



Customary courts in the Congolese judiciary system: a reform for better administration of justice

By the association ACAT/Sud-Kivu (Christian Action for the Abolition of Torture),
Sud-Kivu branch, Eastern Province of the Democratic Republic of Congo
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Introduction

The term “justice” has several meanings that vary according to the subject matter under discussion. In its broadest sense, justice may be construed to mean ensuring that each person has what he or she deserves “*suum cuique tribuere*”; or rather what he or she deserves according the law, or to his or her rights. By extrapolation, we could also say that justice means giving to each according to his or her rank and protecting the rights of all persons with a view to re-establishing social harmony.

Justice is also construed in an institutional sense as the set of institutions to which individuals or groups may turn to ask that justice be done; or for a decision to be taken in their favour, either by convicting an opposing party and granting them compensation or by dismissing the petition of an opposing party and setting aside its action. This establishes the idea of a court system, which is linked to the notion of jurisdiction.

The judicial system of the Democratic Republic of Congo includes two types of courts: customary courts (*juridictions coutumières*) and the ‘classic’ (civil law) courts (*juridictions classiques*), or courts of written law. This dualism dates back to the colonial era and arises from the fact that the natives of the country were subject to the jurisdiction of customary courts, whilst Europeans and ‘assimilated’ populations were subject to the jurisdiction of the civil law courts.

Indeed, the colonisers had taken care to introduce multiple types of courts in order to facilitate legal activity in relation to the native population.¹ However numerous the civil law courts may have been, their judicial districts were too large for them to be able to be effective in judging disputes arising on a daily basis within the indigenous community, or to exercise an effective influence in terms of punishment. Thus, to keep the peace in relations among native people and prevent disorder or re-establish the rule of law, permanent courts were required close to the places where they would be called upon to intervene. These customary courts survived the independence of the country, and have since then undergone certain adaptations according to the changing circumstances.

We will successively analyse the present-day institution and constitution of the customary courts and their jurisdictions, conduct a brief assessment and finally determine whether these customary courts meet the requirements of the proper administration of justice.

¹ A. GOHR, “Le pouvoir judiciaire”, in *Les Nouvelles. Droit colonial*, T. 1, Bruxelles, Picard, 1931, p. 165.

I. The establishment and composition of customary courts

a. The establishment of customary courts

To this day, customary courts in the Democratic Republic of Congo are established and organised by the Decree of 15 April 1926², as it has been amended and supplemented from time to time. Under the terms of Article 1 of the Decree, there are six types of customary court recognised by law: the chieftaincy court (*le tribunal de chefferie*), the community court (*le tribunal de collectivité*), the town court (*le tribunal de cité*), the urban zone court (*le tribunal de zone urbaine*), the rural zone court (*le tribunal de zone rurale*) and the city court (*le tribunal de ville*).

After having listed the only legally recognised customary courts, Article 1 of the Decree specifies that the customary courts shall be maintained until the effective establishment of ‘courts of peace’ (*tribunaux de paix*), which are governed by the judicial reform of Ordinance No. 82-020 of 31 March 1982 on the Code on the Organisation and Jurisdiction of the Courts (*Code de l’organisation et de la compétence judiciaire*, COCJ).³

Chieftaincy courts⁴ exist according to local custom and are recognised, as appropriate, by a provincial director, as the highest-ranking provincial civil servant; or by a provincial governor, as the highest-ranking provincial office-holder. The decision recognising the court must specify whether it is a secondary court or a principal court. The court’s jurisdiction extends to the whole of the chieftainship or ethnic group concerned.⁵ Community courts are created by a provincial director or a mayor. If customary courts already exist within the groups making up a community, these same authorities may recognise them as “secondary community courts”. Town courts are also created by the same authorities, according to the same Decree of 15 April 1926. Urban zone courts are created by a mayor. Rural zone courts are created by an ordinance of the President of the Republic; the same applies to city courts.⁶

b. The composition of customary courts

The composition and territorial jurisdiction of chieftaincy courts are determined by local custom.

Whatever the custom, the chief of a chieftaincy is automatically president of the court of his chieftaincy and is one of the judges forming the different chambers of those courts. Community court judges are appointed by the provincial director. The chief of the community, who is a customary official chosen according to local tradition (generally through hereditary succession), is *ipso jure* president of the community court, which may only validly sit with a panel of five judges. However, a bench made up of half of that number

² See *Bulletin Officiel du Congo Belge*, 1926, p. 448.

³ Article 163 of the COCJ repeats that customary courts shall be maintained until the establishment of courts of the peace, see *Journal Officiel de la République du Zaïre*, No. 7 of 1 April 1982, p. 53.

⁴ A ‘chieftaincy’ at that time was an administrative subdivision governed according to a specific custom and headed by a traditional chief.

⁵ Article 1 of the Decree of 15 April 1926

⁶ *Idem*. The terms “urban zone” and “rural zone” have been respectively replaced, in the administrative language presently in effect, by the terms “commune” and “territory”. We shall maintain use of the former terms, which have not been changed in the law on the organisation and jurisdiction of the courts (COCJ).

is also allowed as being competent, valid and lawful. As the division of five by two does not yield a whole number, in actuality the composition of the bench is lawful with three judges.

Urban zone courts and town courts may validly sit with one or three judges or one president and several vice presidents. In the event of the absence of a ‘zone commissioner’,⁷ the deputy commissioner shall automatically preside. Rural zone courts, for their part, are constituted of a president and two or more assessors (*assesseurs*). The latter are enlisted from among the customary judges of the courts of the jurisdiction. The zone commissioner is *ipso jure* president of this court. No members of the customary courts, at any level, are required to be sworn in.

In principle, no customary court may sit validly without the assistance of a registrar appointed by the community chief, zone commissioner, mayor or provincial administrative authority (town courts). However, the absence of a registrar is not grounds for nullity where the president, the judges or one of the judges makes a record of the hearing. This extreme situation only occurs in cases where, in the audience attending the hearing, there is no major person able to read and write who could be enlisted for that purpose. Indeed, the law provides that in the case of the absence or unavailability of a registrar, the court sits with the assistance of an adult able to read and write, enlisted by the judges or by the president of the court.⁸

The prosecution service, led by the public prosecutor’s office whose territorial jurisdiction includes the customary court in question, supervises the composition and decision-making processes of the justice system. Thus it has sole legal prerogative to introduce a petition to set aside a decision before the competent court of written law, in the event that a customary court decision is handed down in violation of the law.

II. The jurisdiction of customary courts

a. Conditions for customary courts to have jurisdiction

Customary courts apply customary law in as much as it is not contrary to written law, to universal public order and morality, or to the principles of humanity and equity. Customary courts are competent to judge disputes between Congolese citizens, on condition that those disputes do not have to be decided by the application of rules of written law. A second condition for competence is that the defendant must be subject to the jurisdiction of the court.⁹

Customary courts also have jurisdiction over nationals of “neighbouring countries” to Congo in matters that, while they do not give rise to disputes between private individuals, are punishable by custom or by a written law expressly attributing jurisdiction to the customary courts. Such jurisdiction is subject to two conditions: the act must have been committed within the jurisdiction of the court and the accused party must have been present in that jurisdiction.¹⁰

On the other hand, customary courts are not competent where an act is punishable both by custom and by written law, where the latter provides for a term of more than five years of

⁷ This territorial administrator is now known as a ‘bourgmestre’. See note 6 above.

⁸ Art. 9 of the Decree of 15 April 1926

⁹ Article 11 of the Decree of 1926.

¹⁰ *Idem*, Article 12.



imprisonment; or, where the written law provides for the punishment of the act by a term of imprisonment no greater than five years, if, in light of the circumstances, the sentence will exceed one month of imprisonment and a fine exceeding one thousand Zaires¹¹, or either of the foregoing punishments.¹²

b. Applicable Sentences

Maximum sentences vary according to the court hearing the dispute. Thus, they are one month imprisonment for chieftainship and community courts; two months for rural zone and town courts; and four months for city and urban zone courts. Fines also vary between one thousand, two thousand and four thousand, respectively, and penal servitude subsidiary to a fine may range from fifteen to thirty days.

Finally, it should be noted that these courts generally allow the confiscation of objects used in the commission of the offence or that are the profits of the offence, where they are the property of the convicted person.

Art. 24 of the Decree of 1926 specifies that those who refuse the execution of a sentence or do not comply with an order or prohibition of the court may be subject to “civil imprisonment”¹³ of one month or less.

Customary courts do not hand down judgements in default. A refusal to appear may result in a warrant to bring the accused before the judge immediately. Customary judges have the power to detain a person for whom such a warrant has been brought for three days, which may be extended by five days, maximum.¹⁴

III. Appeals from customary court decisions

The decisions of customary courts are immediately executable upon delivery. There are, however, procedures set out under the law for the parties to a case or third parties to obtain a new decision in a dispute when a judge has already handed down a judgment.¹⁵ These procedures include review, setting aside and appeal.

a. Review and setting aside

Customary decisions may be reviewed within three months of their pronouncement. They may also be set aside by a regional court (*tribunal de grande instance*) sitting according to its power to hear a petition to set aside brought by the public prosecutor’s office. Such a petition may be lodged, under the terms of Art. 35 of the Decree of 1926, where:

- the court was not lawfully constituted;
- the court was not competent to hear the matter;
- there was a failure to comply with essential formal requirements;
- the court delivered a sentence other than that provided for by custom;
- the custom applied is contrary to public law and order or morality.

¹¹ The present name of the currency is the Congolese Franc, hence a difficulty in establishing an equivalence in light of a political situation in constant flux.

¹² Article 13 of the Decree of 1926 as added to and amended from time to time.

¹³ A custodial sentence to which an individual is subjected to oblige him or her to pay damages or fines to which he or she has been sentenced.

¹⁴ Art. 27 of the Decree of 1926.

¹⁵ A. LE PAIGE, *Précis de Droit judiciaire*, T. IV, Les voies de recours, Bruxelles, Larcier, 1979, p. 2.

A petition to set aside must be lodged within four months of the judgement unless it applies to an act which is an offence under written law; in that case, the decision may be set aside if the criminal proceedings are not extinguished by the death of the accused or time-barred; if the judgement did not inflict any sentence other than those authorised by the Decree (in this case, the decision may be set aside as long as the sentence has not been completely carried out); finally if the custom being applied could not be applied (in this case, it may be set aside as long as it is useful to do so). The decision to set aside must be pronounced within three months of the petition.

b. Appeal

The regional court hears appeals from decisions handed down at first instance by rural zone and city courts. In cases where a criminal punishment has been handed down, the right to appeal applies to the accused parties; to the person civilly or customarily liable; to the injured party in respect of civil claims only; and, in other cases, to the parties or failing that to the beneficiaries of their rights.

For an appeal to be valid, it must be lodged by the parties or the prosecution within three months of the pronouncement of the decision, in the form of notification of appeal to the registrar of the court that made the decision, or to the registrar of the regional court that is to hear the appeal. The registrar of the regional court then draws up a notice of appeal *ad hoc*.

Within fifteen days of reception, the registrar so notified serves a notice of appeal to the injured parties, to the civilly liable parties, to the public prosecutor and, where applicable, to the registrar of the court having handed down the judgement.

If the regional court deems that the decision may be modified, it may order that the execution of all or part thereof be suspended for a period to be determined by it, which may not exceed three months.

IV. The procedure applicable before customary courts

Customary courts apply rules of procedure laid down by the customs of their jurisdiction.¹⁶ In the event that these customs are contrary to universal public order or to the principles of humanity or equity, or in the event that there is no custom, the procedure shall be inspired by the rules of equity.

No decision, no matter what the custom, shall be handed down without the parties themselves or their agent having had the prior opportunity to contradict the allegations and evidence of the opposing party, and to prepare and submit their defence without any hindrance.¹⁷

Customary courts do not have a procedure to issue judgements in default. Consequently, if a defendant or accused does not appear before the court in person, one of the judges or the registrar is authorised to issue a warrant for that person to be brought before the court immediately.

¹⁶ Art. 25 of the Decree of 1926.

¹⁷ *Idem*.

Fees for proceedings are established for each customary court by the subregional commissioner or the urban commissioner, as the case may be. Customary courts or regional courts hearing an appeal may only proceed at the request of a party if that party has paid to the court registrar the fee for the registration of the case. The payment of the fee may be waived where the party in question is proven indigent or if otherwise allowed by the judge or president.

Costs shall be borne by the losing party. Proceedings before the regional court are free of charge when it hears a petition to set aside or an appeal at the request of the public prosecutor's office.

Unfortunately, the procedures provided for by law are not followed in practice. Thus, for example, people are arrested and kept in custody beyond the legal limit of forty-eight hours, without even being informed of the grounds for their arrest or of their rights, such as the right of access to the defence counsel of their choice. Fees for proceedings are arbitrarily increased by members of the court at the expense of the defendants, who are forced to pay, even in kind, with assets whose value far exceeds the legal amount.

There is also very low awareness of rules relating to the protection of women and children. Women and children are arrested and detained under inhumane and degrading conditions without respect for the minimal rules of hygiene, and without being offered the possibility of access to a family member or counsel.

V. Assessment

Customary justice presents various advantages and disadvantages. Its advantages include its speed, its proximity to the people under its jurisdiction, and its inclusive and easily understood nature.

- a) speed: proceedings are simplified and hearings are frequent and easily called;
- b) proximity: customary chiefs in chieftainships have a jurisdiction that can easily be covered in less than a day, even in sprawling villages;
- c) inclusive: it is difficult to have an idea of the rate of execution of customary judgements. Numerous disputes, particularly regarding land, are brought by the losing party before the modern courts, but it is likely that the social control and pressure that remain strong within the communities make it more comfortable for an individual to obey a decision rather than resisting its execution. However, the execution of decisions made by customary courts poses a problem in practice. Indeed, in hopes of obtaining justice, the same parties may bring the same case before a court of written law after all the time limits on the right of remedy have expired. Most decisions made by customary courts are set aside when they are brought for review before a court of written law, chiefly due to incompetency *ratione material*, which reduces the level of confidence in these courts.
- d) comprehensible: based on an oral tradition, this form of justice is accessible to a population that is for the most part rural and illiterate, for whom legal texts written in French are hard to understand. In general, customary justice tends to fight against the alienation that is generated by impunity, since it reinforces the legitimacy of the law and the punishments for its violation.



However, customary justice also has disadvantages:

- a) overlapping powers: the customary chief has both jurisdictional and administrative responsibilities. This may lead to confusion of powers, arbitrary decisions and abuses;
- b) diversity and conflicts of law: in urbanised areas mainly, where the population is of diverse origins, there may be contradictions between customary laws, which can be difficult to reconcile;
- c) excessive punishment: the range of possible sanctions may vary from moral sanctions to supernatural sanctions to corporal punishment, which is sometimes cruel, inhuman or degrading;
- d) reactionary: means of proof still include oracles and ordeals whose interpretations are inherently subjective;
- e) unjust: regarding women's rights, for example, customs are very diverse and sometimes in violation of national laws or conventions ratified by the DRC.

In summary, traditional justice constitutes an obstacle to the proper administration of justice in the Democratic Republic of Congo. It is characterised by evident contradictions, in terms of both proceedings and the execution of decisions. The range and nature of the punishments applied are disparate. The modes of administration of proof (oracles and ordeals), the treatment inflicted on women, the cases of torture and cruelty in order to obtain confessions, are clear violations of human rights, which marginalize the DRC in relation to the pertinent international conventions that it has lawfully ratified.

Indeed, while these courts apply customary justice, the decree organising them remains silent as to the administration of proof and does not seem to observe the basic principle of criminal law whereby there is neither crime nor punishment without a law that so provides. This principle is repeated in Article 1 of the Congolese Criminal Code, which states that no offence may be punished by sentences that were not provided by the law prior to the commission of the offence.¹⁸

The same decree institutes no objective conditions for the recruitment of customary judges, who also assume administrative functions; no minimum level of education is required. The creation and composition of these courts depend solely on the administrative authorities, which makes them a sort of *sui generis* judiciary jurisdiction in the Congolese legal system, where independent justice is very strongly emphasised, particularly in the constitution, which provides in Article 149: "The judiciary power is independent from the legislative power and the executive power".

Conclusion

A good judicial system should satisfy certain aspirations: justice should be easily accessible to the litigants; it should also be administered by competent and honest judges.¹⁹ The responsibilities of these judges should not be mixed with the exercise of any form of administrative power, and should strictly respect the independence of judicial authority.

¹⁸ Decree of 30 January 1940 on the Congolese Criminal Code as amended and supplemented from time to time, in *Journal officiel de la République Démocratique du Congo*, 43e année, numéro spécial, 30 novembre 2004.

¹⁹ *Encyclopaedia universalis*, corpus 13, "Justice (Organisation de la)", by René DAVID, Paris, 1995, p. 214.



We therefore argue that the Congolese judicial system requires reform working towards the abolition of the customary courts; as already provided by Article 163 of the COCJ, which stipulates that ‘courts of peace’, upon their establishment, shall replace customary courts.

Customary courts constitute a dangerous exception within the Congolese legal system, which belongs to the Romano-Germanic family in which the law constitutes the principal source of rights and should be a sufficient guarantee against arbitrariness on the part of the persons in charge of doing justice.

Their abolition will enable Congolese justice to uphold standard international principles for the proper administration of justice, for it will enable the justice system to eradicate the inhumane and degrading practices that these courts apply to rule on the admissibility of evidence or obtain confessions, and which, rather than contributing to proper justice, purely and simply constitute flagrant violations of human rights.

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