are by their very nature mobile and transgress borders and levels. How flexible can a state and state law be, and can it contain conflicts? The chapter concludes by elaborating on efforts made to regionalize the state in West Africa by, for example, the establishment of ECOWAS.

Introduction

In Gerti's inaugural address¹ at Utrecht University in November 2006, she proposed a legal perspective to understand the relationship between the state and conflict and peace building. Her initial ideas on conflict in relation to the

¹ The lecture was entitled *Vrede en recht kussen elkaar* (Peace and the Law/Constitution Kiss Each Other). See Hesseling (2008).

state generated lively discussion and formed the basis for a course she developed for Utrecht University and that Mirjam was invited to participate in.² The Consortium for Development Partnership (CDP), initiated in 2004 while Gerti was director of the ASC, is a network of researchers from North America, Europe and Africa that are based in various locations in West Africa where they are working on issues of governance in Africa.³ One of the CDP's sub-projects⁴ came up with the term 'conflict mobility' to highlight how conflicts travel and ignore state borders, thus complicating state involvement in conflict resolution. Gerti's conviction that the constitutional state was crucial in solving conflicts contradicts this idea of travelling conflicts. Gerti was not always convinced of these ideas about conflict mobility and nor was Mirjam always sure about her strict interpretation of the state and law. They were both trying to follow Scott's thesis that 'seeing like a state' could not solve the problems they encountered. However, for Gerti, the solution was to develop a more apt state apparatus, while Mirjam argued that it was important to find a different conceptualization of conflict and one that might not be captured by any form of state control. This chapter summarizes the discussions that could have developed in the clash between the idea of the constitutional state and conflict resolution in relation to conflict mobilities. It presents the initial findings of research on conflict mobilities and peace in Africa but does not (yet) offer a complete overview or a theoretically decisive analysis. These thoughts are still in the process of being fully developed.

State and conflict

The 'constitutional state' was a central concept in Gerti's analysis of African societies and their functioning, and she questioned the problems surrounding peace building and conflict in Africa from the perspective of the state, pleading for a peace building approach that would hinge on the establishment of a well-functioning constitutional state. But what should this state then be? And to what kinds of conflicts would this state have answers? Gerti was referring to conflicts within state/national borders and in her inaugural lecture she presented exam-

² Gerti only gave this course once before she became ill and Mirjam took over its coordination.

³ For more details, see <http://www.ascleiden.nl/Research/ConsortiumForDevelopmentPartnerships.aspx> and <http://www.codesria.org/spip.php?article193&lang=en>

⁴ Eghosa Osaghae, a political scientist and Vice Rector of Igbinedion University, Nigeria, and Mirjam de Bruijn, an anthropologist and Professor of African Studies at Leiden University and a senior researcher at the ASC, have been coordinating this project since 2005.

ples of long-running conflicts in Casamance in Senegal and Somaliland. These had developed in relation to a completely different state structure, which was the starting point for Gerti's analysis and questions. Conflicts have a reason for existence in relation, according to her, to the different forms a state can have and they may lead to the establishment of new state forms. To find the right model for the development of a state that would provide an answer to these conflicts, she proposed more empirical research on the 'living state'. With the notion of the constitutional state as a 'living state', Gerti meant that there could not be only one model of state and thus one system of laws that applied to all realities on the ground. On the contrary, she argued that the development of the constitutional state in Africa still needed a great deal of empirical research and there could probably not be one model that fits all.⁵

The CDP's research has focused on the local dynamics of conflicts and attempted to link these dynamics to the national and regional dynamics at stake. A first inevitable conclusion has been that the understanding of conflicts should go far beyond national borders. This was one reason to experiment with the concept of conflict mobility. Conflict mobility beyond state borders immediately questions the assumption that conflicts can be handled by states, while it seems that the spaces of conflicts often extend beyond a state's powers and influence. The constitutional state could then be an answer to some conflicts but not to others. The other issue we raise here is whether a state-legal perspective is able to include mobility. State perspectives are often very sedentary and do not allow for flexibility and mobility (cf. Scott 1998; de Bruijn *et al.* 2001). To be able to control, a state needs structure. In this regard, we should also consider the lecture Mirjam gave as part of the Utrecht course in which she questioned the models of international organizations *vis-à-vis* the containment of conflicts, for example, the UNHCR model of containment. In her lecture she argued that the model of refugee camps thrives on the idea that people in Africa are mobile and have been crossing borders and linking up with new groups for ages. The camps contain this mobility and do not allow refugees to integrate, not even if the region of refuge has similar social and cultural characteristics. In the case of refugees these logics of organization have become part of a set of international rules and laws. Behind these are assumptions about sedentariness being the norm, while mobility is considered deviant (cf. de Bruijn *et al.* 2001). However who is served by these laws? And do these laws serve the people who need them most? A state integrating this sedentary model in its laws might only serve a limited number of its citizens. It is therefore important to question, as the late Bernard Helander (2005) did, who needs a state.

⁵ This is a summary of the argument presented in Gerti's inaugural address (Hesseling 2008).

Conflict and mobility

The CDP's research started in 2004 with a meeting in Eerbeek, the Netherlands where the different project themes were defined. The main objective of the Consortium is to develop good research that is policy relevant in South-South and North-South collaboration. The research is comparative, combines Anglophone and Francophone countries, is policy oriented and has a spirit of collegiality. Ten research topics were all set within the broad domain of governance, varying from 'financing democracy' to the development of legal clinics and empirical research on the local dynamics of conflict. The first results of the last project are central to the discussion here. In the CDP's first phase (2006-2009), this project was coordinated by the ASC in the Netherlands and Igbinedion University in Nigeria. Other partners in the module included University of Ghana in Legon, Point Sud in Mali and CERAP (*Centre de Recherche et d'Action pour la Paix*) in Ivory Coast. One of the main findings was that conflicts are mobile in different ways and, as such, local dynamics are indeed linked to other levels of social analysis and practice. To develop strategies for peace building, this mobility has to be taken into consideration. In the second phase of the research (2009-2011), it was decided that Igbinedion University would coordinate further development of the project on conflict mobility as the ASC had taken over the coordination of the entire programme.

Conflicts are seen as an essential part of social dynamics in both Gerti's analysis and in the CDP module. Recent publications on war and peace in Africa are increasingly referring to conflict as a process, as a social dynamic and part of social transformation, and even one of the important motors for change (cf. Richards 2005; Cramer 2009). The first phase of the CDP's research led to the important conclusion that the dynamics of conflicts and related processes of change as well as efforts to manage or resolve them should be interrogated at local, national and regional levels. Research was done in so-called conflict zones and in areas where more localized conflicts had not yet led to national conflicts but had the potential to do so on account of the dispersed origins of the persons and weapons involved in the conflicts and the 'lessons learned' from conflicts in neighbouring states. This interrelationship between local, regional, national and international levels is especially found in the spin offs of conflicts that we call their 'mobilities'. This is why the second phase of the project focused on mobilities like refugees, displaced people and the trafficking of weapons but also on techniques of war that 'travel', as in the global exportation and diffusion of religious fundamentalism and terrorism, and the widespread cases of piracy in the Horn and the Gulfs of Aden and Guinea and of kidnappings in Nigeria and Niger. Another important element in the proliferation of conflicts is the travelling of ideas, for instance about strangers,

which influence ideas on xenophobia. The information revolution, which has been marked by the proliferation of mobile telephones, satellite/cable television and increased Internet access, has boosted this 'discourse' on mobility.⁶ These mobilities are both a consequence and a cause of conflicts and it is not easy for organizations to contain them. In the policy briefings organized during this project it became clear that most international and national laws, which are embedded in the constitutional state, are frequently not able to contain the problems. Regional organizations, like ECOWAS, have also not yet been able to develop a concept of conflict that goes beyond the idea that it can end in a situated state setting.

Case studies

This section presents the four case studies in the CDP project: the conflict in Ivory Coast; land conflicts in Ghana; violence and conflict in the Niger Delta (Nigeria); and the seeming 'absence' of conflict, which was in fact latent rather than manifest, in southern Mali (2007-2009). In 2010, the situation of the Fulani herdsman in northern Ghana and the increased complexity of conflict in the Niger Delta were added to the Ghanaian and Nigerian case studies respectively.⁷

Ivory Coast/Mali

Initially, the CDP project did not explicitly focus on conflict mobility. The four case studies interrogated the local dynamics of conflicts and their management but the 'rudiments' of conflict mobility were discernible even at this early stage of the project. This was especially true in Ivory Coast and Mali, where the conflicts had crucial cross-boundary origins. On the one hand, the Ivorian conflict had deep roots in the redefinition of citizenship, which denationalized 'migrants' and 'settlers' from such neighbouring states as Mali and Burkina Faso, and in the proliferation of arms following the civil wars in the neighbouring Liberia and Sierra Leone, while on the other, the (latent) conflict in Mali was triggered by the return of migrants from Ivory Coast, a process that generated tensions over land rights and use.

Towards the end of 2010, the Ivory Coast conflict flared up again and developed into a full-blown war, with international involvement in 2011. The problems that precipitated the latest round of conflict in the country cannot be

⁶ Mobility is a social dynamic that is at the basis of the formation of societies in Africa. This paradigm has become even more firmly rooted in African Studies with the evaluation of mobile communication (cf. de Bruijn *et al.* 2001, 2009).

⁷ We do not intend to give an extensive overview here of the conflicts but simply to indicate the mobility elements and how they influenced the spread of the conflicts in the case-study areas. The scope of this article does not allow for more elaboration.

understood without understanding the (mobility) history behind it. The CDP's research in Ivory Coast, which started after the first period of civil war, produced insight into this history in terms of the social dynamics of the conflict, which revolved around the imposition of a deliberate political agenda that ultimately led to war. The political discourses in the conflict in Ivory Coast played an important role in the war and its effects. One discourse was on the notion of 'Ivoirité' and who the real citizens of Ivory Coast are. The citizenship problematic had its roots in historical pull factors, with Ivory Coast having been one of the strongest economies in West Africa and, until the 1990s, one of the more politically stable polities in the region too. This accounted for the influx of mainly labour migrants – or so-called strangers – from other West African countries, especially Burkina Faso and Mali. Another local dynamic in the conflict was the mobilization of youth, who had become one of the important pillars of the country's economy but, due to the economic crisis in the late 1980s, then became idle groups in towns and were easy to recruit for acts of violence. The economic downturn led to some of these youth returning to their villages where they added to the increasingly urgent problem of land scarcity, and the subsequent pushing out of 'strangers'.⁸

One of the immediate effects of the civil war in Ivory Coast was a new wave of migration and remigration of Malians and Burkinabe, who had constituted the largest mobile labour force in Ivory Coast but were now being sent 'home'. These repatriated 'refugees' found themselves back home as strangers and although this did not immediately lead to conflictual situations in Mali (Camara 2008), it did in Burkina Faso (Bjarnesen 2011). Research in Mali showed that the role of the media seems to be crucial to understanding the absence of conflict as a result of the influx of Malians from Ivory Coast. Another important factor was that, even though Malian returnees had originally left a long time ago, they still had rights to land and places to return to in their villages.

Two major mobilities can be distinguished in this case. Firstly, there is the discourse on Ivoirité that travelled from the national to the local level. An interesting question in this respect is how this discourse resonated with the returning migrants. It is also related to the role of the media. This was not explicitly part of the Ivory Coast research project but appeared to be an important factor related to keeping the peace in Mali. The role of the media in conflict has been indicated as crucial. A well-known example is the Rwandan case but many more examples exist too (Ben Arrous 2001). With advances in communication technologies, the role of the media will only become more

⁸ These findings, which were published by CODESRIA, are based on research coordinated by Rodrigue Kone in the CDP's Ivorian team. See Koudia (2011), Silue (2008), Fofana (2008), Gaouli (2008) and Yeo (2008).

important. And as recent conflicts in North Africa have shown, the role of the media should also be questioned from the side of the citizens. The media is clearly no longer only a state medium for control, and is increasingly being discussed in terms of e-democracy (cf. Ekine 2011).

The mobility of people is one of the factors that created the conflict in Ivory Coast but it has also been a consequence of the conflict. Refugees and internally displaced people are a major offshoot of many conflicts in Africa and a new category of mobile people emerged in the Ivory Coast case, namely the returning migrant. The concept of refugees, the internally displaced and migrants has implications for the definition of citizenship and the possibility of receiving attention from the international community (UNHCR), but also for how these people are considered in terms of national protection, i.e. citizenship. An important question related to the concept of the constitutional state is who the citizens are that are protected by the state and state laws. Linked to this is the issue of the protection or non-protection of strangers. Immigration and migration laws are therefore crucial in this conflict and the rights of migrants need to be clearly spelled out.

What are the rights of fleeing populations? There is a complete set of rules and laws at national and international level to protect the rights of refugees (UNHCR 1951, 1998; Abuya 2007; Ohta & Gebre 2005) but considerable confusion surrounding the issue of repatriation. These people are not refugees as they are coming home and are citizens of the states they are fleeing to. But who will protect them? Many of those arriving from Ivory Coast did not in fact go back to their home villages but ended up on the peripheries of urban areas (cf. Bjarnesen 2011).⁹

Ghana/Fulani

‘Stranger’ dynamics are playing a major role in conflicts in West Africa today. Northern Ghana was recently the scene of a serious conflict between allegedly ‘stranger’ Fulani and the so-called autochthonous populations. The cattle-herding Fulani, who are often considered nomadic with their itinerant lifestyle, have been received as welcome strangers in many parts of West Africa over the course of history but are now sometimes finding themselves to be unwelcome strangers and are encountering situations of conflict and violence. Recent CDP research conducted in northern Ghana and in Niger and Nigeria¹⁰ indicates that

⁹ The status of refugees was one of the issues discussed in the above-mentioned course in Utrecht. Oliver Bakewell (Migration Institute, Oxford) in particular raised the topic, as did Antoine Buyse (Utrecht University).

¹⁰ The Ghana team have published the results of their first research and are now considering Fulani mobilities (cf. Ayee *et al.* 2011). Similar tendencies were found in a recent study on Fulani in Niger and Nigeria (de Bruijn *et al.* 2011).

this new and unwelcome stranger element is becoming the norm in many parts of West Africa: itinerant nomads or strangers are being driven further afield where they become strangers once again. It seems that this is culminating in wider conflicts in Niger and Nigeria and bypassing the logic of farmer-herder conflicts. Violent conflicts with a regional character are now occurring too, such as the conflict on the Jos Plateau in Nigeria in 2010.

Again it is the mobility of people in the Sahelian zone searching for pastures or work that is central. Many pastoralists are finding themselves deprived of a reasonable means of income, with a complicating factor in the case of the Fulani being their specific history in West Africa. Their present position as strangers or outsiders in Africa is linked to an interpretation of the history of the Fulani in Africa. They are seen as people who were capable of controlling others, i.e. as slave holders, and were the big empire builders of the 19th century. The Fulani herdsman/women who are entering new zones today are their nomadic counterparts. These same Fulani were historically related to the spread of Islam, a religion that came from outside. Also in older conflicts where Fulani were involved, these sentiments and interpretations of history have been important in stigmatizing the Fulani (cf. recent and older conflicts in Guinea but also the many herder-farmer conflicts in southern Nigeria). It seems today that the Fulani have internalized this 'stranger' position in their presentation of self/identity, an identity that is now reinforced in a language of violence, and one in which they are increasingly the victims.

The Fulani ethnic group, which is found all over West Africa, has a trans-national identity and the problems they encounter in the different West African states are similar and are increasingly demanding a joint politics. Theirs is a very specific and deeply historical mobility that has always been conflictual. The strangerhood encountered here is not comparable to that found in the Ivory Coast study although Fulani are involved there too and ethnic labelling is part of the problem.

Inner Delta of the Niger, Nigeria

Although issues of conflict in the case of the Nigerian Niger Delta were ensconced in the political economy of the resource curse that pitted the impoverished, exploited and suppressed ethnic minorities of this oil-rich region against the Nigerian state and the oil multinationals, the dynamics of the conflict (and its management) had clear elements of mobility too.¹¹

¹¹ See Osaghae *et al.* (2011) on the Nigeria case and the role of youth in the conflict. In the second phase of the CDP project, research is concentrating on the mobility of arms and techniques of violence.

The conflict is undoubtedly informed by feelings of deprivation and marginality by militant youth elements from minority ethnic groups *vis-à-vis* the state. The militias feel that the state has taken resources that belong to the region, leaving it in dire poverty and without compensation or development funding. The international players, namely the oil companies, have increasingly become part of this long-standing conflict, which has become so dominant in the region that it is one of the resource curse models for other oil-rich countries in Africa.

This particular conflict illustrates conflict mobility. Over the years, techniques of conflict have developed, i.e. militias, arms trafficking, kidnappings, the sabotaging of strategic economic installations and terrorist attacks, that can also be found on an increasingly large scale outside the area of conflict (Onuoha 2010; Vidino *et al.* 2010). The militias and the arms used in the Inner Delta were present in the Cameroon Bakassi conflict (see Konings, this volume); techniques of kidnapping have become rampant all over Nigeria, Niger and Mali; and the proliferation of piracy, smuggling and high-seas warfare in the Gulf of Guinea have all been traced to the Niger Delta, as has the political instability in Equatorial Guinea. It seems that the non-human elements of the conflict are very mobile and have spread over the region, creating or at least reinforcing conflictual situations in other parts of West Africa.

These three examples demonstrate the forms conflict mobilities can take. The main ones are human flows, while others have to do with knowledge (lessons learned) and with goods (mostly arms). These fluxes of people, goods and information take the dynamics of the conflict across borders and have become factors/vectors in social change dynamics. These mobilities should increasingly be part of negotiations on the conflict, as conflicts can no longer be contained in one area or nation and their roots often have a transnational history. But in terms of goods of war too, it is clear that a joint policy is needed. This perspective on conflicts crossing borders will become more prominent in the future with the mobility of ideas, connections between people and the transference of ideas. These are becoming part of cross-border communication with the help of new technologies of communication (ICTs) and new media.

‘Constitutional state’ and conflict (im)mobility

The role of the state in the conflicts presented here is rather diffuse. A lot depends on the readiness of those who control its instruments to restore peace or to maintain the conflict. The state, or state institutions that consist of people with their own agency, does not always want to stop a conflict. Nevertheless the Malian case of repatriates shows a government effort to prevent conflict, especially in its attempts to control or use the media for this purpose. By contrast, in the farmer-herder conflicts or related atrocities, the role of the state is dif-

ferent. In Nigeria, there is a perception that the conflictual roles of the Fulani have grown over the years because of the (covert) support and protection they have enjoyed from the powerful northern (Muslim) coalitions that have dominated the country since independence. This perception has certainly been a major issue in the Jos Plateau conflicts. In addition, the role of the state is critical in mobility-driven transnational conflicts and changes, such as the problems of refugees, displaced persons and arms dealers, which are shared by both the national state and the international community. However, the international community cannot do anything without the state.

In relation to our earlier discussion on conflict in which the mobilities of conflict were emphasized, the concept of state has a relevant omission. A state cannot exist if it does not control violence, i.e. if it cannot keep the peace or direct violence and conflict where it feeds into the state. Thus one of the services or functions of the constitutional state is control: maintaining peace and protecting its citizens. General thoughts about African states in development circles and academia are characterized by concepts such as 'failed states' (Chabal & Daloz 1999, 2005) and 'shadow states' (Reno 1999), which suggest the absence of effective structural governance in many parts of Africa (Osaghae 2007). Bellagamba & Klute (2008) added the idea of 'beside the state' to this discussion, questioning who in fact is governing Africa. These discussions make one wonder whether the state in Africa is indeed ready to intervene in certain conflicts. Gerti's call for the development of a flexible constitutional state should also be seen as an alternative to the 'failed state' in Africa.

The CDP's examples indicate that the idea of a state being capable of controlling its territory may not hold. Conflicts that at first sight appear to be developing within national boundaries transgress them all the time. Is there a concept of a 'living state' that could provide structures in which these flows of conflicts might be contained?

Towards a new understanding of conflict governance in West Africa

Notwithstanding the limitations of the constitutional state in the face of conflict mobility, including its diffuse roles and lack of capacity to control violence, protect and safeguard all who dwell in the state (i.e. citizens, migrants, repatriates and strangers alike) as highlighted in the CDP studies, it remains the arena and critical actor of conflict and peace. Most ordinary people in conflict situations, especially those on the receiving end, look to the state for protection and redress. It can be argued that effective statehood is a requirement for conflict control and peace, but this is true only in cases where conflicts are localized and do not spread beyond state boundaries. Where they do, the state

has to cooperate with the international community not only in terms of peace keeping and peace building interventions and humanitarian operations but also in terms of transnational rules and laws that adequately address the intricacies of conflict mobility.

In summary, one major finding from the CDP's case studies has been that although conflicts generally have local contexts, they tend to involve elements of mobility that condition their origins (as in the Malian case where they served as triggers), dynamics (as in arms proliferation and movements of warring persons) and management (as in the increased importance of ECOWAS in the mitigation and management of conflicts).¹² Indeed it can be argued that the degeneration of the West African sub-region into a theatre of conflict and war has had serious implications for, and diffusion effects on, conflicts in different countries. If nothing else, it has provided a backdrop for the generalization and wave of conflicts that appeared to be concomitant in the free movement of persons and goods across the region. It was in this environment that we decided to focus on conflict mobility in the second phase of our CDP research project, especially in the light of the intractability and escalation of the conflicts in the Niger Delta and Ivory Coast, which had discernible conflict mobility elements and changes in the complexion of the stranger tensions in Mali. Attention in Ghana has shifted to the activities of Fulani nomads whose claims to land and its use across parts of West Africa have been a major source of conflict in various countries.

The point in conflict mobility, however, is not only how externalities and cross-border flows of persons, arms and ideas are part of the complexity of conflicts. It is more about how these factors extend the cycle of conflict beyond national boundaries and challenge the conventional wisdom that treats conflicts as within-state variables, and accordingly assigns primary responsibility for managing or resolving conflicts to states themselves. The descent of a number of states in West Africa into varying degrees of fragility, failure and collapse, which has rendered them incapable of discharging the most basic functions of statehood in terms of governance, conflict management and human security, has further raised the stakes of the challenge of conflict mobility. For West Africa, the increased role of the regional body ECOWAS has provided one possible solution. Not only has the organization demonstrated its military peacekeeping capabilities, it has now also a regional legislature and court of justice with transnational jurisdictions. There are also plans for a common currency that, in addition to the existing protocols on free movement within the region, will provide the superstructure for a supranational (con)federal state along the lines of the European Union.

¹² See Thomas & Amadi (2010) on the dynamics of ECOWAS.

Discussion

This chapter began by discussing Gerti's ideas on the relationship between the state, conflict and peace building. The article has confronted these preliminary ideas with the outcomes of a project on conflict and peace building that put conflict mobility at the centre of analysis. Gerti assumed the development of a flexible state as one of the solutions. The primary role of the state is to protect its citizens, which has not been easy in West African conflicts where cross-border dynamics and the mobility of people, goods and ideas escape the control of any governing body. International relations and collaboration are the only answer. ECOWAS is of course a good example in West Africa. The flexible state should therefore be able to collaborate, but laws regarding migrants and the displacement of people should be organized internationally. We will never know if this is what would have been part of the outcome of the research Gerti envisaged, but we hope that this reflection will have helped to develop her initial search for an understanding of the relationship between current conflicts in Africa, peace building and the role of the constitutional state.

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Appendix: Bibliography of prof. dr Gerti Hesseling

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Nigeria, in Ph. Peek (ed.) *Twins in African and diaspora cultures; Double trouble or twice blessed*. Bloomington, Indiana University Press, 2011, 163-182; Medicinal knowledge and healing practices among the Kapsiki/Higi of northern Cameroon and northeastern Nigeria, in *Markets of well-being. Navigating health and healing in Africa*, eds. Marleen Dekker & Rijk van Dijk, African Dynamics 9, Leiden, Brill. 2010, 173 – 200; Eyes on top? Culture and the weight of the senses, in Anne Storch, (ed.) *Invisible Africa, Sprache und Geschichte in Afrika* 21, Koppe, Köln, 2010, 245-270. A monograph on the Kapsiki/Higi religion will appear early 2012: *The dancing dead. Ritual and religion among the Kapsiki/Higi of North Cameroon and Northeastern Nigeria*, New York, Oxford University Press.
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