Legal Pluralism, Customary Authority and Conflict in Masisi, (Eastern) Democratic Republic of Congo

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Abstract

Current literature on legal pluralism in Sub-Saharan Africa recognizes that customary authorities can play a significant role to promote local good governance and to maintain order. Beyond the consensus on the role of legal pluralism as a characteristic of most post-colonial states, the link between multiple legal systems, the attributes of customary authority and how customary and legal authority coexist has not been sufficiently explored. This paper questions the widespread assumption that the attributes of customary authority are inalienable and out of state control. Using the example of land as one of the attributes of customary authority, this paper draws on the case study of Masisi (Eastern DRC) to show how the existing legal and institutional frameworks have not only excluded customary chiefs from land management, but have also provided legal opportunities for political elites to access and control land outside of customary authority. This paper argues that authority attributes are not fixed, and can vary among social actors who are seeking legal support beyond the local arena. The case of Masisi shows how customary authority is not an attribute that is granted, but one that can be periodically questioned, deconstructed and reconstructed.

Keywords: customary authority, legal pluralism, legal framework, political elites, Masisi (North-Kivu)

Introduction

During the past two decades, academic debate intensively discussed issues of land, identity, and power through the lenses of legal pluralism concept, both in academic research and policy making. While the literature sees land, identity and power at the community level as a scale of conflict manifestation and where customary chiefs may

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play a significant role to address the causes of violence, legal pluralism in terms of policy and institutions, and the way it affects customary authority, lack enough empirical evidence.

The concept of legal pluralism gained attention in academic debate already in the beginning of the 1980's. Broadly speaking, legal pluralism has been defined as a situation in which two or more legal systems coexist in the same social milieu (Merry, 1988) or when multiple systems of legal obligations recognize a certain body of customary law (Griffiths, 1986). In attempting to classify legal systems, their relationships to each other and the definition of legal pluralism, the debate among authors does not provide a consensus on the normative value of the legal systems that are inherent to legal pluralism. Scholars tend to agree that legal pluralism in Africa is a phenomenon that emerged in the colonial era, when legal colonial customary regulations maintained order and governed communities and resources, in conjunction with indigenous regulatory systems. This co-existence between the two systems continued after independences, and the hierarchy between them continues to exist as well.

Since the 1980's, the debate around legal pluralism has generated strong opinions around national legal systems being politically superior to indigenous systems, with an ability to abolish them (Griffiths, 1986), and prevail, in the case of a clash of obligations. On a policy level, through new constitutions and specific laws, this has been the reality in most African countries, where customary authority has been, and continues to be, strongly questioned by state institutions and laws. In this paper, I will focus on what Kyed (2009) terms "legal pluralism as a policy concept". Kyed has observed that, on an official level, legal pluralism tends to convey recognition of the socio-cultural diversity of the legal domain within a nation state. She argues that this is exemplified by the import of non-state 'law' into state law, and by the recognition of the role of existing non-state authorities, such as traditional leaders, chiefs, clan elders, and religious institutions, in instituting justice and handling disputes. Kyed argues that this state recognition of non-state legal orders is not a technical, neutral process, but an inherently political one. This process occurs through public institutions in which political actors often include non-state actors (customary chiefs, community leaders, etc.) in policy programming for multiple purposes, one of them being the building up of their constituencies. At same time, non-state actors seek legitimacy and protection of their interests through the collaboration with political actors, in both formal and informal ways.

This relationship between actors is illustrated in Kalyas's (2006) model. According to him, actors at the center are assumed to be linked with action on the ground via the mechanism of 'cleavage' and 'alliance', which entail a transaction

between supra-local and local actors, where the former supplies the latter with external muscle, allowing them to win decisive local advantage. At the center, it also relies on local conflicts to recruit and motivate supporters and obtain local control, resources, and information—even when their ideological agenda is opposed to localism. The political aspect behind the recognition of non-state orders also suggests the idea that customary authority is not given, but is rather negotiated and contested, varying across time and space, and seeking support outside of the traditional arena to legitimate its attributes.

In Africa, this occurred during the colonial period, when local traditional chiefs became collaborators and nominees of the colonial administration, and traditional regulations were accommodated into the colonial legal systems, through what is known as the "indirect rule" system. After decolonization, this "embeddedness" and negotiation between the two systems was, in different ways, reproduced in the new post-colonial states, and some of the attributes of customary authority became a part of state legal systems.

To uncover legal pluralism as a policy concept and a politically motivated process, this paper uses the example of authority over land distribution as an attribute of customary authority that constitutes one of the key issues characterized by the legal pluralism in Sub-Saharan Africa. In this paper, I argue that, while customary authority is defined by a certain number of attributes, such as land rights, claims of belonging to a particular social group or territorial entity, to a large extent, these attributes actually remain under the dependence and recognition of the State's legal systems.

This paper uses the case of Masisi, in the Eastern part of the Democratic Republic of Congo (DRC), to explore how land management is strongly embedded in legal pluralism, with customary chiefs continuing to claim their authority and rights over the land. In tracing the history of colonialism, economic exploitation and migration that occurred in Masisi, I demonstrate how, in a situation of competition between customary and legal systems, the political character of legal pluralism benefits the political elite, who can easily afford access and control to land, without any accountability to customary authorities. Masisi illustrates this point in two major ways. One is that, in most rural areas, land rights have always been a significant attribute of customary authority. This attribute was recognized by the colonial power, and later by the new Congolese state, and customary chiefs have been using land to negotiate their authority over the people who have remained their customary clients for decades. The second point about Masisi is that the arrival of immigrants from

Rwanda[1] in the 1930's, and the promulgation of the land Law in 1973 have been key factors that contributed to a legal pluralism that profoundly changed the relations of authority between customary chiefs and their subjects.

The objective of this paper is to examine how land has shaped and legitimated customary authority in Masisi, and to understand the extent to which land has become subject to legal pluralism for political purposes. This paper intends to question the conventional knowledge according to which customary authority attributes are inalienable and states *must* preserve them to guarantee social order. It is commonly assumed that what constitutes the authority of customary chiefs cannot or can hardly be affected, changed, or even depended on state institutions; and that that customary authority constitutes a counter-power to the state. This paper argues that the authority of customary chiefs is not entirely provided by customs, traditions or beliefs. The state also recognizes and grants it, while also having the power to hinder it through the plurality of legal systems, mostly for political reasons. Land management in Masisi is an example to learn about this duality and to re-asses this conventional knowledge.

Throughout this research, empirical data has been collected through a policy and institutional analysis and a series of extensive interviews with several actors in the field. Key legal texts, such as laws, decrees, edits, ordinances, were analyzed, and in-depth interviews with lawyers, public agents and civil society actors allowed to apprehend the coherence and the contradictions of the legal texts. In-depth narrative interviews were conducted with customary chiefs at different levels of Masisi Territory, and they were coupled with a series of field visits, between 2013 and 2016, to understand how customary structures function, how they relate to public and juridical institutions at provincial and national level.

The paper is organized in four sections. The first section engages with the debate on how land rights are shaped and become a part of legal pluralism, while remaining an attribute of customary authority. This section highlights how the shock between the systems is likely to generate violent conflicts. The second section of this paper goes back in time to discuss the arrival of Banyarwanda immigrants in Masisi, and how this affected land relations in the Bahunde and Gishari Chieftaincies. It is shown that while land was supposed to be granted by Hunde customary chiefs as a strategy to keep control on individuals, the Banyarwanda strongly contested their allegiance to the Hunde chiefs and fought to gain their own land access and political control on it. The third section discusses key features of the Congolese legal framework regarding land

[1] The term 'Banyarwanda' is usually used to describe immigrants from Rwanda (see Tegera, 2009 and Bøås, 2009). The Banyarwanda are constituted by two ethnic groups, Hutu and Tutsi.

management and highlights the main dispositions that hinder and challenge customary authority. The fourth section analyses the land reform policy initiated in 2013, and the place of customary authority in the process, as well as the role of the political elite.

Legal pluralism, land and customary authority

In many countries, the existence of multiple normative systems poses both a problem of implementation, as well as the question of whether legal pluralism is part of the problem, part of the solution, or both (Jentoft, 2011; Kurniawan, 2014; Pimentel, 2011; Schmid, 2001; Unruh, 2008). When it comes to issues over land, the duality between legal and customary systems is expressed in the limits of the state on land management. In some countries, constitutions are quite explicit in the recognition of the customary role within many sectors. In countries where chieftaincies exist, the claims on the exclusivity of authority over land by customary chiefs suggest the idea that the state's authority on customary land *must* be clarified and limited. However, in practice, state institutions continue to interfere with customary authority in conflicting roles (Perneş, 2012; Tegnan, 2015) that try to counteract customary authorities (Rose, 2002).

This conflicting nature of legal pluralism can also undermine traditional dispute-settlement mechanisms. Helbling et al. (2015) have observed the well-documented weaknesses of traditional dispute-settlement mechanisms, and have found that where legal pluralism prevails, in certain situations, access to justice is undermined and significantly contributes to impunity, and in some cases also fuels violence. Kobusingye et al. (2016) have recently found that institutional proliferation in land governance that is fueled by legal pluralism and decentralization, results in confusion in land dispute resolutions, and in the failure of institutions to effectively resolve land disputes in post-conflict settings. They conclude that the struggle for authority between representatives of the state and those of customary land institutions becomes especially problematic because it merges with local and national politics.

In most African countries, governments have created and upheld rural property institutions that have created a relationship between political dependency and authority, generating variations in the structure and political character of land-related competition and conflict (Boone, 2013). Lund (2011) argues that property relations in postcolonial, and specifically African settings, are often ambiguous because of the multiplicity of institutions competing to sanction and validate rival claims, in attempts to gain authority for themselves. Tamanaha (2008) observes that contemporary legal pluralism studies allow for an understanding on how people interact with interests and fight to maintain their power and positions. He argues that people and groups in social arenas with coexisting, conflicting normative systems will, in the pursuit of their

objectives, manipulate these competing systems against one another. Sometimes these clashes can be reconciled or ignored, and they can even operate in a complementary fashion, with serious social and political ramifications.

Keeping in mind how conflicting normative systems can generate multiple authorities, land management in Masisi, as I will later explain, provides an example of this, as people who acquire land through customary chiefs are also in need of title deeds to secure their land. However, having a title deed does not necessarily secure the land because in some areas where state authority is not effective, and customary authorities can easily deny the rights to land, even when the title has been issued. These conflicts arise from that fact that, in many African countries, land property is bound to authority and claims on property need the support of political and legal institutions that are in positions of authority. When authority relationships overlap, social actors become susceptible to refer their claims to a variety of legal political institutions, and often to influential political elites (Sikor & Lund, 2003).

In focusing on why elites acquire land and why this matters to them, Geisler (2015) has found that they are mostly motivated by rent seeking and power consolidation. Elites may thus compete for land and political power to gain and protect their local belongings (Fay & James, 2008), taking advantage of laws in the existing legal framework (Linklater, 2013) that do not have any customary influence. While customary chiefs are strongly supported by the legal framework in many African countries, the example of Masisi offers another story on how customary authority is not always granted and inalienable. Rather, authority can depend on concrete attributes which, at the same time, are defined and provided by social groups, political elite and the state.

Rwandan immigrants, customary authority and conquest of land and power

Customary authority in Masisi began to be challenged by the colonial power in the beginning of 1900, as well as by internal cleavages among clans and families of autochthon communities (Hunde, Nyanga and Tembo). When the former German colony Ruanda-Urundi came under Belgian mandate in 1922, the abundant workforce in these two countries attracted the attention of Belgian mining and agricultural enterprises located in eastern Congo. Between 1937 and 1945, the *Mission d'Immigration de Banyarwanda* (MIB) settled around 100,000 Rwandan men, women, and children in Masisi. This immigration organized by MIB, did not involve local chiefs of Masisi in the integration process, most notably the Hunde, who considered themselves the autochthons of the region.

To deal with the issue of cohabitation between immigrant and host communities, the colonial administration decided, by demand of Banyarwanda chiefs, to create autonomous territorial entities for the immigrants, which were out of the Hunde chiefs' control. To successfully accommodate the immigrants, the colonial administration nominated André Kalinda as the customary chief of the Bahunde Chieftaincy (Mamdani, 2002; Mararo 1997). As a result of the collaboration between Chief Kalinda and the colonial authorities, an additional 47,810 hectares of land were purchased by the colonial administration and became the Gishari Collectivity, which is known today as the Bashali chieftaincy. The creation of Gishari for the settling of the Banyarwanda, was largely seen by Hunde chiefs as an alienation and dispossession of their customary rights (Mararo, 2002, Tegera, 2009).

This dispossession of land went against the representation of land as a community territory, an economic resource, a source of revenue, and a social asset (Vlassenroot & Raeymaekers, 2005). For Hunde, the 'indigenous territory' is often linked to a set of rights and 'sacred' order references. The traditional Hunde chief (*mwami*) who possesses authority over land can claim spiritual power over people, through land distribution. As Mugangu (2007) points out, the person accessing land through the chief inevitably becomes a subject of the chief under customary authority because land is bound to the customary authority that is represented by the chief.

In the process of land distribution to the Banyarwanda who settled in Masisi, these customs and regulations were not acknowledged or respected even though the area of settlement was under the Hunde customary authority. Due to the fact that the Banyarwanda were not socially and politically integrated by local Hunde chiefs according to Hunde customs, the Banyarwanda escaped dependence on Hunde chiefs. As Van Acker (2005) puts it, "land relations are the means to realize a system of dependent integration: land relations and social hierarchy mirror each other". Although the Banyarwanda received land from the colonial power before the Congolese independence, their elite continued to easily acquire land from the Congolese state, and after 1973 land law were passed. For these reasons, one of the widespread narratives of Hunde chief has been to describe the Banyarwanda as foreigners (Lemarchand, 2009; Willame, 1997). Bøås (2009) has noticed how local resistance and the formation of militias in Masisi is, to a large extent, explained by a strong tradition of resistance against any form of foreign control over land, and is often based on the preservation of traditions and practices of customary land protection. The resistance in Masisi has been mostly targeting the Banyarwanda, who contested the Hunde customary authority over land, and used other means to gain access to land.

The resistance of the Banyarwanda who settled in Masisi towards the Hunde claim of authority over land can be explained by their different conceptions of land. For the

Hunde, land is first and foremost a collective property that belongs to the community, lineages and families, and whose chiefs represent values and beliefs of a common ancestor (Van Acker, 2005; Willame, 1997). On the contrary, for the Banyarwanda, land is seen as a commodity, without a 'sacred' character, and can be gained individually, out of personalized authority and customary relations (Tegera, 2009). This perception of land has its roots in a legal system (the Napoleon code) that grants private property rights to individuals on the one hand, the notion of *Isambu* for the Banyarwanda Tutsi on the other, and *Ubukonde* for the Banyarwanda Hutu, which existed in the Banyarwanda traditional land system, where a chief of a family or lineage could grant an exclusive private property right to a family member. These notions of *Isambu* and *Ubukonde* remained the basic conception of the Banyarwanda at the time they arrived in Masisi. These two different visions of land - collective versus private property - have played a significant role in the competition over land between the Banyarwanda and the autochthon Hunde communities in Masisi.

When Gishari was abolished in 1957 by the colonial administration as an autonomous entity of immigrants, the Banyarwanda were put under the thumb of the local Hunde indigenous chiefs. Ever since, the Banyarwanda in Masisi have been struggling for their own native authority, outside of the Hunde customary authority. Struggle for land was accompanied by the competition for political power as a strategy to secure land and also justify a belonging to the Masisi territory as a homeland (Mararo, 1997; Willame 1997).

Between 1970 and 1980, President Mobutu's decision to give some Banyarwanda positions in the local and national administration was a first attempt to integrate the Banyarwanda into sociopolitical structures in Zaire. In 1972, under the influence of various prominent Banyarwanda from North Kivu—especially his chief of staff, Barthélemy Bisengimana - Mobutu passed a law that granted citizenship *en masse* to anyone who had immigrated before 1960. Previously excluded from customary access to land because of their immigrant status, affluent Banyarwanda were able to capitalize on this law and acquire large tracts of land in Masisi and beyond, which they did not acquire from Hunde chiefs, but through a new land law that was promulgated in 1973 (Mathieu & Tsongo, 1998).

Since the early 1990's, most of the arable lands in Masisi thus belonged to Banyarwanda elites, who succeeded in accessing political power and gain authority over land. Some figures show that the Banyarwanda acquired 90% of the ex-colonial plantations, which represented 45% of available[2] lands in Masisi. In 1989, 58% of

[2]After the Land Law of 1973, the Government decided to sell some plots of land. In Masisi most of the land people could purchase was the former colonial farms.

land legally registered in Masisi belonged to 512 families, with 503 titles belonging to the Banyarwanda (Hutu and Tutsi), and only 9 belonging to members of the indigenous Hunde community (Mathieu & Tsongo, 1998; Willame, 1997). This shows how, for many Banyarwanda, access to land and access to political power were inseparable and remain to date at the heart of rude competition in Masisi. This conquest of land was later also followed by a political one in which land acquired was not secured without a political presence in the institutions at different levels of government. The Banyarwanda's lead in different rebellions since 1996, and their victories in the election of 2006 and 2011 are a demonstration of how land control has been combined with political conquest.

The two Congolese wars of 1996 and 1998 constituted a historical moment for the Banyarwanda to politically emerge and consolidate their power. During this period, the Banyarwanda had already been changing the political and administrative landscape of Masisi. Between 1998 and 2003, during the rebellion of the Congolese Democratic Rally (*Rassemblement Congolais pour la Démocratie-RCD*), Eugene Serufuli, who was the Governor of the North-Kivu Province at the time, of which Masisi is part, accelerated the strategy of appointing new agents in local administration who were mostly Banyarwanda[3]. The political motivation behind this was to replace the predominantly Hunde customary chiefs, who were outside Masisi because of the war. Thirteen of the fifteen customary leaders were replaced by people who were designated by the RCD administration. Where Hunde customary leaders were not replaced, the RCD appointed a Hutu as an assistant, and most of the assistants later became increasingly influential and represented the *de facto*[4] authority. This strategy of Hutu control over local power positions was followed by the creation of the *Poste d'Encadrement Administratif*[5] (CPA), where, out of 27 *postes* created, 19 chiefs were Hutu.

Hunde traditional leaders have been expressing concern over this situation for some time. In the words of a traditional chief:

> ... Today, Hunde are about to disappear because we had lost our authority and our ancestral land. We are absent in provincial and national Parliament; local and provincial political positions are occupied by Hutu. Even in army and

[3] Interview with E.T., February 26th 2016

[4] Interview with E.T., March 1st 2013

[5] The decentralization law provides technical support for local administration. 'Chef de Poste' is the administrative expert providing technical support and only four 'Chefs de Poste' are allowed according to that law. Today, in Masisi, there are 27, despite the call of the Minister of Interior to suppress all the 'Postes' across the country.

> police, all senior officers are Hutu and Tutsi (Banyrwanda) who are controlling almost 70% of land in Masisi (Interview in Masisi, October 2014).

This Hutu control over local administrative positions was strongly reinforced by the elections of 2006 and 2011 when the Hutu victories (+70% of the population of Masisi) achieved a political victory over customary authority. This political achievement of the Banyarwanda has not been the only pressure on customary authority in Masisi. The plurality of legal and institutional systems in DRC has fundamentally limited the authority of customary chiefs, while also creating land insecurity for peasants who cannot pay title deeds.

During the late 1990's and early 2000's, other than administrative and political power, customary power was also targeted by Hutu local leaders. An example of conflict over customary power is the Bashali Chieftaincy, where both Erasto and Nzabirinda lay claim to being *Mwami* Bashali, against the customary Hunde chief of Bashali. In the chieftaincy of Bashali, conflict between Hutu and Hunde leaders escalated after the 1996 war.

During the control of Masisi by the Banyarwanda led-rebellion movement RCD (1998) and CNDP (2005-2009), Erasto proclaimed himself as traditional leader of Hutu in Masisi. He had been pressuring the *Mwami* Bashali, known as the legitimate customary chief in Bashali, since he had become a powerful leader within the Hutu community. To end tensions between the two local chiefs, the former Governor, Leonard Kanyamuhanga, and CNDP leaders, Bosco Ntaganda and Laurent Nkunda, tried to reconcile the two leaders, but no solution was found. Meanwhile, Nzabirinda was more ambitious than Erasto and went to court against *Mwami* Bashali, claiming the Chieftaincy of Bashali as an entity under the authority of the Hutu and not the Hunde.

During an interview[6] in early 2015, Nzabirinda claimed he won the trial against *Mwami* Bashali, while *Mwami* Bashali denied Nzabirinda's victory, which he considered to be a political conspiracy against Hunde chieftaincy. Nzabirinda also went to the DRC capital Kinshasa, to meet Bizima Karaha, the former Minister of Interior, during Laurent Desire Kabila's regime between 1996 and 1998. At that time, Karaha refused to sign the document that recognized Nzabirinda as Chief of the Bashali Chieftaincy, for two reasons. Firstly, by signing the official recognition, it was likely that tensions between the Hunde and Hutu would escalate, as they did in 1993 when tensions around land led to the killing of Hutu peasants in Ntoto (on the border between Masisi and Walikale Districts). Secondly, Karaha wanted to avoid pressures

[6]Interview with N. N., February 26th 2013

from his own ethnic community, the Banyamulenge, the Tutsi community of South-Kivu, who were claiming – and continue to claim - official recognition of Minembwe as an autonomous territory. Despite Karaha's refusal of recognition, Nzabirinda continued to proclaim himself *Mwami* of Bashali Kayembe, while Erasto proclaimed himself *Mwami* of Bashali Mokoto[7].

Throughout these political battles, the existing legal framework in the DRC has been far from addressing the issue of status and authority of customary chiefs, which has proven especially difficult in the context of Masisi, where different ethnic groups have periodically challenged the indigenous customary authority of the Hunde.

Legal framework on land and implications on customary authority

The legal landscape on land management in the DRC is characterized by a coexistence of multiple normative references and mechanisms of conflict settlement, both formal and informal, custom law being one of the important sources of land regulations (Mukokobya, 2013). The existing literature on legal pluralism in DRC is largely oriented towards land questions. The land "problem" is seen as a result of contradictions in the existing legal framework and lack of transparent land governance. Vlassenroot (2013) has observed that access to and use of land are governed through a multitude of systems, practices and institutional structures, including a statutory land system, customary systems and a variety of informal land governance practices. The conflicting character of these diverse systems and land management is grounded in the 1973 Land Law (*Code Foncier*), which is considered by many analysts to be the cornerstone of the protracted tensions in Masisi and many other places in DRC (Huggins, 2010; Mugangu 2007).

The first post-independence land-related law is called Bakajika Law n° 66-343 of 7th June 1966, and largely targeting the nationalization of the mining sector. It was only in July 1973 that a more general land law came out, which is still today the main legal reference regarding land management in DRC. Article 53 of the 1973 law, clearly states that, 'the soil is the exclusive, inalienable, and imprescriptible property of the Congolese state', making the state the exclusive owner of the land. The state emphasis on such exclusivity, stretching beyond the sovereignty that allows it to make any decision, has to do with the context of the time in which the law was passed, i.e. only one decade after the DRC got independence, when many companies on the Congolese territory were still Belgian.

[7]The Bashali chieftaincy is one of four Collectivities that constitute the District (*Territoire*) of Masisi. Bashali itself is composed of two *Groupement*, Kayembe and Mokoto.

This law has become a legal shield to claim state monopoly over land and several natural resources. Local customary chiefs in DRC have been always controlling large amount of land in rural areas, and, before independence, even the colonial administration dealt with customary land. In the eyes of the new Congolese state, there was little legal support to gain control over customary land. To get rid of both external control of mining companies and customary supremacy on land, the 1973 Law emphasized and made clear the exclusive right over land by the state, and no compensation to customary chiefs was provided at that time. The promulgation of the Land Law in 1973 was, to some extent, an anticipation to make the later nationalization, which was made easier by providing, for example, articles 55 and 56, which distinguish two domains (areas) of land. The distinction of domains includes the 'public domain', in which public services or specific usage can be located, and 'private' domain in which non-specific usage can be located.

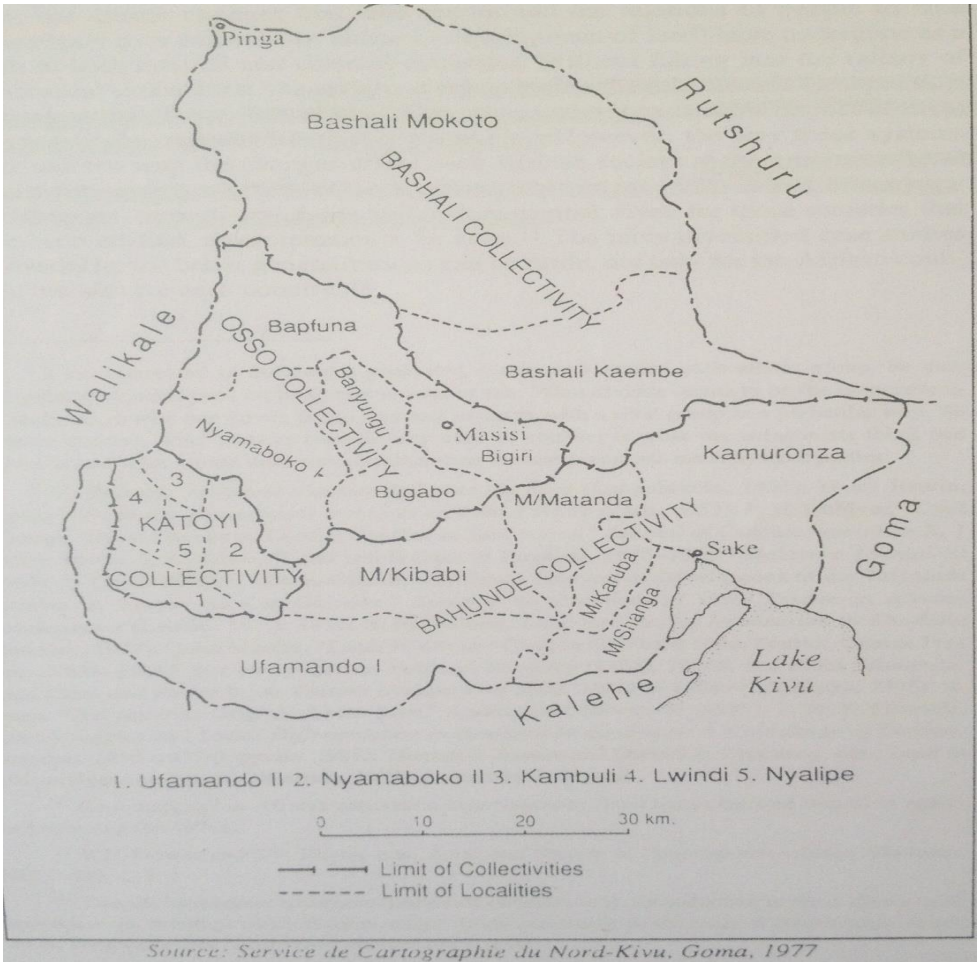
According to the law, customary lands fall under private domain. In practice, under this distinction, the state services of cadastre can grant land to any individual or company in the public domain. When it comes to the private domain, the distinction between what is customary land and private-state land remained ambiguous[8]. Based on article 387 of the law, cadastre services started to issue certificates (title deeds) on customary land areas, stipulating that the "land occupied by local communities enter, from the entry into force of the land law, in the public (state) domain (terres domaniales)". This process of confiscation of the customary lands by the state was the beginning of tensions which have lasted for the past four decades.

Clearly anticipating these tensions, article 389 of the law specifies that anyone can acquire a plot of land in areas occupied by local communities. This article states that a 'Presidential Ordinance will be issued to clarify the status of land occupied by local communities as well as customary competence on those lands'. This ordinance has never actually been issued since 1973, and the current question remains on how customary land areas can be managed without the ordinance. According to Mugangu (1997), the question raised by the article 389 is whether with the promise of an ordinance, the legislature intended to maintain the *statu quo* and leave the issue of rural lands to a future law. He suspects that if the answer is yes, then what it could be argued in the Supreme Court is that, until the promised Presidential Ordinance is signed, the lands must be managed according to the customary rules. In practice, public institutions continue to prevail and issue certificates, thus reinforcing the dualism between customary authorities and public services.

[8]Interview with E. M., January 30th 2014

A widespread narrative relative to land conflict in Masisi, is the perception that land belongs to autochthons. Because, on the one hand, the distinction between the two categories of land mentioned in the Land Law are not documented and mapped, it is not possible today to locate the real boundaries between customary areas and public land domain or even private land domain. On the other hand, there is also the assumption by customary authorities that Masisi land ownership is exclusively customary. The map below shows that the Chieftaincies (*Collectivité-Chefferie*) of Bashali and Bahunde constitute 3/4 of the Masisi Territory, which explains why land is seen as a customary property that is based on the chieftaincies' rules and regulations[9].

[9]Interview with S.K., February 25th 2016



Source: Mararo, 1997

Before 1960, colonial plantations or blocks used to be located in both Chieftaincies (Bashali and Bahunde), which did not necessarily refer to customary or indigenous land, what mattered most at that time was to extend the areas of land that could be favorable to business activities (Tegera, 2009). What the Land Law of 1973 did was simply prevent customary chiefs from any kind of reclamation of exclusive authority on land in the chieftaincies. What remains unclear in the 1973 Land Law is the separation between the public and private domains of land, and whether land is essentially customary in chieftaincies (*chefferies*), and the public domain land in

S*ecteurs*[10]. According to *Action Solidaire pour la Paix*'s 2014 report, the colonial administration had divided Bashali into concessions of land since the 1950's. In Bashali, the number of land registered in 2014 constitutes 12.624 ha on an area of 1.582 km². Based on the fact that 1km²=100 ha, 12.624 ha equals 126,24 km² which is 12,5% of Bashali size. This 12,5% of the Bashali land which is generally seen as belonging to a public domain, while the remaining land size (88,5%) is supposed to be under customary authority. Upon analysis of several interview conducted, it is clear that the frustrations of customary chiefs stem from the fact that Article 54 of the Land Law completely ignores the distinction between public and customary land, stating that all land belongs to the state, and access to it must follow formal procedures according to the law.

In order to have a broader view of land under registration beyond Bashali, there is an important variable to take into account regarding the amount of land that is covered by registration certificates in all of Masisi, beyond Bashali. According to the cadastral services, until 2014, the total land registered in the entire Masisi District constitutes 5.861 ha, which represents 58 km² on a total area of 4.734 km² and, only 8.1% of the land. When it comes to the size of the land registered in Bashali in particular, the trend is the same. What is clear from these numbers is that a very small size of land is registered in Masisi. In practice, a large majority of the population in Masisi does not have property title deeds as such because, they have acquired land through customary procedures, and land selling transactions are made between individuals or families, through the signing of a paper of mutual recognition. This paper is largely recognized by local chiefs and never by cadastral services because formal procedures for cadastral recognitions are expensive, and in many cases are located far away from the villages. For those individuals who can afford to pay for a certificate in cadastral, this option is preferable and more secure.

There have been a series of attempts to initiate land reforms in DRC that legitimize and protect customary land rights and regulations. The first attempt was taken by the Provincial Ministry of land in the North-Kivu, under the *Edit on customary chiefs* which privileged rights and obligations of both Chiefs and landowners. This Edit was motivated by key concerns expressed by customary chiefs in reference to the land law of 1973. It was expected by the Provincial Ministry of land and by the civil society that if the Edit gained the majority of votes in parliament, this would be the beginning

[10]In the Congolese public administration structure, *Provinces* are composed of *Territoires. Territoire* are made of *Collectivités* which fall into two categories: *Collectivités-Secteurs* and *Collectivités-Chefferies* (or chieftaincies). In *collectivités-secteurs*, authorities are generally appointed by the government whereas in *Collectivités-chefferies* the first authority is *mwami* (customary chief) who is assisted by other customary chiefs at lower levels. .

of the restoration of customary authority. When the Edit was presented to the provincial parliament in 2012, it was not approved. However, according to some Congolese civil society experts, there are still chances to insert this Edit in the set of laws, edits and ordinances that are to be the land reform roadmap.

The second attempt made by the National Ministry of Land was a *Law Proposal*, as a follow up to Article 207, paragraph 5 of the Constitution. Although the constitution recognizes the customary authority, there is no specific law it that elaborates on how chiefs can use their authority to regulate access to land and land use, and the proposed addition to Article 207 of the constitution aimed at specifying and clarifying this. After a series of advocacy actions, the *Law proposal* was brought to parliament for vote in April 2015. It was rejected by the Senate and declared unconstitutional. The third attempt is a current series of joint actions of Congolese civil society, International NGOs and UN agencies to advocate for a general land reform that would ultimately remedy and solve all legal confusions that have been created by the existing legal an institutional framework[11].

There is so far little chance to succeed at this level due to number of obstacles, which include lack of priority on the government's part, lack of coherent strategy and coordination among the key stakeholders, and political elites' not being keen on seeing this reform happening.

Land reforms, political elites and customary authority

Land issues do not affect only customary authority. For decades, land has also been considered a driving force of violent conflicts in Masisi and elsewhere in DRC (International Alert, 2010; Mararo 1997). International and Congolese NGOs have been concerned by the level of community violence and have advocated for what could be a long-term solution involving the government of Congo. It is in this perspective that the Congolese government announced the land reform[12]. Congolese and international civil society organizations had already been advocating for the harmonization of legal and customary systems on land issues, even though expectations and priorities regarding the reform varied across the different type of actors at play, including government (national or provincial), civil society (local or international), or foreign investors.

[11]Interview with E.T., February 25th 2016

[12]The legal support of land reform is under decree No. 13/016 of May 31st 2013 on the establishment, organization and functioning of the National Committee of the land reform

During the national workshop on land reforms in Kinshasa in 2012, three major concerns were identified: the legal security for peasants' lands, the issue of governance and harmonizing the collaboration between public services, the need for clarifying the status of customary chiefs, as defined by the 1973 Land law and Article 207 of the Constitution. As a first step, Decree No. 13/016 of May 31st 2013 for the establishment, organization and functioning of the National Committee in charge of land reform process. Even though actions relative to this decree were supposed to end by 2017, the roadmap signed by different stakeholders has not been implemented yet.

Since the land reform process that was officially announced in 2012, initiatives and activities are mainly carried out by local NGOs with the support of international organizations and UN Agencies. There two main reasons why the Congolese Government is not willing to get fully involved in the process of land reforms. One is the high cost of the reforms, and the second relates to the fact that political elites are among 'big' land owners while at the same time they are in key institutions that are supposed to boost the process of land reform[13].

Land reforms can also change power relations at the local level. In Masisi, and in many other places in the country, the implementation of the reforms could provoke a debate over Article 389 of the Land Law, which, as previously stated, specifies the possibility for anyone to acquire a plot of land in areas that are occupied by local communities. If this Article were to be approved and implemented as part of the land reforms, the fall out would be that customary chiefs could take back control of land and all title deeds (certificates of ownership) that have been issued in the past by the state services could become lapsed.

In trying to understand civil society organizations' willingness to push the land reforms forward, there is a dominant assumption that despite the issues generated by the current complex legal framework, the government is willing to get involved and facilitate the reforms. Additionally, customary chiefs have been associated to the land reform process and some laws have been drafted to restore their authority. However, the implementation of the reform will depend very much on the political elites who are the same members of the government and the parliament. The outcome of the reform would inevitably affect the land settings in terms of land re-distribution and re-establishing the dependence on customary chiefs to access land. Some of these elites in state institutions are the Banyarwanda who would like to see the reform blocked.

The example of Masisi also shows how land as an important attribute of customary authority cannot be taken for granted because attributes are not fixed or given, but rather embedded in political processes in which elites use land as a political resource

[13]Interview with P.M., March 4th 2016

to mobilize their constituencies. As long as political competition is also played out across ethnic and regional ties, like in Masisi, customary structures can also serve as a mechanism to negotiate political legitimacy during electoral periods. So far, the existence of customary chiefs in Masisi is not an issue for political elites (Banyarwanda), but any reform that would fully restore customary authority over land is likely to fail. The idea promoted by civil society to restore customary authority has not been rejected by the Congolese government, but political elites that hold strategic positions in institutions constitute a threat to its success, unless a new long-term approach associating them in all processes is carefully negotiated and adopted.

Conclusion

This paper has questioned the conventional ideas according to which customary authority attributes in Sub-Saharan Africa are inalienable and states preserve them in order to guarantee social order. By focusing on customary authority over land in Eastern DRC, this paper suggests that, to a large extent, customary authority without attributes such as land distribution, is likely to remain only symbolic. This paper sought to understand the conditions under which multiple normative systems can serve political purposes that are to the detriment of customary claims of authority. The case of Masisi extends the existing knowledge on legal pluralism with the idea that, when customary authority relies on attributes which are bound by state legal systems, political elites may attempt to profit from the tensions between customary and legal systems for their own benefits.

The example of the arrival of the Banyarwanda between 1937 and 1945 in Masisi, shows how land has been a determining factor in their social and political integration, which has been largely in competition with customary authority, and has profited from state authority. This paper demonstrates how land contestations in Masisi resulted from diverse perceptions of ethnic groups over land use and acquisition, and the refusal of the Banyarwanda to depend on Hunde customary chiefs, which led to a fierce competition over land and political control. The political success of the Banyarwanda in Masisi sheds light on the strategic entry point of navigating state institutions, which can easily allow for land acquisition through legal mechanisms since the 1970's.

This paper demonstrates how the key land law of 1973 in DRC, not only excluded customary chiefs from land management, but also added laws that exacerbated the relationships between the legal system and customary institutions on the one hand, and the ways in which laws apply in areas where customary authority is supposed to rule, on the other hand. The example of Masisi, and DRC in general, show the current legal

framework on land management has deliberately integrated customary lands into public land areas, excluding customary chiefs from the management of this land. While some laws suggest the integration of customary chiefs in the management system of rural areas, in practice this does not occur. While civil society and international peace building organizations have tried to advocate for the harmonization between different laws, institutions, and customary chiefs, the absence of the political elites in the processes has been a serious challenge over the past two decades.

Land as an attribute of customary authority seem to be at stake in violent conflicts, as is shown in the case of Masisi, there is an undeniable need to strengthen customary instances in local governance around land. At the moment, chances are slim to see it happening in a near future. Regarding the legal pluralism and land management and how political elites relate to it in Masisi, Mathieu and Tsongo (1998) have already two decades ago outlined that "the legal vacuum that causes uncertainty and ambiguity in the Congolese context is not an accident or an oversight of the legislature, but rather a meaningful gap, politically and economically exploitable" (p. 401). As this paper has shown, the case of Masisi is exemplary for trying to understand why elite classes and private networks profit from this legal confusion that deliberately maintain the *status quo*.

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