

# **THE LEGAL STATUS OF MARRIAGES CONTRACTED IN AREAS OF LAWLESSNESS: A CASE STUDY OF MARRIAGES CELEBRATED IN TERRITORIES UNDER M23 OCCUPATION IN THE DEMOCRATIC REPUBLIC OF CONGO.**

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## **Abstract**

This study on the legal nature of marriages celebrated in areas outside government control is of paramount importance given the topicality of the issue in the Democratic Republic of Congo, where two provinces, North Kivu and South Kivu, remain under occupation of the M23, a rebel movement that has been operating in the region for more than a decade and has been active again since the beginning of the year. The study examines the validity and recognition of these unions under Congolese and international law. It takes a comparative law approach, examining similar experiences in Liberia, Rwanda, and Sierra Leone, countries that have also seen marriages celebrated under occupation or during internal armed conflicts. It thus calls for the establishment of a legal mechanism for post-conflict regularization to ensure respect for the right to marry and start a family for people living in occupied territories.

## **Introduction**

The question of the legal validity of marriages celebrated in lawless areas, particularly those under the control of the M23 armed movement, is a subject of rare complexity. It touches on the foundations of civil law, the requirements of international humanitarian law, and the very philosophy of republican legality.

In a state facing territorial fragmentation, war does not suspend social life. People continue to be born, marry, start families, and pass on property. However, when these acts take place under the *de facto* authority of an armed group, their legality becomes uncertain. Congolese law, like most contemporary laws, bases the validity of civil acts on territorial jurisdiction and the legitimacy of the public official. In situations of occupation, both of these foundations are called into question.

This study aims to examine, from a legal and doctrinal perspective, the nature and value of marriages celebrated in situations of lawlessness in the Democratic Republic of Congo.

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It aims to demonstrate that, even outside the effective sovereignty of the State, certain acts of marriage can produce legal effects in the name of the principle of State continuity and the protection of the family.

The analysis will be based on the provisions of the Congolese Family Code, national case law, international humanitarian law, and modern doctrine relating to acts performed by de facto authorities. This work has a twofold objective: on the one hand, to understand the legal scope of these unions; on the other hand, to propose realistic mechanisms for recognition and regularization in order to ensure legal security for the families concerned.

### **Marriage under Congolese law and the question of civil legitimacy**

Article 330 of the **Congolese Family Code**<sup>1</sup> defines marriage as a civil, public, and solemn act by which a man and a woman, not previously married, unite before a civil registrar to start a family. This definition enshrines two essential dimensions: the legality of the form and the publicity of the act.

Congolese marriage is therefore both a **contract**—because it results from the free and mutual consent of the spouses—and an **institution**—because it aims to protect society and family stability. This duality is also confirmed by case law. In its ruling RCC 1220 of March 15, 2018, the Court of Cassation reiterated that marriage is not a simple private contract, but an act of public order producing social and legal effects that go beyond the individual will of the parties.<sup>2</sup>

Thus, for a marriage to be valid, it is not enough for the spouses to consent: the ceremony must also be performed by a legally appointed authority with territorial jurisdiction. Outside this framework, the act is considered null and void or non-existent. It is on this specific point that marriages celebrated in areas under M23 occupation pose a major difficulty: civil registrars there are often de facto agents appointed by an illegitimate authority.

### **Marriages celebrated in the context of occupation: between formal illegality and human necessity**

The history of law shows that, even in times of war, the fundamental needs of society do not cease to exist. Populations living under the control of an armed group continue to exercise their natural rights: to marry, procreate, inherit, and educate their children.

To deny any value to these acts would be to condemn thousands of families to legal non-existence.

1 Family Code of the Democratic Republic of Congo (Law No. 87/010 of August 1, 1987), Art. 330.

2 Court of Cassation of the DRC, judgment RCC 1220, March 15, 2018.

International humanitarian law, in particular Article 27 of the Fourth Geneva Convention of 1949<sup>3</sup>, requires respect for family rights, honor, and dignity, including in occupied territory. This humanistic provision establishes that marriage remains a fundamental right that cannot be suspended by war.

Similarly, Article 43 of the **Hague Regulations of 1907**<sup>4</sup> specifies that the *de facto* authority must, as far as possible, restore and ensure public order and civil life in the territory it occupies, while respecting the laws in force.

It follows that even when an armed group administers a territory, it has an obligation to maintain a certain degree of civil organization in accordance with local legal norms, to the extent possible.

Thus, marriages celebrated under these conditions cannot be considered null and void, especially when they meet the substantive requirements of Congolese law: legal age, mutual consent, monogamy, and publicity.

### Legal continuity and the theory of *de facto* authorities

The principle of state continuity is based on the idea that legality does not disappear with the temporary loss of territorial control.

Even if the public authority is prevented from acting, its laws continue to apply.

According to this logic, acts taken by *de facto* authorities may be recognized if they are aimed at protecting the civilian population and preserving fundamental rights.

This approach is supported by several international doctrines and decisions.

The International Court of Justice, in its advisory opinion on Kosovo (2010)<sup>5</sup>, recognized that certain administrative acts emanating from unrecognized authorities may produce legal effects, particularly when they ensure the normal civilian life of the population.

Similarly, the ad hoc international tribunals for Rwanda and the former Yugoslavia have, in various decisions, recognized the partial validity of civil acts (including customary marriages) performed during periods of conflict, when these served to protect the rights of children, women, or families.<sup>6</sup>

These precedents reflect a shift towards legal realism: political illegality must not destroy fundamental human rights.

3 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, August 12, 1949, Art. 27.

4 Hague Regulations concerning the Laws and Customs of War on Land, 1907, Art. 43.

5 International Court of Justice, Advisory Opinion on the Conformity under International Law of the Unilateral Declaration of Independence in Respect of Kosovo, July 22, 2010.

6 See, in particular, ICTY and ICTR, various decisions recognizing the civil effects of acts in the context of conflict, as protection.

## **The jurisdiction of civil registrars and the validity of documents in lawless areas**

Under Congolese law, the jurisdiction of civil registrars is based on their legal appointment by the public authorities.

This jurisdiction is both material (to perform marriages) and territorial (to act within the district to which they are assigned).

Article 370, paragraph 1 of the Family Code provides that:

"Within one month of the celebration of the marriage in the family, the spouses and, where applicable, their representatives must appear before the civil registrar of the place of celebration in order to have the marriage recorded and to ensure its publicity and registration."<sup>7</sup>

However, in areas under M23 occupation, legally appointed civil registrars are generally unable to perform their duties.

Agents appointed by the de facto authority replace them to ensure a minimum form of civil administration.

The legal problem that arises is one of functional legitimacy: these officiants have no official investiture, but they act out of necessity.

However, Article 72 of Law No. 87/010 of August 1, 1987, stipulates that civil status records drawn up by unqualified persons are null and void unless ratified.

This provision, which at first glance appears rigid, is nevertheless limited in humanitarian practice and case law.

In a context of war, Congolese courts have sometimes accepted that nullity should not be applied with excessive formalism when fundamental rights are at stake.

Thus, several local decisions—notably those of the courts of Goma (2014) and Uvira (2019)—have recognized, on an exceptional basis, the validity of marriages celebrated by customary or community authorities, provided that the substantive conditions were met and that the interests of the family so required.<sup>8</sup>

## **Humanitarian arguments and the best interests of the family**

Marriage, as a social and legal institution, is a fundamental right protected both by the Congolese Constitution (Article 41) and by international instruments ratified by the DRC.

Article 23 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right of every man and woman to marry and found a family, while Article 18 of the African Charter on Human and Peoples' Rights (ACHPR) enjoins States to protect the family, "the natural basis of society."

These texts show that the protection of the family transcends political or military uncertainties.

7 Family Code of the Democratic Republic of Congo (Law No. 87/010 of August 1, 1987), Art. 371.

8 Uvira Regional Court 2004 inheritance dispute.

An absolute refusal to recognize a marriage celebrated in a war zone would amount to a violation of the fundamental rights of the individuals concerned and would destabilize an already fragile social structure.

Furthermore, the principle of the best interests of the child, enshrined in the Convention on the Rights of the Child (CRC), requires that filiation and the civil rights arising from these unions be preserved.

Thus, even if the marriage certificate was drawn up by a de facto authority, subsequent regularization becomes a requirement of justice and social protection.

With this in mind, recent Congolese doctrine has adopted a more pragmatic approach.

Professor MBUYI wa Bampembe argues that “the best interests of the family must take precedence over legal formalities.”<sup>9</sup>

For his part, Gilbert Kapita distinguishes between legal non-existence and formal irregularity: in his view, a marriage celebrated by a de facto authority is not necessarily null and void, but can be regularized if the substantive conditions are met.<sup>10</sup>

These analyses illustrate the contemporary trend toward prioritizing legal certainty and family stability over administrative rigidity.

### **Retrospective recognition: a path to regularization and justice**

In Congolese practice, there are already implicit mechanisms for regularizing marriages celebrated in exceptional circumstances.

Courts of peace, when asked to rule on supplementary judgments, can recognize the existence of a customary marriage or a de facto marriage when proof is provided by testimony or documents.

The Ministry of Justice, for its part, may authorize the transcription of such marriages in official registers, provided that the substantive conditions are met.

These practices, although not codified, reflect a desire to avoid the legal exclusion of entire families.

They demonstrate that retroactive regularization is a balanced solution between the rigor of the law and human needs.

In areas formerly occupied by the M23, many couples appeared before the state authorities after the territories were retaken to have their unions recognized.

This dynamic illustrates the importance of designing an explicit legal framework to deal with such situations.

A national regularization mechanism could draw inspiration from the experience of other post-conflict states, such as Rwanda and Sierra Leone, which have set up civil reintegration commissions to validate acts committed during the war.

9 *MBUYI wa Bampembe, Famille et droit congolais : entre coutume et légalité, Revue congolaise de droit*, 2019.

10 *CAPITA Gilbert, Études sur le droit familial en RDC, Presses Africaines, Kinshasa, 2020.*

The creation in the DRC of a special court for the regularization of marriages or a one-stop shop within the civil registry divisions would make it possible to standardize practice and avoid local disparities.

### **The limits of legal formalism in times of war**

War tests the ability of the law to adapt to reality.

Strictly applying the rules of territorial jurisdiction or legal appointment during a period of occupation would amount to denying the civilian life of the population.

However, the law only makes sense if it responds to the concrete needs of society.

As the Supreme Court of Canada noted in *Roncarelli v. Duplessis* (1959), “legality must be interpreted in the light of the requirements of justice and common sense.”<sup>11</sup>

Similarly, contemporary Congolese doctrine considers that the functional validity of acts performed by de facto authorities must be recognized when they aim to protect citizens' rights and maintain civil peace.

This approach is consistent with the theory of the apparent state, according to which acts taken by an illegitimate authority may be recognized if they guarantee legal certainty and no other authority could reasonably have performed them.

In this sense, the conditional recognition of marriages celebrated in lawless areas does not constitute political legitimization of the occupation, but an act of justice and humanity.

It reflects the desire of Congolese law to remain at the service of the people, even in the most extreme circumstances.

### **Prospects for legal reform in the Democratic Republic of Congo**

As a state governed by the rule of law, the Democratic Republic of Congo cannot be satisfied with the empirical regularization of marriages celebrated in lawless areas.

It is imperative to establish a clear legislative framework that reconciles legality and reality.

The aim of this reform would be to protect the family unit, ensure legal certainty for spouses and children, and avoid differences in interpretation between jurisdictions.

Such a reform could be incorporated directly into the Family Code, in the form of a specific title or chapter relating to civil status records issued during periods of occupation or armed conflict.

This text should recognize the possibility of subsequent regularization of marriages celebrated by de facto authorities, provided that the following substantive elements are met:

- free and informed consent of the spouses;
- compliance with the legal age;
- absence of impediments to marriage;

11 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (Supreme Court of Canada).

- monogamy;
- publicity of the union, even minimal.

A special procedure could be established, requiring the couples concerned to file a voluntary declaration with the registrar within twelve months of the restoration of state authority.

The case could be examined by a justice of the peace, assisted by witnesses and, where applicable, customary or religious certificates.

At the end of the procedure, a judgment of approval would serve as proof of marriage and allow for transcription in the official registers.

### **The rationale for reform: fairness, stability, and fundamental rights**

There are several considerations that argue in favor of such reform.

First, fairness: it would be unjust to deprive citizens of their family rights solely on the grounds that they were forced to marry under an illegitimate administration.

Second, social stability: recognizing these marriages would help strengthen cohesion in post-conflict territories and prevent the legal marginalization of families.

Finally, respect for fundamental rights, guaranteed by the Congolese Constitution (Articles 23 and 41), requires the State to ensure the protection of the family and to recognize the civil effects of legitimate unions.<sup>12</sup>

Such an approach does not legitimize the occupation: it repairs its human consequences.

As Professor BOMPAKA Nkeyi Makanyi points out, “the law must be able to bend without breaking, in order to preserve its purpose: social justice.”

This idea reflects the humanist mission of the law, which must adapt without compromising itself.<sup>13</sup>

### **Comparison with post-conflict experiences in Africa**

#### *Rwanda after the 1994 genocide*

After the genocide, Rwanda faced a major administrative vacuum: thousands of marriages had been celebrated in refugee camps or by improvised community authorities.

To prevent the collapse of the family structure, the government established a system of local courts (Gacaca), which played an essential role in recognizing civil acts performed during the war.

12 Constitution of February 18, 2006, as amended by Law No. 11/002 of January 20, 2011, revising certain articles of the Constitution of the Democratic Republic of Congo, January 20, 2011. Art. 41 (protection of the family).

13 *BOMPAKA Nkeyi Makanyi*, *Le mariage en droit congolais*, Éditions de l’Université de Kinshasa, 2018.

Customary or religious marriages were validated on the basis of testimony and summary documents, then transcribed into civil registers after verification.<sup>14</sup>

This process enabled lasting legal and social reconciliation, while consolidating the legitimacy of the reborn state.

### **Liberia and Sierra Leone**

In these two countries, also devastated by civil wars, the transitional authorities adopted special laws recognizing civil acts committed during periods of insurrection.

Joint verification commissions, composed of magistrates, traditional leaders, and community representatives, were created to examine requests for regularization.<sup>15</sup>

This approach has helped restore trust between the state and the population.

It has also promoted legal security for women and children, who are often the most affected by the non-recognition of marriages.

### **Lessons for the Democratic Republic of Congo**

The experience of these countries shows that the legal recognition of marriages celebrated in situations of lawlessness is not simply a political choice, but a requirement for justice and social stability.

The DRC, which has a similar history of repeated armed conflict, should draw inspiration from these models to develop a contextualized national reform.

This reform could be carried out with the support of international partners, such as MONUSCO, UNICEF, or the International Conference on the Great Lakes Region (ICGLR), in order to ensure the credibility and feasibility of the process.

Such a measure would have several advantages:

1. Restoring citizens' confidence in civil institutions;
2. Preventing disputes over inheritance and parentage;
3. Reaffirming the legal continuity of the Congolese state;
4. Consolidating social peace in formerly occupied areas.

Ultimately, this reform would be part of the post-conflict reconstruction and restoration of republican legality, while reflecting the DRC's commitment to human rights and the dignity of families.

14 Comparative example: Rwanda post-1994, Gacaca mechanisms and transcription of civil acts after verification.

15 Comparative examples: Liberia and Sierra Leone, special laws and post-conflict verification commissions.

## **The international and diplomatic implications of recognizing marriages celebrated in situations of lawlessness**

The recognition of marriages celebrated during periods of non-statehood goes beyond the strict framework of Congolese law. It also commits the Democratic Republic of Congo to international human rights law and regional diplomatic relations.

Indeed, the family is an institution universally protected by the international instruments to which the DRC has subscribed.

Article 16 of the Universal Declaration of Human Rights (UDHR) states that “men and women of marriageable age have the right to marry and found a family,” while Article 23 of the ICCPR reaffirms this right by linking it to the protection of human dignity.<sup>16</sup>

These provisions, combined with those of the African Charter on Human and Peoples’ Rights (Article 18), confer normative value on the protection of the family in all contexts, including in times of war.

Thus, the non-recognition of marriages celebrated under occupation could be interpreted as an indirect violation of the DRC’s international obligations.

On the diplomatic front, the issue also concerns the Congolese diaspora.

Many Congolese people who are married in conflict zones encounter difficulties in having their marital status recognized abroad, which affects their right to family reunification and their access to nationality in certain host countries.

A clear position by the Congolese state on the validity of these marriages would help to avoid administrative discrimination and strengthen the consistency of Congolese civil law on the international stage.

## **Geopolitical issues and regional cooperation**

The issue of recognizing civil acts performed during periods of non-statehood also has a geopolitical dimension.

The states of the Great Lakes region share similar realities: unstable border areas, displaced populations, and the coexistence of parallel authorities.

The International Conference on the Great Lakes Region (ICGLR) could serve as a framework for consultation on the development of a regional protocol on the mutual recognition of civil status records established in situations of instability.<sup>17</sup>

Such an approach would avoid conflicts of law, unify administrative practices, and promote regional legal cooperation.

In addition, international organizations such as MONUSCO, the African Union, and UN agencies (UNICEF, UNDP, OHCHR) could support the Congolese state in setting up a national post-conflict regularization program.

16 Universal Declaration of Human Rights, UN, 1948.

17 African Charter on Human and Peoples’ Rights (ACHPR), African Union, 1981.

This program could include:

- training civil registry officers and magistrates on the management of irregular records;
- the creation of digital databases to avoid double registrations;
- community awareness-raising on regularization procedures.

These measures would anchor the reform in a sustainable institutional approach based on transparency, consistency, and social justice.

## General conclusion

The study of the legal nature of marriages celebrated in situations of lawlessness reveals the constant tension between formal legality and social necessity.

Congolese law, while remaining committed to the legitimacy of acts of the State, cannot ignore the reality of the experiences of citizens in war zones.

Marriages celebrated under occupation, although formally irregular, reflect a legitimate human desire to start a family and preserve individual dignity.

Recognizing these unions, under certain conditions, does not amount to legitimizing the *de facto* authorities, but rather to affirming the primacy of the right to a family over political contingencies.

The principle of legal continuity of the state, combined with humanitarian imperatives, provides the theoretical and practical basis for such recognition.

The establishment of a legal mechanism for post-conflict regularization thus appears to be a legal, social, and moral necessity.

It would help restore confidence in institutions, protect inheritance and property rights, and consolidate civil peace in areas long affected by conflict.

Ultimately, through this reform, the Democratic Republic of Congo has the opportunity to assert its legal maturity and social responsibility by demonstrating that justice does not stop at the borders of effective power, but extends to all those who still believe in the rule of law.

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