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The Existence and Legal Mechanisms of the Protection of Congolese Customary Land Law

Tshizena Tshinate Celine

Assistant at the Faculty of Law, University of Lubumbashi, Congo

Abstract: ***In this article, we know the evolution of customary Congolese land law from colonial times to the present day. We found that in relation to the colonial laws regulating the so-called land sector, indigenous lands, current laws, or more specifically, the land law has seen real improvements especially in the protection of customary land rights. Indeed, the protection of this right is deduced by the enjoyment granted to the indigenous communities on the lands they exploit for their survival.***

Keywords: Customary law, land law, mechanism

1. Introduction

The question of Congolese customary land law that is the subject of the present study will be related to its existence, in relation to its legal element as well as legal mechanisms of protection of this right, it is thus that its dualism will push us to analyze even its genesis.

Indeed, starting from the precolonial period, marked by the application of the customary law of the property on the populations constituted in kingdoms and tribal empires, which had subsequently become territories of the independent state of the Belgian Congo before being the Democratic Republic of Congo.

As a result of its arsenal of legislative and regulatory acts by the competent authorities, the dualistic nature of covering both customary (unwritten) law and written law was on the other.

At the beginning, the public authority had shown the willingness to collaborate with its traditional chiefs, but by taking almost all the land, and afterwards it totally granted itself the monopoly of the property with the so-called BAKAJIKA law where the principle was: "the soil and the subsoil belong to the State".
On this subject, several subjects of law deserve to be examined, if not to be reviewed.

1.1 Historical Overview of Land Legislation in the Democratic Republic of the Congo

It is worth noting here that the land history of the Democratic Republic of Congo has had three remarkable periods, namely:

The era of the Congo Free State under Leopold II, that of the Colony as well as that of the Republic of Zaire (Democratic Republic of Congo).

1.1.1 Land legislation in the regime of the Congo Free State

At the arrival of agents of King Leopold II in Congo, there were two types of landholdings:
1) Lands occupied by the natives;
2) Rare earths occupied by the Dutch, Portuguese and English under agreements with local chiefs.

Once on the ground, the agents mentioned above hastened to conclude "friendship" treaties in the field of land with local customary chiefs and these treaties yielded to the association created by King Leopold II in 1878 (Association Congo), their land and / or territory and allowed the AIA (African International Association) and A.I.C. to proclaim these territories "Free States".

Thus King Leopold II declared in 1885 that the vacant lands belonged almost entirely to the Congolese State.

In what, A Conan Doyle adds by saying that from 1890, several decrees will stipulate the division of Congo in two zones of which the first would be destined to the private companies and the second should be considered like the awarded field of the King.

As such, the ordinance of the deputy head of the Congo of 1 August 1885 had decreed that land concessions obtained by third parties from the traditional authorities before that date were valid while those obtained after that date would be valid considered invalid.

The extension of their power of development or cession of the lands inherited from their ancestors, by means of the treaty signing of the friendship with the Belgian crown, had left to the tribal chiefs only a purely symbolic power, that only on the lands intended for the vital and agricultural uses, to say better culture, the hunting and the dwelling.[1]

1.1.2 Land legislation in the Belgian Congo regime

All part of the date of August 20, 1908 when the Belgian parliament had accepted the royal offer of the assumption of responsibility of the management of Congo.

At the time, three concessionary companies, known as charter companies, had received from the state the power to explore resources and to administer and see concede part of the lands which had been ceded to them by the colonial state; in this case the Katanga Special Company (C.S.K.),

[1]KalambayLumpungu, *Droit civil Zaïrois*, Kinshasa, Tome 2, Vol 2, 1984, p.74

the Kivu National Committee (C.N.K.), as well as the Great Lakes Railway Company (C.F.I.).

Thus, during the period of colonization, several laws of a nature to improve the system of the property system were promulgated; it is the case of the law of July 31, 1912.2

1.1.3The 1960 land legislation, from Independence to the present day

a) The BAKAJIKA law of June 06, 1966

It should be pointed out that the massive exodus of Belgians and other foreigners, in relation to the post-independence troubles, had provoked a phenomenon of industrial wastelands, farms and other abandoned property. It is from this sequel that was born the law BAKAJIKA dated June 06, 1966 which held that "the soil and the subsoil Congolese belonged to the Congolese State".

This law has almost renewed the land tenure system put in place by the colonizers, except for the cancellation of all the concessions and concessions granted by the E.I.C. and former beneficiaries were required to submit new applications within a specified period, failing which; their properties became abandoned property, which gave the right to the State to give them to new applicants who wanted them and that in the hope of reviving economic production.

b) Law No. 73-021 of July 20, 1973

This law also attributed to the State the status of exclusive, inalienable and imprescriptible owner of the soil, abolishing and thus excluding any private appropriation of the soil.
Thus, it is better to review some of the basic options of this law in the following lines:

- The unification of land law by domanializing all lands, including those of the natives;
- The possibility for the State to delegate its powers of land management;
- The recognition of the right of enjoyment by individuals only;
- The distinction between the nature of rights on land and those on real estate;
- e) The Congolese land law as it appears from the 1973 Act is based on the simple general principle established in Article 53, expressly stating the following: "The soil is the exclusive, inalienable and imprescriptible property of the landownerState ".

In this respect, Professor LUKOMBE NGENDA, adds that this political choice is justified by the statement of reasons, then a definitive and radical break with the legal regime of the lands of the colonial period, rupture but refusal to be inspired by certain specific solutions practiced by the colonial regime, particularly with regard to emphyteusis, but respecting acquired rights in a manner compatible with the general interest.[3]

It is in respect of the acquired rights that the same law of 1973 has domanialized the lands occupied by the local communities (cf article 387 of the so-called land law) while leaving the duty to regulate the acquired rights on these lands.

At each stage of the evolution of Congolese land legislation since the signing of treaties known as friendship with the Belgian crown, traditional leaders have lost jurisdiction over land allocation and concessions.

1.2 The Quintessence of Legal Texts Relating to French Customary Law

By this term legal elements, we hear about the Constitution, other laws (ordinances, ordinance-laws, law, etc.), case law as well as bylaws.

1.2.1 The Constitution

The State here wanted to guarantee the right to individual or collective property acquired in accordance with the law or custom. This was clear in Article 34 of the Constitution which expressly stated: "private property is sacred".

By this provision, the State felt to encourage and ensure the security of private investments, national and foreign starting from the idea that no one can be deprived of its property only for public purpose and with a fair and previous compensation granted under the conditions set by law. Through him, we understand that all acquired rights cannot be abused and that any act that deprives the individual of his acquired right is null and of no effect.

1.2.2 Laws

Beyond the Constitution, in the evolution of Land Law, some laws have come in support of it, in this case:

a) Law No. 73-021 of July 20, 1973

This law provides meaning or precision on some previously used terms. Thus, in article 388, it says: "The lands occupied by local communities are those which these communities inhabit, cultivate or exploit in any manner, individually or collectively, in accordance with customs and customs local»[4].

b) Ordinance-Law No. 82-020 of March 31, 1982

This order brings an innovation in the matter, as it states in its article 110 that: "The Courts of Peace are aware of any dispute over family law, inheritance, gifts, as well as conflicts collective or individual governed by custom ".[5]
Thus, some powers vested in the customary authorities, now made to the Courts of Peace.

1.2.3 Jurisprudence

In relation to the customary land rights, the Supreme Court of Justice has already had to judge that: "State of collective nature, the Law must necessarily be defended, in case of

[2] Piron et Devos, *Droit foncier et immobilier*, Codes et lois du Congo-Belge, Tome I, Léopoldville et Bruxelles, 1960.
[3] LukombeNgenda, *Droic civil des biens*, Facultés de Droit des Universités du Congo/Université de Kinshasa, Kin, 2003.
[4] Article 388 de la loi n°73-021 du 20 juillet 1973.
[5] Article 110 de l'ordonnance-loi n°82-020 du 31 mars 1982.

dispute, by a delegate of the group who pretends to be holder of the domain in its judgment of 24 July 1975.[6]

We CSJ assert that the customary regime is repealed in terms of land occupation[7], it is in its judgment of 09 April 1980, and it demonstrates that: "Under the land law, any customary rule on the occupation of land plots has been repealed. They fall under the jurisdiction of written law ". (C.S.J., R.C. 334 of April 09, 1980, R.J.Z., p.8 supplement[8]).

1.2.4 Regulatory acts with legal force
It will be a question here of resorting to some ordinances, judgments and decrees taken on the purely administrative level.

Ordinance of the Deputy Head of the Congo of 1 August 1885
This ordinance of the Congolese general administration validated all the lands obtained before in the hands of the customary chiefs, but also declared invalid all those obtained from the customary authorities after this date.[9] This in order to restrict or limit the power of the latter in land matters and the written law already existing in this area, should therefore recover the monopoly of its control as well as its organization.

The judgment of the General Administration of Congo of November 08, 1886
This decision, having the concern of regulating the land domain, brings and deals with the question of the registration and the measurement of the properties.[10]

The Registrar of Land Titles will register:
1) Land over which non-natives had acquired private property rights, prior to the publication of the Sovereign King's decree of 22 August 1885, provided that these rights were duly declared and recognized as valid in accordance with this decree and the ordinance of March 15th, 1886;
2) The lands which the natives have ceded or will cede to private individuals, so that their disposals may be authorized or approved by the general administration of the Congo;
3) Land that has been or will be sold by the State to individuals.[11]

The decree of June 20, 1960
This decree tended to regulate the problems of demarcation and measurement of the land and it is for this precise reason that paragraph 3 of its article 1 states the following: "Lands customarily occupied by indigenous populations do not fall under the application of this Decree ".[12]

1.3 Some Characteristics of Congolese Customary Land Rights

In view of the evolution of the customary Congolese land system, it should be said that certain points characterizing it can be highlighted, namely:

1.3.1 Collective rights
According to the case law of the Supreme Court of Justice in its decision of 24 July, the customary land tenure right is essentially of a collective nature.[13]

The same is true of almost all the terms used by the legislature and other administrative authorities, namely: "Land occupied by local communities, collective land disputes governed by custom", term taken from articles 387, 388 of the so-called land law, as well as Article 110 of Ordinance 82-020 of 31 March 1982.

1.3.2 Hybrid rights
Customary land rights are hybrid in nature because they are customary and are also recognized in law by law and jurisprudence.

In addition, whatever they are not covered by the titles of the written law, they are protected by various legal provisions and the actions tending to defend them and or to claim them, are admissible before the jurisdictions of written law.

In addition, while returning land occupied by local communities in the private land of the State, as stated in Article 387 of the so-called land law, the public authority has recognized indigenous or local populations, the power or faculty, to assign their lands to individuals, provided that their assignments are authorized and approved by the deputy head of the Congo.[14]

However, it is also remarkably consistent that customary land tenure rights ultimately have an indisputable double foundation, including:
- In customary law (custom);
- In the written law (Constitution, laws, jurisprudence, regulatory acts).

1.3.3 Uncertain and precarious rights
Customary land rights, although recognized by the state for the benefit of local communities on all rural lands, still retain fuzzy, uncertain and precarious material contours, as they can be reconfigured and / or modified at any time object of new legal subdivisions or legal concessions.

This is not the case with the so-called land law, which not only clearly defines the concession unequivocally, but also sets out the applicable legal regime in this area.

Thus, in the scheme of this law, Article 61 specifies with regard to the definition of a concession, saying that "it is the contract by which the State recognizes a community, a natural person or a a legal person of private or public right, a right of enjoyment of a fund on the terms and conditions

[6]Dibunda, Revue générale de la jurisprudence de la Cour suprême de justice 1969-1985, C.P.D.Z., Kinshasa, 1990, p.205.
[7] C.S.J., R.C. 11 du 24 juillet 1975, R.J.Z., 1978, p.8.
[8]KalongoMbikayi, *Code civil et Commercial congolais*, mis à jour le 31 mars 1997, C.R.D.J., Kinshasa, 1997, p.227.
[9] C.S.J. RRC, 334 du 09 avril 1980, R.J.Z., p.8.
[10] B.O. 1886, p.204.
[11] Codes Larciers, p.144.
[12] Préambule du Décret du 20 juin 1960.
[13]Jur., C.S.J., R.C. 111, 24 juillet 1975.
[14]Loi du 20 juillet 1973, Art. 387, inédit.

provided by the presence of the law and its implementing measures ".[15]

The concession is thus a fund with a specific area which must be protected by a legal and official written title.

Since the creation of the Congo Free State, the politico-administrative authority has ruled out the lands inhabited by natives or local communities, the measurement system and the demarcation of land and private property, so the lack of titles Legal writings and the absence or exclusion of the measuring and demarcation system has, at any time, weakened and continues to weaken, unfortunately, real estate property rights in the Democratic Republic of Congo.[16]

1.4 Protection of Customary Land Rights

The Congolese customary land domain is genuinely protected by law, which provides for the terms of expropriation of a land concession.

1.4.1 The principle of compensation

This principle is clearly enunciated by the Constitution of the Democratic Republic of Congo of 08 February 2006 in its article 34 especially in its paragraphs 2 and 4 which respectively have the following: "The State guarantees the Right to individual or collective property, acquired in accordance with the law or custom "; paragraph 4: "No one may be deprived of his property except in the public interest and with a fair and prior compensation granted under the conditions set by law"[17].

It follows from the combination of these two paragraphs that the Constitution of the Democratic Republic of the Congo prohibits any abusive expropriation of a right of legal or customary property by subjecting any expropriation to two preconditions, namely:

- The existence of a cause of public utility;
- The fair and prior compensation.

1.4.2 The principle of judicial recourse

This principle gives a little more assurance and security regarding the protection of land rights already acquired. Thus, the Supreme Court of Justice had already recognized the right of customary tenure holders to sue for and / or claim their rights and interests.[18]

This allows local communities whose lands are being looted or are the object of an attempt of spoliation, within the framework of the abusive expropriation of the lands, to seize with legality the competent jurisdictions of the judgments to hear them say the Right.

This law is also devoted to article 244 of the so-called land law of July 20, 1973, which states: "The decisions of the conservator may be challenged by an appeal before the Court of Grand Instance. This appeal is brought by way of summons of this official, in the forms of the civil procedure. The judgment is always subject to appeal.[19]

1.4.3 From the rural land acquisition procedure

Indeed, it is quite indisputable that only customary land rights obtained in accordance with the law can be protected, while passing through the procedure required for their acquisition.

In this respect, article 166 of the aforementioned law gives direction while clearly stating that: "In order to safeguard the property rights of rural populations, all transactions on rural land will be subject to the procedure of prior investigations provided for by this Law.[20]

The purpose of this preliminary inquiry is to verify on the spot the demarcation of the land requested, the census of the persons in the area or carrying on any activity there, the description of the places and the inventory of what is there in terms of timber. forest; waterways, taxiways, etc., as well as the hearing of persons who verbally formulate their claims or observations, record it and study all written information. This is taken over in its entirety in Article 194 of the same Law, with a view to protecting any applicant from the very beginning.[21]

2. Conclusion

Congolese customary land law has undergone a remarkable evolution in time and space, and its dualistic character makes it not only a present but also present and moving law.

However, the fact for him to have a foot in the custom where all power in this matter was devolved to the only traditional chiefs, and that another foot is in the law, where only the legislator foresees the modes of acquisition, of enjoyment as well as expropriation of rural concessions, can in no way create a contradiction between the two rights, beyond the fact that the first is verbal and the second written.

Quite to the contrary, this dualism strengthens, organizes and secures this customary land sector by bringing it closer and linking it more and more with the will of the legislator manifested in the various laws.

Also less old than customary law (unwritten); the written law seems to be ascendant vis-à-vis the latter by its character, as well as the force applicable to the laws enacted in this regard.

While denying the customary chiefs the granting power, the State through the Administrator General, through the ordinance of November 3, 1886, recognized the lands surrendered by third parties in the future.

[15] KalongoMbikayi, *Code civil et commercial congolais*, éd. C.R.D.J., Kinshasa, 1997, p.181.
[16] Ordonnance de l'Administrateur Général du Congo du 08 novembre 1886.
[17] Constitution de la République Démocratique du Congo du 18 février 2006, Article 34.
[18] DibundaKabunji, *Répertoire Général de la Jurisprudence de la Cour Suprême de la Justice*, 1969-1986, C.P.D.Z., Kinshasa, 1990, p.205.
[19] DibundaKabunji, Op.cit., p.207.
[20] Loi n°73-021 du 21 juillet 1973, Article 166
[21] Loi n°73-021 du 21 juillet 1973, Article 194.

This provision implicitly recognizes the customary granting power of customary chiefs while subjecting it to the authorization or approval of the General Administrator.

Finally, it should be pointed out that customary land tenure rights are indeed recognized and protected by the Constitution, the so-called land law and case law on the one hand, and the customary power of customary chiefs on the other hand, which is still implicitly recognized by the General Administration by-law of 08 November 1886, although Law 73-021 of 20 July remains on the principle of allocating land to the State as being its exclusive property, inalienable and imprescriptible.

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