



The Issue of Dowry against Dualism: Written Law and Customary Law in Eastern of the Republic Democratic of Congo (kinshasa).s

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ABSTRACT

The dowry, this customary institution, was certainly misunderstood by the authors of the written law. The interpretations flow from it and the decision to integrate it or not into positive law falls under the sovereignty of each State. However, it is asked to those who made a condition of the marriage ⁽¹⁾, to be able to control overflows of speculation to avoid falling through the tariffication. Eastern Democratic Republic of Congo (Kinshasa), it is mainly about goats, cows in number apparently exaggerated. The bill presented by the family-in-law to their future son-in-law is often inflated as marriage takes a long time to come to fruition and this state of affairs discourages many marriage candidates. Hence the phenomenon of "Yaka tovanda" (come and stay together.) Failing the dowry or dragging, the divorce quickly arrived.¹This is the case in the DRC: Family Code, Law No. 16/008 of 15 July 2016 amending and supplementing Law No. 87-010 of 1 August 1987 on the Family Code. The future spouse and his family must agree with the parents of the future wife of a gift of property and / or money that constitute the dowry for the benefit of the parents of the future wife. Marriage can only be celebrated if the dowry has actually been paid at least in part. Notwithstanding any contrary custom, the dowry may be symbolic.

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Introduction

Many studies have been devoted to the "African dot". It is questionable to what extent they have resulted in the lives of Africans and that is the meaning given to the word "dowry".

There is no longer any doubt that authors have traveled the same roads or beaten tracks. And yet, the Congolese people will continue to focus on so-called "dotal" values, while some authors will place their controversy on the "semantic" and "commercial" aspects of such values.

Indeed, in Congolese societies, the family of the bride or the bride requires certain pledges of her future son-in-law or her son-in-law and the importance which she attaches to it is great. The debates accompanying the determination of the amount of such pledges have led Europeans to reduce Congolese marriage to a question of commercial transaction.

We must understand that unlike the dowry practiced in the West, which consisted of movable and / or immovable property constituted by the parents of the bride as a contribution to the expenses of the new household, without losing the property to the bride, the dot in Congo is a remittance of a sum of money and goods; or simply a delivery of property or service from the fancy or her family.

From this definition emerge, on the one hand, the persons who are to collect the dowry: the bride herself or her family and, on the other hand, the dowry modalities in relation to the cultural specificities: it can be the dot in kind and dowry by service commonly known as the "Jacob dowry", in memory of the seven years of service that he gave to his father-in-law Laban before marrying his Leah, then seven years more to get Rachel's hand (Gen. 29, 15-32).

For the moment, exaggerations recorded during dowry marriages prompt us to re-examine the law, which remains incomplete. Article 363 of the Family Code states: "The dowry may not exceed the maximum value.

Fixed by order of the President of the Popular Movement of the Revolution, President of the Republic, taken at the proposal of the regional assemblies"⁽²⁾.

Even repealed by the law of July 15, 2016, the blur has not been totally removed. The new article says, "The dowry is determined according to the habits and customs of future spouses"⁽³⁾.

Here are the reasons for the discussion of this article. There are too many problems. Including those of knowing:

- If a European took in marriage a Congolese in the DRC, what will happen, what habits and customs will he follow?

- What understanding should be given to the dowry?

² Formulation of the law n ° 87-010 bearing the family code of 1st August 1987. Article 364 ads: "The dowry may not be increased or revaluated during the marriage or at its dissolution; any custom or convention to the contrary is of no effect.

³ Law No.16/008 of 15 July 2016, Law amending and supplementing Law No. 87-010 of 1 August 1987 on the Family Code.

In fact, it is a question of answering the question, what is the position to take with respect to dualism: written law and customary law, with regard to dowry in the DRC. The conflict of laws is to be dismissed because the Congolese code is quite clear.

To answer this interrogative question, this work is organized around five points: the position of the research problem; deciphering the term dot; theoretical discussions on Dowry; the dowry in the African legislations and finally, the consequence of the hardness of the dowry or phenomenon "Yaka tovanda". (Come and we stay together) A brief conclusion puts an end to this reflection.

I. Position of the Problem

1.1. There is a phenomenon of "libertinism" in dowry; one would say, the principle distilled by many, about the law is the non-fixation of amount, but rather the contribution on the part of the man of what he has to honor his wife and in-law as well only for his own honor and dignity. A real confusion reigns in Kinshasa and in the rest of the DRC, because everyone establishes the list of goods commonly called the "marriage bill".

1.2. Also, the values that the future or the spouse pays to the parents of his future wife have received from Europeans an inappropriate name: "the dowry" (4).

From our point of view, this confusion is inexcusable. It is in this context that it has been asserted that Congolese, in particular Africans in general, are buying their wives.

On the other hand, writers who use the term "dot" have opened a polysemic field. Hence the need to define the meaning of this term in the following paragraph.

II. Decryption of the concept "dot" and its meanings

For some, the "dowry" refers to the values that the future son-in-law gives to the parents of his future wife, while for others, it also refers to the gifts of the suitor to his future wife or, quite simply, the set of values constituted by the fiancy or his family for the purpose of marriage.

From another angle, the "dot" seems to be a versatile reality. It has a compensation role (5). It is an "indemnity, in compensation for the harm done" to the woman's family; she is a surety (6).

In another respect, the dowry is an instrument of proof of consent to his parents-in-law to guarantee that he will treat his wife well, compensation, compensation, a title of filiation of children.

The dowry makes the marriage legal, one of the basic conditions of marriage (7). The dowry stabilizes the unions. In fact, the dowry distinguishes the marriage from the concubinage (friendship) by the fact that it makes acquire the right of the father over the children. The dowry is the

⁴ Belgian and French authors use the term "dot". Anglophone writers use the terms "dowry", "bride-price", "marriage payment", "marriage money" and others. MAIR L.P., African marriage and social change in SAMFL, 1953, I.IV, P.5]

MINKAT L., The "back ex marito" in history and in law compares modern "Roma, 1963, p.105]

⁵LA FOSSE M., Negro-African civilizations, Paris, 1925, p.48

⁶Id, the blacks of Africa, Paris, 1922, p.141

⁷ Congolese Family Code, Article 361 al 2 and 3: "Marriage can only be celebrated if the dowry has actually been paid at least in part. Notwithstanding any contrary custom, the dowry may be symbolic".

instrument of legal proof of the clan contract; it is the realization of the idea of marriage.

Some writers have noted that formerly marriage was affected by the exchange of women among certain African Peoples and that because of the many disadvantages of such a process, it came to the dot (8).

If we leave it there, it becomes very difficult to get an exact idea of the legal value that the authors attribute to the dowry.⁹

In all layers of Bantu societies, African values called "dowries" by Europeans have constituents that have neither the same name nor the same legal function under customary law.

Therefore, it is necessary to distinguish the value translating the "dowry":

- As an instrument of proof marking the official beginning of the court;
- As an instrument of giving consent to betrothal and marriage;
- Values that the fiancé gives to his future in-laws to show their gratitude;

There is also the dowry as values, which:

- concretize the transfer of responsibility on the girl to the future spouse;

Other values must be given to the parents-in-law so that they are willing to consent to the marriage of their daughter;

- symbolize the alliance between the son-in-law and his in-laws or those handed to the spokesperson (10).

All things considered, the dowry is this set of values, which concretize, especially among the Bantu, the alliance between the future husband and the family or the clan of his future wife.

The realization of this alliance is not unilateral. In due course, the bride's family will present gifts to the future son-in-law or son-in-law. And among Africans, the spirit of sharing is the very foundation.

Friendship. Giving is synonymous with showing love and esteem. And if the girl's parents demand a deposit from the suitor or their son-in-law, what they ultimately want is that it shows how much he is willing to do anything to prove that he loves his wife or his future wife and those who gave birth to her.

III. Discussion

3.1. Sales contract theory

In view of the thesis defended by many authors, the one which maintains that the dowry represents the purchase price of the bride; a vision that has emerged mainly from the writings of the first Western anthropologists and jurists, amazed at this particular way of concluding marriage, it is advisable, at this level, to clear or overcome the obstacles that prevent a correct understanding.

This is the case of Pastor Keller who writes: "The dowry becomes money, the woman has become merchandise, a marketable commodity and one seeks to monetize at the highest price" (11).

⁸ ELELAGHE J.P., Dot and marriage in Central Africa, in LUX, 1965? P.56, 57-59 (In the Paboins).

⁹ Among the Binja (one of the tribes of Maniema), the words "biendo" or Keôbo "designate in Swahili" Mali "which means" wealth "

¹⁰ Chez les Binja (une de tribus du Maniema), les mots « biendo » ou Keôbo » désignent en swahili "Mali" qui signifie "richesse"

The same goes for the lawyer H. Solus who, in the 1950s, wrote: "The payment of a sum of money that the future husband makes to the father in order to obtain his daughter takes more and more the legal character of a purchase price, and thus alters the very nature of the marriage which it transforms into a real sale, ... "⁽¹²⁾.

In order to refute such an interpretation, which we consider from the outset to be wrong, let us define now what a contract of sale is. It is regarded as a legal transaction by which a seller passes on the thing he is clean to a buyer who gives him the price.

Therefore, equating dowry with a woman's purchase price raises several questions.

- First, we must ask ourselves who, - parents or husband, can claim to have the right to transmit or acquire the property of a person since we know that slavery has already been abolished?

- Then, the sales contract, supposing the transfer of a thing, the nature of the human person incompatible with that of a good, excludes this definition.

- Finally, in relation to the price: this being the value or the counterpart of the object to be alienated, it must correspond to the value of the thing to be transferred, unless the parties agree for a symbolic price. Otherwise, we would talk about a sale with injury. Whatever the amount paid for the dowry, its qualification in purchase price turns out to be inoperative.

This qualification is even more inadequate in view of the fact that many legal contracts, such as exchange, deposit, lease... also involve a pecuniary dimension.

Nevertheless, it should be noted that a good change of qualifications depending on the legal context. Thus, a cow in an enclosure is an economic good at all. The same cow, once introduced into the legal trade becomes either an object of right of enjoyment or a royalty of a land lease or a dowry in the context of a matrimonial bargain.

The same goes for a sum of money (10,000Fc for example) kept in a portfolio that is an economic good. But if the same amount of money comes into a sales contract, it will be called the price. In the lease, it will be called rent, in the donation, 10,000Fc is a gift.

So, why in a matrimonial bargain, this sum of money (10.000Fc) would not it be called dot? Why do we interpret it as a purchase price of the woman and a name pledge, a deposit or a lease while in all these cases occur a circulation of economic goods without it being sales.

It should also be noted that the expenses surrounding marriage are not specific and only to African societies. Anthropologist A.R Radcliffe-Brown writes:

"There is of course a great diversity in the services provided at the time of the engagement in different societies... It is necessary to consider that, some of them; it is to their symbolic aspect that it is especially important to tie first. This is clearly demonstrated by the English custom of the engagement ring, the wedding ring and wedding gifts (...), this gift is not considered an economic transaction or at least an affair, it is symbolic, ... "⁽¹³⁾.

Moreover, the different positions against the qualification of the dowry as the purchase price have not convinced Maurice Kouendji Yotnda. Indeed, in his contribution to the new family law in Cameroon, he reiterated the interpretation of the dowry in terms of purchase price based on one of the characteristics of African marriage, namely the displacement of the family daughter of the parental home to that of the husband. He writes on this subject:

"This departure is explained by the very nature of the union: it is a purchase, it is necessary to proceed (as in any sales matter) to the removal especially as the seller wants the more often to release his responsibility from the guard to rather (¹⁴).

This would be tantamount to asserting that parents would no longer check their daughter's presence at home as if it were merchandise whose non-delivery would expose parents to assume all the risks that may arise in the event of theft, loss or deterioration?

In this case, the author applies the theory of risk by imposing on the father who marries his daughter for the dowry, the rule "resperit debitori" devoted to Article 1138 of the French Civil Code and included in all codes African civilians.

"The thing remains at the risk of the debtor, that is to say the seller, in case of sale, whenever the loss occurred while the seller still owned the thing sold.

However, this requirement which pushes the parents to such an eagerness is dictated not by the concern to free themselves from any responsibility of guard, but by the prudence and is justified by the fear that as long as the girl remains under their roof, an infidelity or a possible pregnancy of which the author would be other than the pretender; would not engage their civil liability, but would undermine the honor of the whole family.

This misconception, far from being only bookish, is found in the actions of certain husbands who consider that the dowry benefits confer rights on their wives. Hence the abuse of language that often refers to the dowry paid to justify abuse or neglect. A song of the orchestra Ok Jazz, is not leftover "mwasi na bala na masolo, nani atindi ye atuna epayi nawuti, ..." (¹⁵): (The woman that I married with my money, of which right goes Will she ask me where I come from or justify my late return home).

This reputation, however, should not prevent us from condemning social practices that see it as a mercantile operation. In fact, the growing degradation of economic conditions and misery, mean that some parents find in the marriage of their daughter a hoped-for opportunity to raise their standard of living.

We thus witness bidding of all kinds of all kinds that sometimes look like scams in some heads of families who even collect several dots on the same girl.

The reasons for these outbursts, unacknowledged or simply mentioned of the girl, especially when she has a level of university studies on the pretext that it is the husband who will benefit more from the dividends of his professional activity. This approach, which resembles debt collection, denotes irresponsibility for the duty of parents to provide for the essential needs of their offspring until they become of

¹¹ DEDE A.-F., The real contract of marriage (dowry) and the status of women in black Africa, thesis of Dictorat, University of Lovanium / Kinshasa, 1962, p.56

¹² Id. p. 89

¹³ RADCLIFFE-BROWN A.R, Structures and functions in primitive society, midnight editions, Paris, 1972, p.95

¹⁴ NKOUEUNDJI M., Cameroon in search of his right of family, LGDJ, Paris, 1975, p.149

¹⁵ MIANDA G., African women and power-market gardeners of Kinshasa, L'Harmattan, Paris, 1996, p.120

age. It is also nonsense because maintenance is not just about tuition.

3.2. Marriage compensation theory

After examining the theory of the contract of sale, it is imperative to carry out the outline of the so-called matrimonial compensation theory.

Indeed, since the financial interpretation of the dowry as a purchase price proved to be inadequate and erroneous, sociologists and anthropologists have developed the terminology of matrimonial compensation in order to explain the specificity of matrimonial bargaining in Africa. To thus raise any equivocation on the dowry as practiced formerly in the west.

So here, in the elementary treaty of customary law in the Belgian Congo, considers the dowry in this aspect of compensation and this, as opposed to the question of the purchase of the bride in these terms:

"Finally, it appears that elsewhere, we have the more utilitarian conception of demanding compensation; not for the transfer of the woman per se, but for the loss that the group felt deprived of her activity and for the more or less extended rights that the husband's family will have on the children to be born of her, ... " (16).

For the proponents of this theory, the dowry as marriage compensation is explained on the one hand, by its dimension of economic loss suffered by the family of the woman and on the other hand, because it invests the family of the claimant of the rights on children.

As regards economic compensation, the explanation cannot be sustained in the light of the legal meaning of the term "compensation" which is the simultaneous extinction of two obligations of the same nature existing between two persons who are reciprocally creditor and debtor. One and the other ".

It goes without saying that the terms of the compensation are very rarely met for debts other than sums of money (17).

In its strictly legal sense, compensation is subject to a sine qua non condition: the identity of nature of the objects called to offset each other. Gold,

On the dowry side, we have money, goods or service on the one hand and a human person on the other. In the absence of an identity of nature, the handing over of the dowry against the departure of a girl cannot be properly designated under the title of matrimonial compensation.

In addition, how can one assess or determine in advance a claim consisting of a future activity of which the family of the bride will be deprived in favor of that of the husband? On what basis would such calculations be based? Would it be according to the virtual volume of production or its duration in time? So, is it fair to say that marriage leads to a break in legal relationships with one's family when one knows that married women continue to help their families with the fruits of their labor?

This theory of matrimonial compensation finds its limits here. At the very least, M. DOUMBE rejects it when he writes:

"An economic compensation in the current sense of the word? No. Original compensation with the African effigy? Yes. It must report another person called to fill, by the substitution effect, textually the role of his counterpart. It is in

a way an exchange that does not necessarily conceal economic aims, ... the product of the dowry in principal has never served that "redemption" of another woman in the family, ... "(18)

Therefore, the departure of a girl is offset by the arrival of another in his family and this so-called specifically African compensation is qualified by many authors, including Double exchange.

3.3. Exchange problem

Exchange is defined as "a contract by which the parties give each other one thing for another" (19).

According to this definition, only things can be exchanged in an immediate reciprocity. Hence the inappropriateness of the term exchange, because the woman is not a thing.

On the other hand, immediate reciprocity is lacking because, in the perspective of Mr. DOUMBE, the dowry serves as an intermediary in the transaction between the girl promised to marry and, eventually, another daughter to marry in the family of the one who has been married.

This rejection of the compensation theory is again relayed by DEDE when he writes:

"The hypothesis of economic loss has a semblance of truth while being erroneous. First of all there is no equivalence between the objective value of the woman and the real value of the dowry. Moreover, a fact can only be economically compensated for by its substitute (beet sugar and cane sugar) and not by its symbol, as is the case with the dowry ... "(20).

It appears that the term of compensation cannot be used in its economic sense because of the difference of nature between the woman and the dowry called to replace it.

Whatever the amount, the dowry remains a symbol. It cannot be put on the scale as a possible compensation for the woman.

IV. Dot in African legislation

In Congolese law, article 427 of the Family Code provides for sanctions against those who contravene it. Because of the legal vacuum due to Article 363 of the same Family Code, we are seeing, as mentioned above, bidding wars that deprive the dowry of its profound meaning.

Nevertheless, this view of the dowry as a basic consideration of marriage has not been retained by some African countries who opted for a pure and simple suppression of the dowry. This is the case for countries such as the Central African Republic, Gabon and Côte d'Ivoire.

These countries have deprived marriage of its dotal foundation for two main reasons:

- The first aims to put on an equal footing all customs in dowry. It is in this sense that very early on, the legislators of the above-mentioned states have worked for the modernization of marriage.
- The second part of the postulate according to which the economic development, objective that all the African States have set themselves after the political independences, cannot be reached without a modern legal framework likely to

¹⁸ DOUMBE MULONGO M., *Les coutumes et le droit au Cameroun*, édition CLE, Yaoundé, 1972, p.75

¹⁹ Here, the word "KEOBO" in binja, finds all its meaning: it is one of the finalities of the dowry. In other words, it is the transformation of it into another dot for a new marriage.

Congolese Civil Code, Book III, Article 365

²⁰ DEDE A. F., *op. cit.*, p.20

¹⁶ A. Sohier, quoted by DEDE A.F, *op. cit.*, p.102.

¹⁷ TERRE F., LEQUETTE Y. and SEMLER Ph. *Civil Law, Obligations*, 10th ed. Dalloz, Paris, 2009, pp.972-973

discourage all the social practices inducing wastefulness. The regulation of dowry and excessive spending on family ceremonies aim to eliminate the monetary and economic aberrations from customs ⁽²¹⁾.

Faced with the attachment of the population to the dowry, Cardinal Malula was right during the Euro-African meeting in Yaoundé to ask if we could: "legitimately impose the way to marry and consummate the marriage of a people to other peoples who have their equally valid centuries-old way of getting married" ⁽²²⁾.

In spite of this secondary place, granted to the dowry, the Malian and Togolese codes legislate that the non-payment of the dowry can be evoked as the reason for the dissolution of the marriage. To this end, the Malian code recognizes the woman's ability to seek a divorce for non-payment of dowry while that of Togo pushes further this contradiction by inventing the dowry among the causes of the relative nullity of marriage at the expense of wife ⁽²³⁾.

It thus turns out that there is on the part of the African legislator's confusion between the symbolic which does not mean in any way the modesty.

V. Consequences of the Penibility of the Dowry or Phenomenon «yoka tovanda»

In Africa, the DRC and the provinces of former Kivu (Maniema, North Kivu and South Kivu), dowry has become a difficult problem.

The report was made in Kinshasa. The team "Libala ya Mwindi" pointed out that the "pre-dot" and the "bill" are set so high that they no longer have any relation to what a young person earns as a salary or with his modest income in most families.

On the boys' side, more and more often his uncles and even his parents warn him that they will not be able to contribute to the dowry.

As a result of all this, the growing number of young people and even adults no longer care about performing customary marriage ceremonies. Some try to make a gesture, by pouring the "first-wine"; but then discouraged by the demands of the beautiful family. They give up going further. Many others decide, moreover, from the beginning to no longer go through the custom, the civil and the religious, bypassing the obstacle by the shortcut called "Nzela mukuse" which is in fact the phenomenon "Yaka Tovanda" whose characteristic feature is the absence of dowry and celebration. This is what qualifies this form of cohabitation of a free union or "Yaka tovanda" ⁽²⁴⁾. In Congo-Brazzaville, the phenomenon is known as "Tokobe". The expression literally means, "Come and stay together!". It is a form of free union, cohabitation, cohabitation or civil pact of solidarity which consists in seeing a man leaves his roof to live with the woman, or for the girl, to leave the parental roof. To live with

a man ⁽²⁵⁾, without the latter having paid the dowry to his parents or without their union being registered before the registrar.

His expression is used to describe the status of two persons who are not legally married but who live together that is to say as a couple, as if they were true spouses.

In this expression, the central element that translates "yaka to vanda" is the absence of the payment of the dowry on the part of the man to those responsible for the girl and the instability of the union, which lovers can break it at any time, because it lacks stability and legal certainty, although it may happen in some cases, that these unions last for years.

This phenomenon is gaining more and more importance as a result of the exaggerated price of the dowry, one of the basic conditions of marriage in Congolese law (Articles 316 to 367 of the Family Code).

The dowry has only a symbolic character. But, due to the negligence of the authorities, that is to say the Provincial Assemblies, which have not proposed by edicts the maximum and minimum sum that no one can exceed in each province, and the consequent absence of a legal provision is the law of each family that applies.

Each one fixes, in fact, the amount of the dowry, according to whether his daughter has studied or comes from a rich family.

The dowry seems to be a versatile reality. In African customs in the DRC, the dowry had a symbolic character. The meaning was of capital importance because the dowry crystallized the strength, the perseverance, the pursuit of the pretender vis-à-vis his future beautiful family.

The dowry is also an instrument of proof of the consent of the families, the title of the alliance; a pledge given by the husband to his parents-in-law to guarantee that he will treat his wife well. It is a title of the filiation of children.

According to many customs, a man could become polygamous by endowing several women; whereas the code of the family forbids bigamy. This corroborates the idea that dowry is a guarantee and not a compensation.

Conclusion

The term "dowry" will have to be banned in black Africa, in general, and in the DRC, in particular. Its misuse has distorted the concept of customary marriage too much.

Already, we must pay benevolent attention to the aboriginal term and the meaning of each of the values (in each tribe) disbursed by the future or the spouse for the purpose of marriage.

In fact, even though Africa has entered the mainstream of modernity, it was not a tabula rasa before it met with the West and therefore, it does not intend to obscure or alienate its own culture for the benefit of the West. Of a foreign culture whose logic is sometimes at the antipodes of his own. It is therefore not surprising that family law, of which marriage is the foundation, is torn between modernity and tradition.

²¹ COSTA-LASCOUX J., "Criminal Law and Development in Africa" in Dynamics and Purposes of African Rights, Economic, Paris, 1980, pp.187-188

²² MALULA J.A. , « Rencontre euro-Afrique » in Actualités religieuses dans le monde, n°212, Yaoundé, 15 mai 1984, p.23

²³ Cameroon Order of 1981, Article 70

²⁴ Diocesan team "LIBALA MWINDA", "The dowry: a challenge to inculturation", in happy family, review of the information of the family, n ° 38, July-August-September 1995, p.10

²⁵ This movement or displacement not to say this phenomenon has several us in Lingala: "aboti libala ya buzoba", "Okoti libala ya moniato, babali ye bapesi mbongo te

In the end, the dowry, this customary institution, is certainly misunderstood by the interpretations that one makes of it and the decision of integrating it or not in the positive law falls under the sovereignty of each State. However, those who have made it a condition of form or substance of the marriage are asked to be able to supervise overflows of speculation to avoid falling into the trespass of pricing.

In the DRC, Articles 363 and 364 must be completed in order to at least fix the maximum and the minimum of the dowry.