

ISSUES OF SOIL PROTECTION IN MADAGASCAR

RAFANOMEZANTSOA Telina Toky¹

¹ Lawyer at the Madagascar Bar

ABSTRACT

The Land degradation has negative impacts on the well-being of mankind. The place occupied by the soil in the law constitutes an element which has contributed in some way to this degradation. Indeed, the soil is reputed to be often ignored and little discussed in the law. However, the legal instrument is the only binding tool that can provide real protection for it. If this instrument is lacking or being scattered, lacks consistency, it is impossible to establish effective protection. This is why the purpose of this article is to study the issues related to the legal protection of soil in Madagascar compared to other countries such as Germany, Poland ... in order to reflect the complexity of the importance the preponderant role of law in soil protection. To do so, the analysis of the problems relating to soil protection at the legal level was carried out following documentary reviews.

INTRODUCTION

Land degradation is a global ecological problem. It has a direct impact on the livelihoods of millions of people, especially the poorest and most vulnerable living in the world's drylands, where more than 500 million hectares of land are degraded. It also has a negative effect on the ability to increase global food production, which is necessary to meet the food needs of a rapidly growing population (Global Environment Facility, 2014). In this context, unsustainable agricultural practices, soil erosion, overgrazing and deforestation are seen as the determining factors of soil degradation and as contributing elements to the deterioration of ecosystem services. In order to overcome these problems, a real conservation policy is needed in the field of soil resources, by setting up appropriate administrative structures, necessarily centralized and well-coordinated at the regional level. Appropriate legislation is also needed, making it possible to rationally distribute the various human activities within the regional and national framework, to control the techniques of use of the grounds likely to degrade or pollute the environment, to protect the grounds against the natural aggressions or caused by man, finally and if necessary, to restore them (Environmental Legal Review, 1976). Yet at the international level, despite a general consensus on the recognition of the value of soils, the resource is struggling to obtain full legal status. While soil preservation is dealt with incidentally by universal conventional instruments, texts aimed at specifically protecting it remain for the time being, and with rare exceptions, at the draft stage. Soils are subject to non-binding guidelines. They are often taken into account indirectly in many policies. Most European countries have put in place different types of policy instruments aimed at soil protection. However, only some states have specific legislation for soil protection, which most often covers only part of the issues related to soil management (contamination, waterproofing, erosion, etc.). Poland, Slovakia and Latvia have national laws to protect the best agricultural soils. Germany and Switzerland are good examples of the implementation of these guidelines. This reality is similar to the situation of soil protection in Madagascar. Indeed, the Malagasy soil is apprehended in various legal texts posing the problem of inconsistency of the texts. Thus, the facts show us that it is becoming urgent to adopt, at the international, regional and national levels, legal instruments specifically aimed at the protection and sustainable use of soils. It is equally urgent to promote the integration of this objective into all other policies in order to better serve the interests of food security (Lavoisier, 2013). However, the purpose of this study is to find out how far the law can protect the soil. It is about knowing the place of the soil in the law in order to measure the importance of its protection in a given country. To do so, the global soil situation will be addressed in this study, including that of Madagascar in order to assess the

importance of its protection. The methodology adopted for this concerns documentary reviews and an analysis of the legal situation of soil protection.

Legal situations of soils

Soil is qualified by the World Soil Charter to be "a precious commodity of mankind" (world soil charter, 2015). As such, soil is an appropriate good. This consideration leads to the conception of legal rules organizing the relationship of man with the good in question. Thus, the land as an appropriate good is governed by the regime of property in civil law (Art. 554 Civil Code). This regulation only provides for the protection of a right of an individual owner of the property, here the soil and not the protection of the soil as living matter and fragile natural environment. Like France and Madagascar, the legal status of soils is placed "at the property level". According to Mr. Billet, the soil "is considered much more as a substrate" in environmental matters, while there are no provisions which "formally recognize it as a natural environment" unlike water (Billet P., Collin B., 2011). According to a legal approach taken from the opinion of the Economic, Social and Environmental Council: "The soil does not enjoy legal protection (opinion of the economic, social and environmental council, 2015). While a wide variety of texts deal with soil, it is most often incidentally, and without ultimately giving it real status. The town planning code obviously occupies a special place. It apprehends the soil as the support for constructions and human activities and requires all local authorities to carry out "thrifty" and balanced management of spaces. The world soil policy adopted under the aegis of the FAO on November 26, 1981 is partial, insufficiently asserted and not very visible even though there is henceforth a World Soil Day, on December 5 of each year. Likewise, neither chapters 10 to 14 of Agenda 21 of the Rio Conference (1992) which promote the sustainable use of soils, nor the United Nations Convention to Combat Desertification of 17 June 1994 which considers soil erosion caused by wind and / or water to be a source of land degradation, have not produced the desired effects. The latter is the only international convention directly dedicated to soils, but it only addresses land degradation in arid, semi-arid and dry sub-humid areas as a result of various factors, including climatic variations and human activities. As for European law, it most often considers the soil indirectly or incidentally, through texts relating to the control of urbanization, the assessment of environmental impacts or the conditionality of agricultural aid, for example in international law, the need to preserve it is affirmed, but the existing instruments are not very restrictive (like the European Soil Charter of 1972 or the World Soil Charter of 1981) or very specific (like the Protocol of Bled from 1981 which targets alpine soil). Speaking to the agriculture, fisheries and food section, Mr. Philippe Billet, director of the Institute for the Environment in Lyon, gave his analysis of the causes of this situation. It is with regard to its dual nature - that is to say either as a surface or as a material (or volume) - that soil is apprehended by law. When it establishes the principle according to which "the property of the soil takes away the property of the bottom and the top", Article 552 of the Civil Code is concerned with "soil surface". The ground then appears as an abstract space of transition, between the top and the bottom, to which it is necessary to refer to, for example, to set a limit to its occupation. On the other hand, when it affirms the sovereignty of States over their natural resources, public international law refers to "material soil". The framing of town planning, when it takes into consideration the agronomic value of soils to decide on an agricultural zone classification, or rural law, when it integrates the productivity of a plot, also refer to this second conception of the land ground, more concrete. This understanding of the soil, based on a partially artificial distinction, may have contributed to the scattered nature of soil protection by law. Philippe Billet concludes that "soils remain largely ignored by law" and that "the abundant but scattered nature of the provisions concerning them should not give the illusion of effective consideration". From this observation, we can deduce that irrational land use is no longer surprising without the existence of a coherent law stipulating their protection; and that this situation explains the increase in their degradation. If no measure is taken against the operators, in particular strict measures advocating a sustainable management of this resource, we can expect various impacts such as the upsurge in the drop in production, the disruption of the ecosystem, due in particular to the malfunction of the heading (Soil sustainable management report, 2015).

The granting of legal status to the soil: outcome for the development of a country

The granting of a legal status to the soil makes it possible to legally qualify the soil, to organize its management, to provide for preventive measures, incentives and repressive measures and will facilitate its control.

The impact of such an approach would be the improvement in terms of knowledge and management of the soil among users, leading them to better use the soil and to pay more attention to its protection through research and to always ensure its preservation. . It is said that protected soil is holy soil and holy soil is necessary for the well-being of mankind. The establishment of a specific text for the soil is one of the essential conditions for achieving sustainable soil management.

However, there are issues to consider in adopting such an approach. These issues concern in particular the place of the land in law, from its appropriation to its uses. Does the current status of the soil make it possible to embark on the adoption of a specific text against it or otherwise what are the elements to be considered in order to achieve this? To respond to the problem posed, some authors debate the need to qualify land as a common good, which will easily lead to the adoption of a specific text provided for this purpose. Thus, according to the authors' debates on the subject: "It is what would be desirable if, beyond private and public goods, land could become a common good, beneficial to all for different and flexible uses and without harming the variable interests of each other (Pierre Donadieu, Élisabeth Rémy, Michel-Claude Girard, 2016). However, even if the legal and fiscal system for soil protection were strengthened and homogenized in a country, the application of the law to such a polysemous object would be uncertain and probably in some cases unfair, unless it was accompanied by an important control mechanism. Proposals considered for Europe are listed in the debate in question to resolve the problem of insufficient soil protection by law, but are also valid for other countries which have the same situation that of the lack of 'a specific text for soil, including the case of Madagascar. These are two propositions, which are:

-To dissociate the absolute right of ownership of the soil from the rights of use of its ecosystem services which would become inappropriate, because produced by a territorial governance of the soil, and more generally of the corresponding space, by the holders of the rights (Fabienne Orsi, 2013). Under these conditions, this governance would turn their qualities and their local surface into inalienable commons by the institutions or collectives holding rights of use. This societal co-production of general interest could be a complement to the one and uncertain product of dedicated legislation. This idea of governance is already being observed in the context of water resource management.

2. Whatever the legal status of the land and the services it provides, recognize by law the common action of land stakeholders (State, communities, owners, tenants, elected officials, users, inhabitants) as sources of rights multiples and local rules for the construction of the common (access, control, etc.). To continue the parallel with the right to water, which enjoys a protection status, the requirement of which is set with reference to "good ecological status", that is to say the quality of the water, the law could recognize and protect soil quality. Through a phenomenon of "transappropriation" (Ost, 2003; Note 2014), the private or public owner would therefore be the owner of the land, but not of its functions and services, of which he would become the guardian or the guarantor. In the case of urban gardens, it would then be possible to assert as much the general will of those who recognize the interest of the "edaphic" common good (the inhabitants, gardeners or not) as that of the private and public owners (who would like it) particular build). On the condition, however, that public debate relates to the methods and purposes of a dialogic democracy (Callon et al., 2001). In the same vein, some amateur gardeners, confronted with proven pollution, say they are ready to participate in the remediation of sites in order to allow future generations to cultivate in good conditions. Carrying a form of general interest, these different speeches thus participate in the political implementation of the quality of urban soil, proposed as a common good (Grenet et al., 2016).

This point of view is not utopian, since it works where this democracy is implemented. This is the case in certain territories where the future of soils in urban regions is everyone's business, because a majority of the actors concerned, in one way or another, participate in the public decision on their use (Donadieu, 2014).

In the case of Madagascar, this point of view is possible but other elements remain to be examined in order to comply with the realities of the country.

Stakes in Madagascar

At the legal level, soil constitutes an element of the environment, its protection is mentioned in environmental texts as well as in certain texts, such as the water law and the forest regime (Law No. 2015-003 on the Environmental Charter) (Law No. 98-029 of January 20, 1999 on the Water Code (OJ No. 2557 E.S. of January 27, 1999, p. 735). The scattering of provisions providing for soil protection is problematic as the objectives of each text are different. To this end, the soil is not the subject of real protection but indirectly treated. Thus the issue of granting land status in Madagascar is based on several aspects raised in a report: "the non-involvement of peasants in soil conservation, the interpretation of observations and other survey results as well as the analysis of experience allowed us to make the following observations: in most cases, the peasant sticks to the conservation of his piece of land, to the best of his living space which he uses for its survival. (Example: rice fields or the Highlands; the ADILY in the South). Although laudable efforts have been undertaken by various organizations campaigning for soil conservation, the pilot actions have not always produced the expected results. The problem of environmental destruction following human pressure on its ecosystem still remains acute. Soil conservation risks always being a misunderstood concept as long as its resolution is based on purely technical considerations without prior information and training efforts for those concerned on the hold and outcome of the action. The different definitions formulated by the initiating organizations according to the goals they have set for themselves only aggravate the distress of the peasants.

Moreover, as long as the farmer cannot clearly distinguish the value of land as a non-renewable basic resource, effective involvement in soil conservation on his part will be difficult to envisage. In these economic activities, the peasant appropriates the space and thereby creates a dynamic relationship with the water, the forest, the pastures ... An anarchic and uncontrolled exploitation of these resources, as it is observed in the currently, will not be compatible with a soil conservation policy. The peasant world identifies with the regulation of access to space; also controlling your space turns out to be fundamental. The peasant can also have the idea that the interference of the State in his land area can undermine his freedom of maneuver, to cultivate where he wants, etc ... Conservation (development) seems to take better where the possibilities for extension are low. The legitimization of this access to land will be able to secure the peasant and thus make him more permeable to all forms of incentive for soil conservation. It is very important to understand the peasant approach to the land question where very often the notion of patrimoniality takes precedence over ownership taken in the sense of positive law ” (Randrianaivo, 1997). According to this analysis, if there is no text providing for a clear and precise qualification of the soil, its conservation remains precarious and the effects will not be less (DAHL Öyvind, 1992). This observation should challenge stakeholders and decision-makers and justifies the need for granting a specific legal status to soils.

CONCLUSIONS

The legal situation of soils in the world is certainly a rare and little discussed subject, but given the scale of the stakes, in particular the effects of soil degradation, the question of soil conservation from a legal point of view is becoming increasingly important and the related debate gradually emerges. The granting of a specific legal status to the soil is therefore a big step towards solving the thousands of problems which cover several areas, namely the economy, to speak of the function of the soil in production, the environment on the balance of ecosystems, and finally the social in improving the well-being of humanity. However, this remains conditioned by the sole will of each country.

REFERENCES

- ¹ Global Environment Facility, fonds pour l’environnement mondial combattre la dégradation des sols dans les zones d’activité économique, 2014.
- ² In: Environmental Legal Review, Charte européenne des sols. Conseil de l’Europe, Strasbourg, août 1972, n°3-4, 1976. Travaux du premier Congrès de la SFDE (Strasbourg, les 6, 7 et 8 mai 1975) pp. 421-424; https://www.persee.fr/doc/rjenv_0397-0299_1976_num_1_3_1185)
- ³ Lavoisier | « Revue juridique de l’environnement » 2013/4 Volume 38 | pages 595 à 612 ISSN 0397-0299 ISBN 9782756205076
- ⁴ World soil charter, 2015
- ⁵ Art. 554 Code civile
- ⁶ Billet P., Collin B., 2011. Les sols et le droit, in Girard M.C., Walter C., Rémy J.-C., Berthelin J., Morel J.-L. (Eds), Sols et Environnement, Paris, Dunod, 798-816.
- ⁷ L’état des sols de France, GIS Sol, page 3. – avis du conseil économique, social et environnemental 2015-14 nor : ces11100014x lundi 25 mai 2015 journal officiel de la république française Mandature 2010-2015 – Séance du 13 mai 2015 Question dont le Conseil économique, social et environnemental a été saisi par décision de son bureau en date du 12 novembre 2014 en application de l’article 3 de l’ordonnance no 58- 1360 du 29 décembre 1958 modifiée portant loi organique relative au Conseil économique, social et environnemental. Le bureau a confié à la section de l’agriculture, de la pêche et de l’alimentation la préparation d’un avis intitulé : La bonne gestion des sols agricoles : un enjeu de société. La section de l’agriculture, de la pêche et de l’alimentation présidée par M. Joseph Giroud, a désigné Mme Agnès Courtoux comme rapporteure, avec l’appui de Mme Cécile Claveirole. La bonne gestion des sols agricoles : un enjeu de société Avis du Conseil économique, social et environnemental présenté par Mme Agnès Courtoux, rapporteure, avec l’appui de Mme Cécile Claveirole au nom de la section de l’agriculture, de la pêche et de l’alimentation

⁸ Soil_sustainable_management_report.pdf, Proposals for a national framework for sustainable soil management established by Philippe BELLEC, Patrick LAVARDE, Laurence LEFEBVRE and Marie-Laurence MADIGNIER, S e p t e m b r e 2015

⁹Pierre Donadieu, Élisabeth Rémy, Michel-Claude Girard, Les sols peuvent-ils devenir des biens communs ? Natures Sciences Sociétés, 24, 261-269 (2016)

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¹⁰ Fabienne Orsi (2013) sur la dissociation des droits de propriété selon l'économiste Elinor Ostrom, prix Nobel en 2009.

¹¹Ost, 2003; Note 2014

¹² (Callon et al., 2001)

¹³ (Grenet et al., 2016).

¹³Donadieu , 2014

¹⁴Law No. 2015-003 on the Environmental Charter

¹⁵Law No. 98-029 of January 20, 1999 on the Water Code (OJ No. 2557 E.S. of January 27, 1999, p. 735)

¹⁶Law n ° 97-017 of August 8, 1997 revising forestry legislation (OJ n ° 2449 of August 25, 1994, p. 1717)

¹⁷Review and evaluation of works and achievements in the field of soil conservation in Madagascar, legal and institutional land issues by requested randrianaivo fofifa / drd, March 1997.

¹⁸DAHL Öyvind, 1992 « Quand le futur vient de derrière », le concept malgache de temps et d'ordre du monde et conséquences pour le transfert de technologie in « Colloque pour chercheurs en sciences sociale et opérateurs économiques sur les changements sociaux dans la région du Vakinankaratra », Avril 1992.

